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Neutral Citation Number [2021] EWHC 458 (TCC)

Case No: HT-2019-000061

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

Business and Property Courts
Rolls Building
London, EC4A 2NL

Date: 4 March 2021

Before :

THE HONOURABLE MR JUSTICE FRASER

- -

Between :

BECHTEL LIMITED	**Claimant**
- and -	
HIGH SPEED TWO (HS2) LIMITED	**Defendant**

- -

JUDGMENT

- -

Michael Bowsher QC and Ligia Osepciu (instructed by **Hogan Lovells LLP**) for the **Claimant**
Sarah Hannaford QC, Simon Taylor and Ben Graff (instructed by **Addleshaw Goddard LLP**) for the **Defendant**

Hearing dates: 8, 12, 13, 14, 15, 19, 20, 21, 27, 28 October
and 10 and 11 November 2020
Draft distributed to parties 12 February 2021

Mr Justice Fraser:

1. This judgment is in the following parts.

A: Introduction

2. This is a procurement claim brought by Bechtel Ltd ("Bechtel") against High Speed Two (HS2) Ltd ("HS2") for breaches of the duties imposed upon HS2 by the Utilities Contracts Regulations 2016 ("UCR 2016"). It is not in dispute that UCR 2016 applied to the procurement competition in question, which was run using the negotiated procedure under Regulation 47 of UCR 2016. HS2 is a very well-known and high-profile infrastructure project to construct a new high-speed railway to connect London with destinations both in the Midlands and the North of England. Phase One is to construct four new stations, and approximately 140 miles of new high-speed rail track, between London and Birmingham. Two of the stations are in the south, and two further north, with the terminus in Birmingham. Journey times by rail between the two cities will fall from 1 hour 21 minutes, to about 50 minutes. Phase Two will then continue the high-speed rail link onwards, north of Birmingham, in the shape of a letter Y, connecting onwards to Manchester, and to Leeds. Some of that phase will use existing track. Once completed, London will be at the base of the letter Y, with Birmingham at the junction before the two limbs go on towards the North East (as far as Leeds) and to the North West (to Manchester).

3. The trains will run at speeds in excess of 250 mph. As a project, it is very high cost, and the current estimate is somewhat in excess of £100 billion. The duration of the works for Phase One is about 8 years, with Phase Two expected to open about ten more years after that. It has proved to be a controversial project, as major infrastructure projects often are. In 2019 there was a Government review into its future. There are those who strongly support it, those who strongly oppose it for a variety of reasons, and many more somewhere in between those two points of view. Although the project has been controversial for reasons associated with both the total cost, the increase in the originally predicted cost, delay and also its environmental impact, these proceedings are not concerned with any of those very wide issues.

4. This litigation is much more narrow in scope, and concerns the procurement competition conducted by HS2 to decide which entity should be the Construction Partner (or "CP") with HS2 for Old Oak Common, one of the two Southern Stations (the other being at Euston in London). There is currently a disused train maintenance depot at Old Oak Common, which was utilised as a construction materials marshalling facility for Crossrail. Old Oak Common is located to the west of London, about 600 metres from Willesden Green. The two Northern Stations for Phase One are to be Curzon Street in Birmingham, and another one to the south of Birmingham, which is to be called simply Interchange. This litigation concerns only Old Oak Common, known as OOC in all the documents. The procurement competition was run separately from, but at the same time as, that for the other Southern Station, Euston. The Euston competition was Lot 1, and that for Old Oak Common was Lot 2. Originally Bechtel was pre-qualified to bid for Lot 1 too, but withdrew from that competition by way of a formal withdrawal on 7 March 2018. The reason for the withdrawal was that Bechtel, having conducted a detailed review of the Invitation to Tender (or "ITT"), decided to concentrate all its collective efforts on its bid for Lot 2. Another bidder, whom it is not necessary to identify, took the same decision in relation to withdrawing from Lot 2 to concentrate upon Lot 1.

5. Old Oak Common is to be what is called a super-hub station, and will be one of Europe's largest railway stations when it is opened. It is to have 14 platforms, six of which will be high-speed platforms and entirely underground by a depth of 20 metres. The other eight platforms will be on the surface and will interchange with the West Coast Main line, Heathrow Express and Crossrail (now called the Elizabeth line). The West Coast Main line currently goes from London Paddington to Bristol, Plymouth and beyond. All these lines will therefore interchange with HS2 at Old Oak Common.

6. The station at OOC will also cost a very large amount of money to construct; one of the aims of the HS2 procurement process was to ensure that it could be built for £1.054 billion. This undoubtedly will make it one of the most expensive railway stations ever to be built in Europe, although still somewhat less than the cost of the New York World Trade Centre Transportation Hub in the United States, said to be the most expensive railway station in the world (at a cost of US$4 billion). The budget for Euston is even higher than that for Old Oak Common, and is in excess of £1.5 billion. Both station projects are, evidently, highly complicated and consequently expensive.

7. Four different bidders tendered to be the Construction Partner to HS2 for Old Oak Common. Although the procurement competition result was separate to that for Euston, some of the post-bid documents featured discussion of both, and some HS2 personnel were involved in both. The competitions were run simultaneously. No bidder could win both competitions, under a feature of the two competitions called the Win One Only Rule (or "WOOR"). As it happened, that rule did not need to be invoked as the winning bidder for each competition was different.

8. Although at one stage Bechtel had contemplated bidding jointly for Lot 2 with another well-known company, Morgan Sindall, as matters turned out Bechtel bid alone, with Morgan Sindall as its intended sub-contractor.

9. The evaluation of the different tenders resulted in another bidder being scored higher on the tender for OOC than Bechtel. This winning bidder was a joint venture between Balfour Beatty Group Ltd, Vinci Construction (UK) Ltd, Vinci Construction Grands

Projets SAS and Systra Ltd. I shall refer to this consortium as BBVS. More detail on the scoring is provided below, but in overall terms in the procurement evaluation, BBVS scored 75.38% and Bechtel scored 73.76%. Although Bechtel scored higher than BBVS on some areas of the evaluation – these being Technical, Behavioural Assessment, Commercial and Staff Rates – it was substantially outscored by BBVS on the fifth area, Lump Sum Fee. On that one area of the evaluation, which was worth a maximum of 10%, Bechtel scored only 5.76% and BBVS scored 10%, the maximum score for that Question. That score is therefore 4.24% higher than the score Bechtel achieved on this area of the evaluation. Due to the way the ITT was designed, this means that BBVS tendered the lowest Lump Sum Fee of the four bidders, as the maximum score was to be given to the bidder tendering the lowest Lump Sum Fee. Given the overall difference in the total final scores of these two bidders was only 1.62%, it can be seen that the single difference in score on Lump Sum Fee alone, accounts for a considerable difference in the overall scores between Bechtel and BBVS. Bechtel was the bidder that achieved the second highest score overall. In these proceedings Bechtel challenges the outcome of the procurement competition. BBVS is an Interested Party in the litigation but took no part in the trial, given the issues to be tried at this stage of the litigation are essentially those of liability.

10. Projects of this nature are highly complex. Procurements involving these type of projects are, similarly, highly complex. There are a vast number of different documents and personnel involved in considering, submitting and evaluating a bid for a project such as this one, and putting together a bid of this nature involves a large team of specialist people working in very great detail. Similarly, evaluating such tenders is an arduous task, involving Independent Assessors, Moderators and other personnel. This judgment will not address all the different documents, nor all of the evidence adduced by the many witnesses called by both parties, but only those sufficient to address the issues necessary to resolve the litigation. The most important document (although to refer to it as a single document is potentially misleading, as it has many different volumes and appendices), which governs the procurement competition is the Invitation to Tender or the ITT. This is the document that (amongst other things) sets out the rules of the competition, explains how the tender should be prepared, and gives the scoring methodology. Evaluations must be conducted in accordance with the requirements of the ITT. That is a different way of stating that the competition must be evaluated in the manner identified in the ITT, and notified to the bidders. The most important part of the ITT for these purposes is Volume 0. However, I will refer to that simply as the ITT.

11. What follows is a high level summary of the issues. At its heart, Bechtel alleges that HS2 was in breach of its obligations under UCR 2016 in the way the evaluation was conducted, and in the result of the competition as a result. It maintains both that its own tender, and that of BBVS, were not evaluated correctly. In some respects it maintains that BBVS should have been given a lower score on some questions, and that Bechtel should have been given a higher score on some. It criticises the BBVS bid as being what is called in the regulations an "abnormally low tender", and contends for certain adverse consequences for BBVS in the competition as a result. Bechtel maintains that had the evaluation been performed correctly, without manifest error and in accordance with the obligations upon HS2, Bechtel would have been the first-ranked bidder, would have won the competition and would have been awarded the contract. Bechtel also maintains that BBVS ought to have been disqualified from the competition, and/or that the competition ought to have been abandoned. It also maintains that certain changes

that occurred to the details of the contract entered into for the project, predominantly due to dates being moved, means that the project entered into between HS2 and BBVS is a different one to that procured in the competition. It maintains the competition should have been re-conducted.

12. HS2 has four broad lines of defence. These are, firstly to deny that it was in breach in any of the different ways alleged in terms of the evaluation, and to maintain that the score awarded to Bechtel is correct and that BBVS was the overall winner. Secondly, it denies that the BBVS tender was abnormally low, and maintains that the ITT was specifically designed to require a *minimum* Lump Sum Fee of 7% (what is called the Fee Collar) to ensure, expressly, that no bids could be, or should have been, abnormally low if they exceeded the Fee Collar. Thirdly, in respect of some of the questions in the procurement where complaint is made by Bechtel of the evaluation, HS2 maintains that the challenges that Bechtel wishes to bring in these proceedings are time-barred (under the very strict time limits for bringing procurement challenges). Fourthly, it maintains that Bechtel's claim fails for causation reasons, because Bechtel included a very substantial and significant – the word used in some of the cross-examination was "fundamental" – qualification to its tender that was not acceptable to HS2. Had Bechtel been given the highest score, HS2 maintains it would have been entitled under the terms of the procurement to disqualify Bechtel as a result of this qualification, and would have done so. Overall, although this is not advanced as a separate line of defence, HS2 draws attention to the very different – and higher - level of Lump Sum Fee included by Bechtel in its tender, compared to the lower level tendered by BBVS. For reasons explained in Section B of this judgment, Confidentiality, that particular area is considered in Confidential Appendix II. However, given the difference in fee level tendered, and given the higher scores awarded to Bechtel on so many other areas of the tender, it can be concluded simply on the face of the documents that had Bechtel tendered a fee lower than BBVS (but still in excess of the 7% fee collar) it would have won the bid. This is because the tenderer who tendered the lowest fee was to be awarded the maximum score available of 10%, and BBVS had the lowest fee in their bid, therefore achieving this percentage in the evaluation. Given this was the highest score available for that part of the tender, BBVS obtained a considerable advantage in its overall score as a result of its keen pricing in this respect. Bechtel was awarded only 5.76% in the evaluation of its Lump Sum Fee, and was therefore outscored by BBVS by 4.24% overall on this single area of the evaluation. This is far in excess of the difference in evaluation score between the two bids overall.

13. Tender competitions such as this one are aimed at securing the most economically advantageous tender (sometimes referred to as "MEAT"). Losing tenderers may often, with the benefit both of hindsight and the type of disclosure provided in proceedings such as these, revisit both their own tender evaluation and that of the winning bidder, and seek to have the court examine different areas of the evaluation. During the cross examination of Mr Blair, Bechtel produced an exhibit C1, which showed that had different figures been included within the Lump Sum Fee calculation, this would (or could) have led to Bechtel outscoring BBVS both on the evaluation of this area of the procurement, and therefore as a result overall in the competition. This is considered in more detail in Confidential Appendix II, due to the different percentages, including the levels of profit sought. However, I consider such an exercise to be wholly redundant. The law, considered further below, is clear: the court will only interfere in the evaluation if there has been manifest error, or other breaches of obligation (such as that

of equal treatment). It is no function of the court to re-evaluate the different bids absent manifest error or other breach. It must be remembered that a procurement exercise such as this is a *competition*, with the different bidders competing against one another to secure the contract. The bid that is evaluated with the highest score will, assuming that it is evaluated in accordance with the ITT (and absent manifest error), win that competition (absent breaches of the principles of fairness, equal treatment and transparency). Hindsight is of no assistance in proceedings such as these. Exhibit C1 was plainly an exercise in hindsight put forward to show that, given different figures, Bechtel could have won the competition. That is all very well in terms of internal analysis at Bechtel investigating how it is that BBVS came to win the competition, but is of no assistance in these proceedings.

14. Bechtel was told by letter dated 5 February 2019 that it had been unsuccessful in the competition. Bechtel issued proceedings later that month in February 2019, and what is called the automatic suspension under UCR 2016 then operated, so as to prevent HS2 from entering into the contract with BBVS. After a delay of some months, HS2 issued an application to the Court to lift the automatic suspension, and Bechtel indicated its opposition to that application, and also served evidence to contest it. In August 2019, shortly before that application was to be heard, the parties sensibly compromised it. Bechtel consented to the lifting of the automatic suspension on certain terms which it is not necessary to set out in detail. The contract was therefore entered into between HS2 and BBVS. One of the remedies sought by Bechtel in these proceedings, in addition to its claim for damages, is a declaration of ineffectiveness in respect of that contract. These proceedings contend for different relief, but the parties were sensibly agreed at an early stage that liability should be dealt with first; the court agreed. Appropriate relief will only therefore be dealt with in a later round of the litigation, if one is necessary, in a subsequent trial.

15. The trial took place with some adjustments for the Covid-19 pandemic. Overspill courts were organised due to limitations on the number of attendees in courts as a result of the required social distancing. One of the witnesses, Mr Steward, gave evidence by video link, but all the others attended in person, although in accordance with the measures introduced in terms of social distancing and other Covid-19 requirements. At the end of the second week of the trial, London moved from Tier 1 to Tier 2 measures. As a result, certain changes were made to permit the parties' legal teams to attend remotely from two specific designated external locations, in addition to the use of the overspill courts. Counsel physically attended court throughout for opening submissions and all of the evidence. After the evidence was concluded, England moved from the Covid-19 Tier 1/Tier 2/Tier 3 model to the second national lockdown, which commenced on 5 November 2020. The closing submissions on 10 and 11 November 2020 were therefore heard remotely using Skype for Business.

16. At an earlier case management stage it was agreed by the parties, and approved by the court, that the first trial would deal only with liability, breach and causation, and not quantum or the issue of a declaration of ineffectiveness. The issues agreed by the parties and approved by the court are at Part C of this judgment.

17. This litigation, and the trial itself, has been conducted in a highly constructive and professional manner. There has been no protracted interlocutory warfare between the parties, relatively few contested applications, and the whole approach by both sides has been one that is entirely in accordance with the overriding objective. The parties'

advisers have been wholly co-operative with one another, both before and during the trial. It is only for that reason that it was possible to conclude the trial within the relatively limited number of days that it occupied. All of the witnesses on both sides were generally helpful and constructive in their oral evidence. Obviously, the Bechtel witnesses held rather different points of view in terms of the correctness of the evaluation of the Bechtel and BBVS bids, but these opinions were genuinely held. I deal with each witness in more detail, and separately, in Part E of this judgment.

18. Finally, by way of introduction, I wish to add some general observations about the judicial oversight of procurement, and challenges to the outcome of procurement competitions. The more detailed legal basis of these observations is set out below in each section of the judgment dealing with discrete areas of challenge. Pursuant to Regulation 36(1) UCR 2016, the core principles of procurement are that "utilities shall treat economic operators equally and without discrimination and shall act in a transparent and proportionate manner".

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

"12. The first (and still best-known) case in which a judge worked through a tender evaluation process to see whether or not manifest errors had been made was ***Letting International Ltd v London Borough of Newham*** [2008] EWHC 158 (QB). There, Silber J followed the approach of Morgan J in ***Lion Apparel*** as to the law, and went on to say:

> 115. Third, I agree with Mr Anderson that it is not my task merely to embark on a remarking exercise and to substitute my own view but to ascertain if there is a manifest error, which is not established merely because on mature reflection a different mark might have been awarded. Fourth, the issue for me is to determine if the combination of manifest errors made by Newham in marking the tenders would have led to a different result."
>
> (emphasis added)

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

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

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

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

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

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

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

25. In ***The Queen (on the application of Campaign Against Arms Trade) v Secretary of State for International Trade*** [2017] EWHC 1754 (Admin), a decision of the Divisional Court (Burnett LJ and Haddon-Cave J, as they both then were), the court referred at [209] to finely balanced matters being "subject to scrutiny in the High Court, but with a suitable recognition of the institutional competence of those charged with the decision-making process". That case does not concern procurement at all, and is concerned with very different facts and decisions of an entirely different nature. However, in my judgment, the phrase "suitable recognition of the institutional competence" of decision makers usefully encompasses the way in which the court, in a procurement challenge (grounded as it is in the relevant Regulations and the public law landscape), will approach challenges to evaluation. The High Court recognises the competence of evaluators, in particular those who are what is called Subject Matter

Experts or SMEs. SMEs evaluate details in a tender that are in their specialist fields; that is why they are experts. They are likely to know the subjects in which they are expert. That is not to say that they can never be wrong. However, the court will recognise their competence.

26. Some procurement competitions are not governed by the different sets of regulations, but can be subject to judicial review. Some procurement challenges start life both as Part 7 proceedings in the Technology and Construction Court, and also judicial review challenges in the Administrative Court. In those circumstances the cases will proceed jointly before one single judge, but one with the necessary authorisation to sit in both courts. Judicial review proceedings require a claimant to obtain permission to bring judicial review as a preliminary filter. There is no matching preliminary filter in the Regulations for Part 7 claims to be brought, although a defendant can apply to have allegations struck out. Regardless of the precise nature of the claim or the underlying procurement, the approach of the courts will be broadly the same. Challenges to evaluations will only be upheld if there has been manifest error, taking into account the margin of discretion available to the decision-maker, or other breach of obligation. There are parallels, as I have explained, with the test of irrationality in public law proceedings. Not only that, but breaches have to be "sufficiently serious" within the meaning of what is called the ***Francovich*** case law (the subject of Issue 23 below) in order to entitle a claimant to damages. This has been made clear by the Supreme Court in ***Nuclear Decommissioning Authority v Energy Solutions EU Ltd*** [2017] UKSC 34 at [37] to [39] per Lord Mance.

27. Of course, some procurement challenges do succeed, and there are a number of judgments where that has occurred, including some very sizeable and high profile ones. In some cases, the conduct of the procurement has been somewhat stark, and in breach of the Regulations. I will not list specific cases, but examples include failures to advertise sizeable procurement competitions *at all;* potential bidders learning of the existence of competitions only from press announcements once the contract has been actually awarded; clear failures to treat bidders equally; manifestly wrong evaluations; and failures to disqualify bidders who obviously ought to have been disqualified. However, the number of successful challenges is likely to be a small proportion of all the procurement competitions conducted each year in this jurisdiction under the different sets of Regulations. The scope of potential remedies available to a disgruntled bidder is comprehensive, and include some powerful orders available to the court in the event of a successful challenge. On the other side of the scales, providing balance, these powers are exercised with restraint. Challenges are considered by the court with the supervisory jurisdiction in mind. The court approaches these challenges with the "suitable recognition" to which I have referred above.

28. It does appear from some aspects of this case that it might be thought that procurement law imposes a counsel of perfection upon contracting authorities, and that any failure to achieve perfection will result in the court's interference. That would not be an accurate depiction of what procurement law requires, and it is not the approach that the court has adopted in this case.

29. To assist I provide a summary of my findings as follows:

1. HS2 raised, as an overall defence to the entire claim, the assertion that the Bechtel bid, by reason of the qualification of its tender in respect of Clause 6.2 of the draft

Conditions of Contract, could have been disqualified. HS2's case was also that, had Bechtel been the overall winner of the competition, Bechtel *would* have been disqualified in any event. I find that this line of defence succeeds. I accept HS2's case as to the fundamental nature of the qualification, which would have entirely shifted the financial risk profile of the Construction Partner contract. That risk would have been shifted substantially to the detriment of HS2, and would have markedly reduced the intention of the contractual arrangement proposed by HS2 in the procurement, which was that the risk of budget and programme was to be borne by the CP. I also accept HS2's evidence as to what would have occurred had Bechtel won the evaluation overall. The nature and effect of the Bechtel qualification was such that for HS2 to have accepted it, this would have led to a contract entirely different to the one HS2 wished to award. That different contract, including as it would have done the amended clause 6.2 proposed by Bechtel, would have been directly contrary to the whole commercial rationale of the procurement, which was intended and carefully designed to enable HS2 to construct Old Oak Common Station within the budget set of £1.054 billion ("the Incentive Target") and to the Programme Target. HS2 was not prepared to enter into such an amended contract, and gave Bechtel several opportunities to withdraw its qualification. Bechtel declined to do so. The Bechtel bid was, as a result, tendered on a basis not in accordance with the terms of the ITT, and on a different basis, one that was contrary to the commercial ethos of the HS2 procurement competition for OOC (and for that matter, for Euston too). This finding alone means that the Bechtel claim in these proceedings fails. It should also be observed that the emails disclosed show that Bechtel knew at the time that there was a real risk that it would be disqualified. It seems that, collectively, there were those at Bechtel almost holding their breath in anticipation of, potentially, being disqualified, although those personnel obviously hoped that Bechtel would not be. Even had HS2 issued a Withdrawal Ultimatum (which was not done) I find that Bechtel would not have withdrawn its qualification; there is no evidence available that it would have done. I also observe, in passing, that had Bechtel won, and had HS2 accepted the qualification, the contract between them would have been so markedly different to that tendered, as to have entitled all the other bidders to challenge, and potentially overturn, that decision in any event as it may have contravened the principle of equal treatment. However, that latter observation was not argued and does not govern my findings on this important part of the case.

2. HS2 also raised limitation as a defence, in respect of three different areas of the evaluation challenged. These were all in the Technical Envelope and are in respect of Bechtel's score for E004, E007 and E009. HS2 maintained that the legal challenge was not brought within the period required in the Regulations and that Bechtel had sufficient information to do so from the standstill letter of 5 February 2019 and its associated 195 pages of feedback. I find that the contents of the standstill letter, which was extraordinarily comprehensive, contained sufficient information for Bechtel to have brought claims related to its own score in its original pleadings. However, limitation is raised by HS2 in respect of the comparison exercise raised by Bechtel with the BBVS bid. It challenges its score based on how the BBVS tender was scored on certain questions in comparison with its own. In order to do that, Bechtel required the BBVS tender itself, not merely the explanation in the moderation rationale for why it had been scored as it had. Bechtel did not have this document when the original claim was issued, and was not given it until 1 May 2020. Under the terms of the consent order granting Bechtel the right to amend and include the comparison exercise (in Annex 3 of the Amended Particulars of Claim), HS2 said it would not raise any limitation defence in

respect of matters arising out of standard disclosure. These areas of the challenge are not therefore time-barred and can be advanced by Bechtel.

3. Turning to the substantive challenges to the different questions in the evaluation, both to Bechtel's score and also the score awarded to BBVS, it is necessary for Bechtel to demonstrate manifest error and/or lack of transparency, and/or unequal treatment on the part of HS2. This Bechtel has failed to do, in respect of any of the separate challenges to the evaluation, either in respect of its own score (to have that increased) or BBVS's score (to have that reduced). I find that there were no such manifest errors by HS2 on each of those different areas of the evaluation, nor were there any other breaches of obligation. Bechtel has failed to establish that any of the evaluations are in error, let alone manifestly in error in the manner required. Nor are there any findings, on the evidence, in Bechtel's favour, of unequal treatment or lack of transparency in the evaluation of the bids. The breaches alleged by Bechtel of HS2's duties of equal treatment and transparency all fail. The scores in the evaluation of the tenders both of Bechtel and BBVS therefore remain undisturbed.

4. Bechtel's assertions that BBVS ought to have been disqualified, and/or that the competition ought to have been abandoned and/or re-run, are entirely without foundation and I find that they, too, fail.

5. There is one respect in which the records kept by HS2 of the procurement competition fall below what is expected of a contracting authority, and that is in respect of the clarification meeting of 5 September 2018 held between HS2 and BBVS. A proper written record should have been kept of what occurred, and this was not done. Minutes of the meeting, in the sense that term is ordinarily understood, were not kept. Some notes were kept but no proper minutes were prepared; nor were draft minutes circulated for approval by the HS2 attendees. HS2 has failed to provide an adequate explanation for this; it appears to have happened almost by accident. The failure in record keeping is partly explained because nobody was clearly identified as the taker of the minutes of that meeting. Mr Pybus, who was the person present whom other witnesses from HS2 told me had occupied that role, told the court that he did not know that he was supposed to be doing so, and he took only sparse notes. No typed minutes were even created until February 2019, 6 months after the meeting. Oral evidence from those present was necessary in order to ascertain what took place at that meeting. However, I find that both the holding of that meeting, and its content, were proper and permitted within the terms of the ITT and the Regulations. BBVS was the winning bidder before the meeting, and the meeting resulted in its final qualifications being withdrawn, and explanation being given by BBVS to HS2 of certain matters, including BBVS' management resource level. This isolated failure in respect of record keeping does not therefore assist Bechtel in its claims against HS2.

6. The project entered into by HS2 and BBVS is slightly different to that tendered for, in terms of some of the dates in the overall programme, partly caused by the delay in HS2 entering into the contract as a result of the automatic suspension imposed by reason of Bechtel issuing these proceedings, and partly due to delay caused by other matters (and in view of the nature of the project, these delays are in any event modest). The contract data in the executed contract is therefore different to that contained in the ITT, in terms both of dates and also BBVS' MRS. However, not only is this sufficiently minor as to be of no importance in a project such as this one, and indeed may even be said to be entirely expected, but I find that this was permitted under the terms of the

procurement competition itself. In no way can it be said to constitute HS2 and BBVS entering into a materially different contract to the one the subject of the procurement. This ground of challenge by Bechtel also therefore fails.

7. In these proceedings therefore, I find for HS2, and Bechtel's claims all fail.

30. With that short introduction to set the scene, and provide a summary of the outcome, I shall turn to the precise issues and the actual terms of the procurement competition.

B: Confidentiality

31. The issue of confidentiality often arises in litigation concerned with procurement challenges. There is a short timescale for proceedings to be commenced before they become time-barred, which is 30 days, and by issuing proceedings the contracting authority becomes subject to the automatic suspension preventing contract award to the winning tenderer. This means that it is not unusual for the claimant (an unsuccessful tenderer) to be seeking a range of remedies, including seeking to prove that it should have won or (as here) that the winner should have been disqualified and/or that it is entitled to a declaration of ineffectiveness. Bid information may include matters of commercial confidence arising in the claimant's bid that are relevant to the same procurement (should it be re-run) or could be relevant to other competitions in the near or mid-future. Therefore, properly to plead or argue a case, or to comply with disclosure obligations, may involve the use of confidential information.

32. To avoid these difficulties and to preserve confidential information, what is called a confidentiality ring (or on occasion, two confidentiality rings) are usually established by order of the court, and (again, as here) not all of a party's witnesses will necessarily see all, or any, of the confidential material. Confidentiality may attach to some parts of the claimant's bid, and also to parts of the winning tenderer's bid. These orders are usually established by consent, and require review by, and the approval of, the court. They entitle the parties and their advisers fairly to contest the litigation, whilst preserving confidentiality. Very occasionally, the parties cannot agree on some of the detailed terms, and these disputes will be resolved by the court, but this does not occur very often.

33. It is important, however, to bear in mind the very important principle of open justice. The starting point is that each party should be allowed unrestricted access to inspect all of disclosure given by other parties subject to the implied undertaking that the disclosure will not be used for a collateral purpose; per Hamblen J (as he then was) in ***Libyan Investment Authority v Société Générale SA and others*** [2015] EWHC 550 (Comm) at [20] to [35]. This applies to procurement litigation as much as other cases, a point I made in ***SRCL Ltd v NHS Commissioning Board*** [2018] EWHC 1985 (TCC) at [70] and [71], which made clear the approach the court would take to another bidder's confidential information.

34. Turning to the way that such documents and evidence are dealt with during a trial, although the court can go into confidential session, and continue proceedings with only those within the confidentiality ring present, such occasions must be kept to a strict minimum, and doing so must be justified on each occasion. It is contrary both to open justice and transparency to have trials conducted even partially in secret, and doing so is prima facie contrary to these fundamental principles. There must be very exceptional

circumstances to justify such a course, which is a departure from how trials should be conducted. Similarly, judgments need to be readily comprehensible and include reference to all the relevant material and reasoning of the judge. If it is strictly necessary and cannot be avoided, some parts of a judgment can be put in a separate confidential appendix or schedule, but again that must only occur when there is no alternative, and where to provide the details included in the appendix publicly would run the real risk of destroying justified confidentiality in commercial issues.

35. In my judgment, the level of profit in percentage terms that a tenderer included in its bid in this procurement competition is properly described as commercially confidential, and is also something that any tenderer, whether a claimant in proceedings or otherwise, would wish to keep confidential for justifiable reasons. Although level of profit may fluctuate from project to project, in a commercially competitive environment, reciting in a publicly available judgment that either Bechtel and/or BBVS included profit of x% in their bid for this HS2 contract is likely both to advantage their competitors, and severely disadvantage each of them, in future bids. That small and discrete part of this judgment is therefore included in Confidential Appendix II, which will be made available only to the members of the parties' legal teams and those party representatives in the confidentiality ring. This has been drawn to the parties' attention in the circulation of this judgment in draft.

36. Another aspect of confidentiality, although of a different nature, is the practice of redacting some documents to be used in the electronic trial bundle. Documents that are read out in open court, or which the judge is specifically invited to read outside court, or which it is clear (or expressly stated) that the judge has read, are of a different character in terms of being subject to the court's inherent jurisdiction, to documents that are merely contained in the trial bundle; ***Cape Intermediate Holdings Ltd v Dring*** [2018] EWCA Civ 1795 per Hamblen LJ (as he then was) at [112]. However, the widespread redaction of documents in any trial bundle, particularly a vast trial bundle such as this one, will only usually come to light when those documents are deployed in the trial itself. It became increasingly clear to me in this case that there were numerous passages within directly relevant documents that were put to witnesses in evidence (these were usually HS2 documents) with large areas within them redacted. The visible parts of those documents made it appear highly unlikely that the redacted passages could be properly subject to legal professional privilege (which would obviously have justified the redactions). I therefore adopted the practice whereby, whenever such a document was used in the trial, at the end of that court session Ms Hannaford QC for HS2 would be invited personally to review the redactions. If legal professional privilege were not the reason for the redactions, HS2 would either disclose an unredacted version or explain (and therefore seek to justify) the basis of the redactions. This process almost invariably led to unredacted versions regularly being produced during the trial following each such review. It would also sometimes be the case that the original reason for the redactions was wholly unclear, and HS2 could not itself explain why the redactions had been made. This demonstrated, however, that the original scope of redactions was far too wide, and had been done with insufficient consideration of the proper grounds for making redactions.

37. Given the number of documents in a case such as this, it is not feasible to task one single specific person to examine every document in order to review the type of widespread

and unjustified redactions that were present in this case. That exercise could certainly not be done, in any event, during the actual trial itself.

38. Finally on this subject, some parts of witness statements had portions redacted in their open form, with certain sections only available in the confidential versions. Many of these passages, in respect of which someone must have made a positive decision to redact due to confidentiality, simply contained no confidential information at all. As an example, one such allegedly confidential passage included reference to HS2 being built in two phases, with stage one going to Birmingham. Such information has been in the public domain for some years. It is not remotely confidential. Redacting such obviously non-confidential detail should never have happened; and it is very difficult to see how this can have occurred.

39. The following point is an important one, and it is particularly important in the field of procurement law when a public body under obligations of transparency and fairness seeks to redact documents in this way. Redactions from documents in the trial bundle that are going to be put to a witness should only be done by a qualified solicitor or barrister, who is taking account of the correct legal test for an assertion of legal professional privilege, and its proper scope. It would also make sense, where redactions are made, for an index to be compiled by the lawyers performing these redactions, of the documents that have been redacted, and the justification for this. That would save much time, and confusion, when such documents are considered in open court. It would also mean that a ready explanation would be available for the court and for counsel when redactions are queried. However, I am satisfied that the exercise I have described, in this case, did not interfere with the fair disposal of the issues in this case, and also did not prevent Bechtel from properly considering the contents of HS2 documents that it was entitled to see.

C: The Issues

40. These were agreed before the trial, and amended after some discussion. The final version agreed by the parties was provided after the trial, on 18 November 2020. That included changes to some of the issues, and in particular to Issues 8, 9, 10, 11, 12, 13 15 and 20. Although it may seem odd to add issues after the trial has taken place, the changes were not highly material and I am confident that the issues as finally agreed can fairly be dealt with. I have reproduced the final list agreed by the parties, which included the headings, but omitted the numerous references to paragraphs in the different pleadings.

41. The numbering and lettering in the list of issues below was contained in the agreed document submitted by the parties to the court. I have retained it.

I. DEFENDANT'S DUTIES UNDER UCR16

1. Did the Defendant owe the Claimant a duty (i) of good administration and/or (ii) to identify whether other bids received in the competition appeared to be abnormally low and/or (iii) to investigate such bids as did appear to be abnormally low and/or (iv) to decide whether to reject the tender in light of explanations provided and/or (v) to conduct the evaluation of tenders and take decisions on its abnormally low tender investigation on a rational basis and/or free of manifest error?

a. What is the correct meaning of 'abnormally low tender' and can a tender be 'abnormally low' based on resource levels?

II. BREACHES OF UCR16 AND IMMEDIATE CONSEQUENCES

Breaches going to the exclusion of BBVS from the competition and/or abandonment of the competition

2. Did the Defendant breach principles of transparency and/or equal treatment and/or commit a manifest error of assessment in awarding a score of Concerns (10%) to BBVS for Technical ITT Question E001 and ought the Defendant to have therefore awarded BBVS a score of "Major Concerns" for Technical ITT Question E001?

3. If the answer to Issue 2 is in the affirmative, ought the Defendant to have excluded BBVS from the competition for the Lot 2 Contract pursuant to IFT. §6.8.15(b)(i)?

4. Did the Defendant breach its duties under Regulation 84 UCR by not identifying BBVS's tender as apparently abnormally low on the basis of:

a. its proposed level of resourcing; and/or

b. its price, in particular the Lump Sum Fee?

5. If the answer to Issue 4 is in the affirmative, did the Defendant breach its duties under Regulation 84 UCR by not excluding BBVS's tender on the basis that it was abnormally low?

6. In the event that the Defendant was right not to exclude the BBVS bid from the competition for the Lot 2 Contract, did it breach the principle of good administration in not abandoning the competition pursuant to IFT, §8.4.5 on the basis of concerns as to the sufficiency/adequacy of resources proposed by BBVS (the Preferred Bidder) in its tender response?

Breaches resulting in changes to the scoring of the BBVS and/or Bechtel bids

7. How would the Alignment Factor have been understood by a reasonably well-informed and normally diligent ("**RWIND**") bidder?

8. Having regard to BBVS's proper score for Technical ITT Question E001 (whether "Concerns" or "Major Concerns"), was the Alignment Factor applied in the evaluation of BBVS' response to Technical Questions E002, E004-E010 and I001 rationally and/or in accordance with how it would have been understood by an RWIND bidder? Did any such failure properly to apply the Alignment Factor result in the award of too high a score to BBVS for any of Technical ITT Questions E002, E004, E005, E006, E007, E009 and I001?

9. Did the Defendant fail, in breach of its duties, to have proper regard to the alignment of BBVS' responses to Technical ITT Questions E004-E009 and I001

to references in certain Works Information documents relating to the need for sufficient management resources. Did any such failure properly to have regard to the need for alignment to the Works Information documents result in the award of too high a score to BBVS for any of its Technical ITT Questions E004, E005, E006, E007, E009 and I001?

10. Did the Defendant breach its duties of transparency and/or equal treatment and/or good administration as a result of the Defendant's moderators and/or advisers involved in moderation assurance improperly interfering with the judgment of Individual Assessors so as to apply downward pressure on scoring (i) in marginal cases generally and/or (ii) of the Claimant's bid in particular, such that the Claimant would, absent the improper interference, have been awarded consensus scores of at least Good Confidence (rather than Moderate Confidence) for any of Technical ITT Questions E004, E007 and E008?

11. Did the Defendant breach its duties by taking an inconsistent and/or irreconcilable approach to the scoring of the Claimant's and BBVS' responses to the Appendix C Factors in Technical ITT Questions E004 (Factors 4 and 5) and/or E007 (Factors 1, 2, 4 and 5) and/or E009 (Factors 3 and 6)?

Failure to keep proper records

12. Has the Defendant breached the principles of transparency and/or good administration by:

a. Conducting a Moderation Assurance review that (i) improperly focused on the amendment of the scoring rationale in Moderation Minutes so as to justify the consensus scores recorded in those minutes; and/or (ii) failed properly to prompt the review, discussion and reconsideration of scores for Technical ITT Questions; and/or (iii) compromised the accuracy and/or transparency of the moderation minutes?

b. Failing to keep full and proper records of the reasons for the reduction at Moderation of the scores awarded by Individual Assessors to the Claimant's responses to Technical ITT Questions E004, E007 and E008?

c. Failing to keep full and proper records of the Post Tender Exchange of the 5 September 2018 meeting?

Post Tender Exchanges and Material change to Key Dates

13. As regards the Post Tender Exchanges:

a. Were the "reassurances" as to proposed resource levels provided by BBVS to the Defendant at the 5 September 2018 meeting (i) post-tender clarifications permitted by the ITT and/or consistent with the UCR 16 and the equal treatment principle or, conversely, (ii) did they amount to impermissible material changes, alternatively, promises to make impermissible material changes, to the BBVS tender, such that their acceptance was in breach of the Defendant's duties of equal treatment and transparency and/or amounted to a manifest error?

b. Were the revisions to the Management Resource Schedules ("**MRS**") submitted by BBVS in response to the Revised Contract Data and/or the Further Revised Contract Data (i) permitted by the ITT and/or consistent with the UCR 16 and the equal treatment principle; or, conversely, (ii) did they amount to impermissible material changes, alternatively, promises to make impermissible material changes, to the BBVS tender in breach of the Defendant's duties of equal treatment and transparency?

c. Did any impermissible "reassurances" and/or revisions to the BBVS MRS, as identified under (a) or (b) above, cause, or contribute to, the Defendant's decision to award the Lot 2 Contract to BBVS?

14. Did the Revised Contract Data and/or Further Revised Contract Data amount to an impermissible substantial modification and/or material change to the basis on which the Defendant invited final tenders for the Lot 2 Contract in breach of the Defendant's duties of equal treatment and transparency?

15. Ought the Defendant, acting in accordance with the principles of transparency and equal treatment and avoiding manifest error, to have invited revised tenders from all bidders (including the Claimant) on the basis of the Revised Contract Data and/or Further Revised Contract Data?

II. LIMITATION

16. Are any of the pleas at Annex 3, §§2, 5 or 8 of the Re-Re-Re-Amended Particulars of Claim time barred?

III. CAUSATION ISSUES

17. In the light of the conclusions on the issues 2-5, 7-11 and 13 above and any consequential adjustment to the relevant scores, ought the Claimant to have been identified as the Preferred Bidder?

18. Is the Defendant permitted to treat the Claimant as excluded from the competition for the Lot 2 Contract by reference to one or more of its Qualifications:

a. After the conclusion of the procurement and issue of the Standstill Letter; and

b. in the absence of any Withdrawal Ultimatum?

19. In the event that the Claimant had been identified as the Preferred Bidder for the Lot 2 Contract:

a. Would the Defendant have issued a Withdrawal Ultimatum in respect of one or more of the Claimant's Qualifications?

b. If so, how would the Claimant have responded to such a Withdrawal Ultimatum?

20. In light of the conclusions on Issues 6, 12 and/or 14 to 19 above, is the court satisfied on the balance of probabilities that, absent the Defendant's identified breaches of UCR16:

a. The Claimant ought to have been awarded the Lot 2 Contract; or

b. The Claimant had a substantial, alternatively, a real chance of being awarded the Lot 2 Contract?

IV. REMEDIES

21. In light of conclusions on Issues 14 and 15 above, does the court have grounds for making a declaration of ineffectiveness in respect of the Materially Altered Contract awarded by the Defendant to BBVS?

22. Are damages for any breaches of UCR16 identified above available only in respect of breaches that are "sufficiently serious" as described in the *Francovich* case law?

23. To the extent relevant/necessary, are the identified breaches, individually or collectively, "sufficiently serious" within the meaning of the *Francovich* case law?

42. I will provide the answers to these, sequentially, at the end of this judgment after considering the evidence and the applicable law. Not all of them arise on my findings on the facts.

D: The Procurement

43. Bechtel pre-qualified as a bidder for both Lots 1 and 2. The former related to the station at Euston, and as explained above at [4] Bechtel chose to concentrate on its bid for Lot 2 for the station at Old Oak Common, and withdrew from the bid for Euston. No bidder could win both contracts under the WOOR. Many of the elements of the relevant documents applied to both lots, however. The ITT comprised a number of volumes. Volume 0 was Instructions For and Conditions of Tendering, and this was also referred to during the proceedings and evidence either as the ITT or as the IFT. This is the part of the competition that received the most consideration during the trial, but it is only one part. I shall refer to it as the ITT (even though strictly speaking there were multiple volumes in the ITT).

44. For completeness, the Invitation to Tender for the OOC Contract was in fact divided into four parts as follows:

(a) Volume 0 - Instructions for and Conditions of Tendering. The same applied to the Procurement of both the OOC Contract and the contract for a Construction Partner for the Euston HS2 station;

(b) Volume 1 – Agreements, including Conditions of Contract;

(c) Volume 2 – Works Information;

(d) Volume 3 – Site Information.

45. The Conditions of Contract were based on the NEC3 ECC Option F 2013 (cost reimbursable management contract), with certain modifications. This is a standard form of management contract, and the NEC3 group of contracts are well known in the construction industry. The scope of works to be delivered under the OOC Contract was described in Section 3 of Works Information ("WI") 100 in the following terms:

> "*3.1.1. The Contractor provides the works to deliver a fully-functioning station in readiness for operational delivery. The works comprise:*
> *a. management services to Provide the Works; and*
> *b. physical delivery of the works.*"

46. The term "*works*" (using lower case, italicised) was defined in Section 1 of Contract Data Part 1 as follows:

> "*the management, design, execution, construction, testing, commissioning and completion together with related asset management duties and Delivery into Passenger Service of Old Oak Common Station to budget and programme including the procurement and management of all works packages, stakeholder management and other activities required as the Construction Partner in accordance with the Works Information*."

47. WI 100 section 3.1.2 sets out a non-exhaustive list of "*management services*" which the contractor would provide, including planning, specification and procurement of work packages; undertaking constructability and buildability reviews of the works; design and costing; delivery management, testing, commissioning handover and maintenance; providing management information to HS2; management of risk; and what is called stakeholder and community engagement. The Construction Partner was therefore to be contracted to do the following:

(a) Work collaboratively with the consultant appointed by the Defendant under a separate Station Design Services Contract ("SDSC") to finalise a design for OOC Station and to verify that the design could be delivered within the Incentive Target and Programme Target. The SDSC for Old Oak Common was a practice called WSP (for Euston it was a different practice, Arup).

(b) Divide up the works required to deliver the approved design into appropriate Works Packages and sub-contract the delivery of those Works Packages to suitable third parties, which would involve the procurement exercises for each of them.

(c) Supervise, manage and coordinate delivery of those Works Packages so as to deliver the completed OOC Station within:

a) The Incentive Target - being the fixed maximum budget for delivery of the OOC Station, specifically, £1,054,000,000; and

b) The Programme Target – being the deadline for the completion of OOC Station, which at that stage was 26 December 2026. There was also contained in Contract Data Part 1 a series of three interim Sectional Completion and 12 Key Dates.

48. The Incentive and Programme Targets are particularly important in the context of the qualifications made by Bechtel in its bid, namely its proposal to amend clause 6.2 of the proposed contract terms in a substantial way. I deal with this subject further in Section G Qualifications below. Basically, the Incentive Target was to be the *maximum* that Old Oak Common was to cost.

49. In summary, therefore, the winning bidder would become the Construction Partner or CP to HS2 and would manage the works required for Old Oak Common Station. The Work Package contractors would perform the physical works necessary for the completion of the OOC station project. The "fixed maximum budget" set out in the ITT was £1.054 billion, which is the same as the Incentive Target. The CP would effectively contract with HS2 that the station could be built for that budget, and to the programme identified. Failures by the CP to achieve either of those important matters – the Incentive Target or the Programme Target - would result in the application of financial disincentives, which would mean that the CP would be financially disadvantaged as a result of any failure to meet either the budget or the programme. As a rather simplistic summary of complex contractual provisions, HS2 would, by reason of the terms of the contract with the CP, be entitled contractually to have the project constructed both to its budget and its programme, and would not have to pay any higher fee to the CP if the station cost more than the budget. This would have the effect of diluting the level of fee the CP would receive. Both the cost and duration of the project were risks that would be transferred from HS2 to the CP. It was concerns about these risks that led Bechtel to qualify its tender by proposing an entirely alternative version of clause 6.2 of the contract.

50. In general terms, the employer on any project, construction or otherwise, is perfectly entitled to impose a budget for the works that the employer wishes to have performed. The price to be paid for a construction project is an important component part, for any size of project. For the OOC station project, and indeed the whole HS2 project in general, budget is of considerable - if not fundamental - importance. So too is programme. Putting entirely to one side the general public controversy about HS2 and how much it will eventually cost, those tasked with delivering it are tasked with doing so within a specific budget - the funds to pay for it are being provided out of public funds – and to a specific programme. There is a vast array of different construction industry contracts available which, within them, have very detailed contractual machinery to deal with price and cost. Without reproducing all of the intended terms for this contract verbatim, the structure of the contractual arrangements was to be as explained in [47] and [48] above. As well as the specific budget, the programme for HS2 is highly complex because there are so many other contracts involved, such as Main Works Civils, Route Wide Railways Systems, Rolling Stock and Depots. Constructing Old Oak Common is not a project being performed in isolation. The other contracts for the other elements of the HS2 project, with their different programmes, are all interlinked in the sense that they are all working towards completion of the overall infrastructure project.

51. I shall return to this subject in Part G of this judgment which deals with qualifications, because this was an important area of contention with Bechtel during the procurement. This is because Bechtel was unwilling to enter into the agreement with HS2 to become CP on the terms that I have broadly identified and summarised above. Bechtel wished to become the CP for the OOC station project, certainly, and submitted a detailed and careful bid. However, Bechtel was particularly concerned with the way that HS2 sought to transfer the risk of budget and programme to the CP in the proposed contract terms. Bechtel was concerned that, following the design of the station, it might not be possible for Bechtel to achieve construction within the fixed maximum budget available and the programme. In other words, Bechtel wanted to deal with the potential situation whereby the station may turn out as costing more to build than HS2 wished to provide for in the contract itself as the budget, and/or taking longer to build that the programme target. Bechtel did not wish to bear the burden of contractual risk in terms of the achievability of budget and programme, and the potentially reduced fee in the sense that if cost went above the Incentive Target, the payable fee to the CP did not increase. That was why it qualified its bid in the terms it did, proposing an alternative, and entirely different, version of Clause 6.2 of the contract.

52. There are a limited number of questions in the procurement whose evaluations are under consideration in these proceedings. For the most part, these consist of Bechtel challenging the score awarded to BBVS; some challenge to both the score given to Bechtel (said to be too low) and that given to BBVS (said to be too high) on particular questions in the bid; and one relates solely to Bechtel alone (namely E008 Design Management). I shall therefore only deal with those areas of the bid relevant to the challenges brought by Bechtel in this judgment. Appendix 1 sets out both the different Questions, and the different Factors. In outline terms however, the procurement was designed, and was to be evaluated, in the following way. There were four sections in what was called the Qualification Envelope, with Sections A to D. These were all lot specific and were evaluated in a pass/fail manner.

53. The Technical Envelope had further parts to it, identified as Sections E to I. These each had a different percentage available, and scored towards a potential score of 80% of the overall total. Some were lot specific, and some were generic (as in, they applied to both Lots 1 and 2). Sections E to H were Technical Evaluation and Section I was Commercial Qualitative.

54. The Commercial Envelope comprised only two sections, namely Sections J and K. Section K was Contract Data and did not attract any percentages in the evaluation. Section J was J001 Staff Rates and J002 Fee, each with a potential score of up to 10% of the overall score in the whole procurement, thereby totalling 20% of the marks. The score from the Commercial Envelope went together with the score from the Technical Envelope to give the bidder's overall percentage total in the competition. Assuming the pass/fail part of the competition were passed by the bidders, the winner of the competition would be the tenderer with the highest score. Analysis of the Lump Sum Fee of both BBVS and Bechtel appears in Confidential Appendix II. Together, these two elements were described as "Price" in the ITT and explanation was given in section 6.11. This included explanation of the so-called Fee Collar at 6.11.19 to 6.11.23:

" 'Fee Collar'

6.11.19 Tenderers should note that HS2 Ltd has set a 'Fee Collar' to the Lump Sum Fee evaluation to avoid unsustainable low bidding and to ensure that the successful Construction Partner will achieve a fair level of Fee recovery so that the Construction Partner is incentivised to adopt the desired behaviours (see Part 3 above).

6.11.20 The Fee Collar will be set at a Fee percentage of 7%, in that any Lump Sum Fee which derives from a tendered Fee percentage of less than 7% will be deemed to have breached the Fee Collar.

6.11.21 If a Tenderer tenders a Lump Sum Fee that breaches the Fee Collar, that Tenderer will score 0 for the Lump Sum Fee element of the Commercial Evaluation.

6.11.22 The lowest Lump Sum Fee that does not breach the Fee Collar will receive full marks (10.00) for the Lump Sum Fee element of the Commercial Evaluation. The score for all other Tenderers that do not breach the Fee Collar will be determined as noted in paragraph 6.11.15 above."

55. A worked example was given in the table at 6.11.23 which it is not necessary to reproduce. The Fee Collar is considered further in Section J, Abnormally Low Tender.

56. The Staff Rates were to be provided by each bidder in a spreadsheet template against a pre-ordained series of job descriptions. The way the tender was structured is that these rates then, by reason of the way the spreadsheet operated (through the formulae contained within it), generated data that could be considered by HS2 independently of the volume of resources proposed by the tenderer. As will be seen below, the volume of resources (rather than the rates for those resources) were considered (and scored) in the evaluation in the Management Resource Schedule or MRS, which was part of E001. However, due to the way the procurement was designed, the rates proposed by each bidder for the type of resources it would provide were considered separately to the adequacy of those resources, and the rates were evaluated within J001.

57. As I have explained in Confidential Appendix II – which recites the precise percentages and money sum equivalents of the BBVS and Bechtel bids for the respective Lump Sum Fee including profit – BBVS scored more highly in the Commercial Envelope, particularly on the Lump Sum Fee, than did Bechtel. BBVS tendered the lowest fee of the different bidders, and was therefore given the score for first place of 10% for J002. However, given the scoring matrix, the percentage score to be allocated to the other bidders for their Lump Sum Fees was affected by the amount by which their particular fee was higher than that of the lowest bidder. This means that the greater the divergence of fee tendered by any other bidder, which would be higher than the lowest fee tendered (in this case by BBVS), the lower the score would be for that other bidder on Question J002. This method of designing the scoring matrix had the following consequence, which would have been obvious to an RWIND tenderer. The bidder that tendered the lowest Lump Sum Fee would not only achieve a straight score of 10% - which is a sizeable amount for a single element in any evaluation – but the lower that its fee was, the more likely it was that there would be a larger differential with its nearest competitor on fee. The larger the differential on fee, the lower the next cheapest bidder on fee would score on J002. There was no fixed score of x% for the second lowest bidder on fee on Question J002; it was the differential with the lowest bidder that mattered. This scoring system has the plain and obvious consequence of granting the bidder who was lowest on fee, a very sizeable scoring advantage towards the overall total. It could also,

theoretically, encourage bidders to consider how low they could set their percentages. It therefore had one potential disadvantage, namely it might potentially encourage unrealistically low bidding. However, given the creation of the Fee Collar, bids on fee had to be *above* the percentage set by HS2 above that threshold. The potential disadvantage of unrealistically low bidding on fee was therefore avoided.

58. This scoring system and its potential consequences, in my view, was plain and obvious from the terms of the ITT itself. There was no hidden feature of how it would work; the summary in [56] and [57] above was set out in section 6.11 of the ITT. Bechtel would not have known in advance that BBVS (or any other bidder) would necessarily outscore it on J002 by as much as 4.24%, because it would not know by what amount its fee would be higher than the lowest of the fees bid by all the bidders. However, both Bechtel, and indeed any RWIND tenderer, would have known from reading the ITT itself that there was the potential for any tenderer to be heavily outscored on J002, which was only a single element of the tender. Bechtel, and any RWIND tenderer, would also know that this outscoring would depend upon the differential level of fee tendered by Bechtel; the higher the fee that was tendered, the greater the potential for being outscored on this element would be. The fee tendered by BBVS (the precise figures are contained in Confidential Appendix II) was above the Fee Collar. However, the fee tendered by Bechtel can, in my judgment, correctly be described as very substantially above the Fee Collar. That higher fee proposal would mean, if Bechtel won the tender overall, that Bechtel would be paid by way of fee a far higher level of remuneration by HS2. That much is also obvious. However, by doing so, it made the potential for being heavily outscored on J002 by another, lower bidder, that much more likely. Matters of commercial judgment of this type are made by the senior members of bid teams of commercial organisations in almost all large scale procurement competitions. They are, however, matters of judgment based on the contents of the ITT and the scoring matrix adopted by the contracting authority, in this case HS2. They are clear on the face of the documents and they would have been clear to an RWIND tenderer.

59. In order to be the successful tenderer in this procurement, any tenderer bidding a fee well in excess of the Fee Collar would have to outscore its competitors (and at the very least, outscore the competitor bidding the lowest fee, who would receive 10% for that alone) by some margin, cumulatively, on the other areas of the evaluation, including the Technical Envelope, in order to succeed overall. Whether the full impact of this was actually, subjectively, known at Bechtel during the procurement does not matter; what matters is whether an RWIND tenderer would have known this. I find that such an RWIND tenderer plainly would. Indeed, as I have explained, this is clearly explained in the ITT itself.

60. The full ITT and contract terms are very extensive. I have reproduced only some of them in this judgment. To have reproduced them all, or even just a proportion of them, would have led to this judgment becoming extraordinarily cumbersome. I have considered all of the terms relied upon by both parties in submission and evidence, but only included those in this judgment that are necessary in order to understand the issues.

61. The Procurement was carried out under negotiated procedure in Regulation 47 of the UCR 2016. HS2 advertised the Procurement in the Official Journal of the European Union on 24 August 2017 (reference 2017/S 161-332984) ("the OJEU Notice"). The same OJEU notice covered both Lot 1 and Lot 2, namely Euston and Old Oak Common.

The OJEU notice is the official method of initiating the procurement process, and notifies potential bidders of the existence of the competition.

62. Although the term Construction Partner was used, the role of the winning bidder was to be that of, effectively, a management contractor. A management contractor does not usually perform the physical works; it manages the works, with those physically being performed by other companies called Works Contractors. The CP role was to include (among other things) the management and coordination of all design, construction, testing and commissioning activities for the station required to meet the schedule and milestones, detailed design of the station following novation of the contract between HS2 and the designer to the Construction Partner, procurement of the supply chain and the management and mitigation of risks. The works were to be carried out in a series of Works Packages by the Works Contractors, and the CP would manage those other contractors and the works. The ITT explained that HS2 intended to identify the most economically advantageous tender by assessing both the quality and price of the tenders. The objectives of the ITT were set out in paragraph 2.1.2 of the ITT. They were to ensure that the successful tenderer had:

(1) Demonstrated understanding of HS2's objectives and requirements for the Construction Partner role;

(2) Provided evidence that its approach was aligned to HS2's requirement to bring OOC within budget and programme; and

(3) Given HS2 confidence that it shared HS2's objectives and would be capable of working with HS2 as a partner to perform the Contract.

63. Those familiar with large procurements will not need this explanation of the terminology, but the AWARD system was to be used for evaluation and the Bravo portal system was used for communications between HS2 and the tenderers. AWARD is a secure system whereby notes, reasons and scores are kept and recorded, and this can usually only be accessed under conditions of security in certain locations. This is to preserve the integrity of the process and provide an audit trail of communications between the bidders and HS2. The different bidders were referred to by code words; here, both letters of the Greek alphabet (Kappa for BBVS and Zeta for Bechtel) and also in places, the names of different cheese (Gorgonzola for BBVS; Stilton for Bechtel). Again, the use of codewords is not unusual and is to preserve anonymity, avoid any subconscious bias, and maintain the integrity of the competition. The ITT consisted of the following volumes and appendices, which I list here for completeness:

Volume 0:	**Invitation to Tender: Instructions for and conditions of tendering**
Appendix A	Tender response checklist and Qualification templates
Appendix B	Documents provided "for information only"
Appendix C	ITT Questions and detailed scoring guidance
Appendix C1	Key Person CV template
Appendix C2	Commercial Templates (Fee Schedule Template and Staff Rate Schedule)
Appendix C3	Management Resource Schedule Template
Appendix C4	Contract Data Part Two template
Appendix D	Behavioural Assessment

Appendix E Conflict of Interest Policy – Supplier Principles
Appendix F Bid Team Template
Appendix G CPC Scorecard Matrix

Volume 1 (Agreements).
These were amended in both April and August 2018 and the amendments notified to the tenderers using the Bravo system
Form of Agreement for Construction Partner
Schedule 1 to the Form of Agreement: Conditions of Contract
Comparison of Contract against NEC 3 Option F standard form 2013
Contract Data Part 1
Contract Data Part 2

Volume 2 (Works Information documents), together with 35 Appendices containing the relevant Works Information ("**WI**") documents. Of these 35, the following are referred to by Bechtel in its claims in these proceedings:
WI 120 – Management of the Works
WI 300 – Design
WI 800 – Commercial Management
WI 3000 – RIBA2 drawings prepared by HS2

64. The evaluation was divided into Quality (80%) and Price ('Commercial Quantitative') (20%). The two Price elements are J001 and J002 as I have explained. The sub-division was explained in paragraph 6.4.2 of the ITT:

Quality:
Technical Questions: 57%
Commercial Qualitative: 8%
Behavioural Assessment: 15%

Price:
Tendered Staff Rates: 10%
Lump Sum Fee: 10%

65. The ITT also set out the timetable for the procurement competition. The ITT stated that the Contract would be awarded to the most economically advantageous tender on the basis of the evaluation criteria and weightings and that the ratio of Quality to Price was 80/20. This can be seen from the above breakdown in the different percentages.

66. The Technical Questions were set out in Appendix C to the ITT. These assessed the tenderers' proposals for, among other things, mobilising, deploying and retaining their contract team and their outline plans for the early substructure works, contract management, the works package strategy and procurement strategy "in order to give HS2 Ltd confidence in the Tender response and the Tenderer's proposed approach, strategy and plans" (the statement at paragraph 3.14.2 of the ITT). The Technical Questions which are in issue in these proceedings related to the following technical issues. I shall not deal at this stage with the weighting of each, although cumulatively they have a combined weighting of 38%.

67. These questions were to be assessed against a scoring methodology which was set at Table 6.8 of the ITT, which set out the scoring descriptors or parameters for the scoring that was to be used. The percentage score in the left hand column relates to the percentage of the marks available for that question:

% score	Description	Scoring Methodology	Further Evaluation Guidance
0%	Major Concerns	*Overall HS2 Ltd has no confidence in the Tenderer's response to the ITT Question because one or more of the following applies:* • *No response is provided.* • *The response fails to answer the ITT Question at all.* • *The response does not address any of the factors in the Evaluation Guidance.* • *A response is provided but it raises one or more major concerns in relation to the Tenderer's proposed approach to delivery and/or represents a substantial risk to HS2 Ltd.*	*Tenderers are referred to Appendix C, which provides further guidance to Tenderers relevant to each ITT Question ("Evaluation Guidance")*
10%	Concerns	*Overall HS2 Ltd has very low confidence in the Tenderer's response to the ITT Question because one or more of the following applies:* • *The response fails to address a substantial part of the ITT Question.* • *The response fails to address a significant number of the factors in the Evaluation Guidance.* • *The response gives rise to one or more concerns in relation to the Tenderer's proposed approach to delivery and/or represents a significant risk to HS2 Ltd.* • *The response gives greater confidence than 'Major concerns' but is not sufficiently comprehensive to warrant 'Minor concerns'.*	
25%	Minor Concerns	*Overall HS2 Ltd has low confidence in the Tenderer's response to the ITT Question because one or more of the following applies:* • *The response covers all the elements of the ITT Question but at least one of*	

% score	Description	Scoring Methodology	Further Evaluation Guidance
		the elements is not adequately addressed. • *The response fails to address one or two factors in the Evaluation Guidance adequately or at all.* • *The response gives rise to one or more minor concerns in relation to the Tenderer's proposed approach to delivery and/or risk.* • *The response gives greater confidence than 'Concerns' but is not sufficiently comprehensive to warrant 'Moderate confidence'*	
55%	Moderate Confidence	*Overall HS2 Ltd has moderate confidence in the Tenderer's response to the ITT Question because one or more of the following applies:* • *The response generally addresses the ITT Question and the factors in the Evaluation Guidance in a satisfactory manner, although parts of the response lack significant detail and/or evidence.* • *The response gives greater confidence than 'Minor concerns' but is not sufficiently comprehensive to warrant 'Good confidence'*	
75%	Good Confidence	*Overall HS2 Ltd has good confidence in the Tenderer's response to the ITT Question because one or more of the following applies:* • *The response addresses well the ITT Question and the factors in the Evaluation Guidance, although parts of the response lack detail and/or evidence.* • *The response gives greater confidence than 'Moderate confidence' but is not sufficiently comprehensive to warrant 'Very good confidence.'*	
90%	Very Good	*Overall HS2 Ltd has very good confidence in the Tenderer's response to the ITT Question*	

% score	Description	Scoring Methodology	Further Evaluation Guidance
	Confidence	*because one or more of the following applies:* • *The response addresses very well the ITT Question and all the factors in the Evaluation Guidance and provides very good evidence of where the proposed or similar approach described has been used effectively elsewhere.* • *The response addresses very well the ITT Question and all the factors in the Evaluation Guidance and includes innovative ideas and/or proposals that meet HS2 Ltd's requirements described in the ITT.* • *The response gives greater confidence than 'Good confidence' but is not sufficiently comprehensive to warrant 'Excellent confidence'.*	
100%	Excellent Confidence	*Overall HS2 Ltd has excellent confidence in the Tenderer's response to the ITT Question because one or more of the following applies:* • *The response addresses the ITT Question and all the factors in the Evaluation Guidance in an excellent, comprehensive and robust manner.* • *The response addresses the ITT Question and all the factors in the Evaluation Guidance in an excellent manner and in addition provides evidence of where the proposed or similar approach described has been used effectively elsewhere and includes innovative ideas and/or proposals that exceed HS2 Ltd's requirements described in the ITT.*	

68. Therefore, the evaluators were required to come to a conclusion as to the level of confidence that was provided by a particular bidder in its answer to a particular technical question in the Technical Envelope. Depending on that level of confidence, the description that was applied to that answer would attract a certain percentage of the marks available for that question, which would go towards the overall total of that bidder's score in the technical section. HS2 "*reserved the right to reject*" tenders which

(among other things) scored one or more Major Concerns and/or two or more Concerns. This was clearly set out in paragraph 6.8.15 of the ITT which stated the following:

"6.8.15 Without limiting any other right referred to in this IFT (Tenderers are referred in particular to Part 6.21 below (Minimum Acceptable Score Threshold)), given the value and complexity of the Contract, Tenders must be acceptable overall. Accordingly, notwithstanding the overall score and ranking, HS2 Ltd reserves the right to reject a Tender that:

a) in relation to any criterion assessed on a pass/fail (compliant/not compliant) basis, a Tenderer fails the relevant criterion; and/or

b) in relation to any of the relevant qualitative ITT Questions, a Tenderer:
(i) scores one or more "Major Concerns"; and/or
(ii) scores two or more "Concerns"."

(bold present in original)

69. I should also add that the score was to be reached by two evaluators who were to evaluate each question; they were not the same two people across the entire Technical Envelope, but they were the same for each question across all the different bidders. They would each decide on their draft score; they would then meet, discuss and reach a consensus score after a process of what is called moderation, chaired by a Moderator.

70. It can therefore be seen that if any bidder was given a score of "Concerns", this might have a detrimental impact upon the chances of success (particularly if two "Concerns" were awarded). If a bidder were given even a single score of Major Concerns, the whole bid could potentially be rejected. If simply a score of Concern, it depended upon how many of these were awarded to an individual bidder, but if two or more were awarded, then the whole bid could be rejected. Bidders would be astute to avoid submitting a bid that might achieve a score of any Concerns or Major Concerns. Quite apart from the low contribution of that score to the overall score (which for Major Concerns would be zero) the very fact of achieving such a score could lead to serious consequences to that bidder.

71. Paragraph 5.5.7 of the ITT explained to tenderers that HS2 expected the relevant questions to be answered "in a manner that demonstrates a holistic approach to the Tenderer's technical delivery proposals". The Factors for the Scoring Methodology (which were referred to in the third column above) were set out in the Evaluation Guidance at Appendix C of the ITT (which was referred to in the final column above). The Factors were the characteristics that tenderers were instructed to address and consider in their response in order to give HS2 confidence in that tenderer's response. Each of the Questions in issue included a factor that was called the Alignment Factor. This was a requirement " - that the Tenderer's approach is aligned to its responses to the ITT Questions in [this] section E." (the word "this" in square brackets was excluded from the wording in question I001). The Alignment Factor therefore was consistent with the so-called "holistic approach" required of the technical proposals and to ensure that the different answers to the different Questions were consistent with one another. All the Questions and the different factors in respect of each are set out in Appendix 1 to this judgment.

72. I shall set out the factors for Question E001, as in particular this occupied much of the trial. BBVS were given a score of "Concerns" for E001, and Bechtel maintain it ought to have been "Major Concerns". This question required bidders to "Explain how you will structure your organisation to manage and deliver this Contract, Provide organisation charts of how you will manage and assure delivery of the Works from the starting date to completion date and provide a completed Management Resource Schedule in the form of Appendix C3" and listed the following Factors:

"To give HS2 Ltd confidence a response should include and demonstrate:

an organisation approach that will efficiently and effectively manage and deliver in a cost effective way. [Factor 1]

that the Tenderer has a management structure tailored to support the particular challenges for Old Oak Common station including reporting lines and interfaces with HS2 Ltd. [Factor 2]

where the Tenderer is a Consortium, identification of the lead company with details of the responsibilities to be assumed by each Party, an explanation of how any risks associated with a joint approach will be mitigated and how any potential opportunities could be realised. [Factor 3]

organisation chart(s) showing levels of the Management Resource Plan, including all forecast interface and demarcation with the Supply Chain. [Factor 4]

a completed Management Resource Schedule in the form of the template at Appendix C3 detailing an efficient level of resource that the Tenderer demonstrates will effectively manage the Works over the duration of the Contract. [Factor 5]

a structure that is flexible and resilient to change over the life of the Contract and is aligned to the Works Package Strategy outlined in ITT Question [E005]; and [Factor 6]

that the Tenderer's approach is aligned to its responses to the ITT Questions in this section E. [Factor 7]"

73. The Factors were not numbered in the ITT, but for the trial the parties numbered them and I have included this numbering in the square brackets above. When I deal with each Question below, I shall use the numbering of the Factors provided by the parties. The final Factor for each of the Questions in dispute in these proceedings was what was called the "Alignment Factor". Tender responses were to be aligned, but would need to be capable of being read and assessed on a stand-alone basis as follows. This was set out in paragraph 5.5.7 and 6.8.1 of the ITT in the following terms:

"5.5.7 Tenderers will note from Appendix C that HS2 Ltd expects ITT Questions [E001] to [E010] and [I001] to be answered in a manner that demonstrates a holistic approach to the Tenderer's technical delivery proposals and the Evaluation Guidance in Appendix C that accompanies ITT Questions [E001] to [E010] and [I001] indicates that a response will give HS2 Ltd confidence if it is aligned with the Tenderer's responses to the other ITT Questions in section E. However, responses to each ITT Question must be capable of being read on a stand-alone basis and Tenderers must not cross-refer between any ITT Questions to circumvent the stated maximum page limit for any ITT Question. HS2 Ltd will consider such cross-referenced material as

'extraneous' to the ITT Question and will not evaluate such cross-referenced material.

6.8.1 Assessors will award scores for the response to each ITT Question based wholly on the contents of the written responses to the ITT Questions, and any associated clarifications and responses from Tenderers made in accordance with the procedures specified in this ITT, including but not limited to clarification and/or validation at clarification meetings and presentations in accordance with Part 6.18 (Post-Tender clarification meetings and presentations)."

(emphasis added)

74. The Alignment Factor was explained further by HS2 in response to a clarification request on 20 March 2018 in these terms:

"HS2 Ltd will evaluate each ITT Question, including those in section E, as described in ITT Volume 0 Part 6.8, namely by reviewing the extent to which and how well the response answers the relevant ITT Question being evaluated. As described in Part 6.8, in evaluating a response to each ITT Question, HS2 Ltd will consider the extent to which and how well (a) the ITT Question has been answered; and (b) each factor in the accompanying Evaluation Guidance has been addressed and then HS2 Ltd will award a score based on the confidence level it has in the response as a whole taking into account the criteria and factors set out in the score descriptors in Table 6.8. In relation specifically to the last factor in the ITT Questions in section E concerning alignment, HS2 Ltd is keen to ensure that each response in section E is consistent to give HS2 Ltd confidence that the Tenderer has considered and proposed a holistic overall proposition. Accordingly, in addition to the two subject matter expert Assessors who will evaluate individual responses to ITT Questions, HS2 Ltd has also engaged a 'technical lead' whose role is to review all responses to section E to ensure responses align. To the extent a response to an ITT Question in section E is not consistent with the rest of the responses to the ITT Questions in section E, HS2 Ltd will in the first instance clarify any inconsistency or lack of alignment if appropriate in accordance with the provisions in ITT Volume 0 and the Utilities Contracts Regulations 2016. If a clarification is not appropriate or does not resolve any inconsistency or lack of alignment, then HS2 Ltd may reflect a material lack of inconsistency [sic] in its score for that ITT Question in accordance with the relevant score descriptors depending on the extent of the inconsistency (for example, does it represent a minor concern or does it just reduce confidence from 'Very good' to 'Good')."

75. The "technical lead" referred to was Mr Reading. The approach to assessment was explained comprehensively in the ITT. Paragraphs 6.8.7 to 6.8.8 of the ITT stated the following:

"6.8.7 The 'Evaluation Guidance' for each ITT Question contains a number of factors that represent "typical characteristics" expected of each response. The factors in the 'Evaluation Guidance' for each ITT Question are not separate sub-criteria and are not sub-weighted. Furthermore, the typical characteristics should not be interpreted as being placed in a decreasing (or increasing) order of significance. The typical characteristics are not exclusive but rather are intended to give additional guidance to Tenderers on the required content of each ITT Question and on the factors that HS2 Ltd will take into account when applying the scoring methodology set out in Table 6.8.

6.8.8 In arriving at a score for each ITT Question, HS2 Ltd will consider the response as a whole and apply the scoring methodology described in this Part 6.8 and in Table 6.8 above but will also take into account the factors described in the Evaluation Guidance in Appendix C and the strength of the evidence provided by Tenderers in their Tenders."

76. Paragraph 6.8.8 was the subject of a clarification request on 20 March 2018, which was answered in the following terms by HS2:

"HS2 has received the following query:
ITT paragraph 6.8.8 states, "In arriving at a score for each ITT Question, HS2 Ltd will consider the response as a whole and apply the scoring methodology described in this Part 6.8 and in Table 6.8 above but will also take into account the factors described in the Evaluation Guidance in Appendix C and the strength of the evidence provided by Tenderers in their Tenders."
Please confirm that in arriving at a score for a particular ITT Question, HS2 Ltd will consider the response for that question only and not the overall tender response as this paragraph seems to suggest
HS2 responds as follows:
Yes, the intention of Part 6.8 is to confirm that to arrive at a score HS2 Ltd will consider a response to an ITT Question as a whole. Accordingly, paragraph 6.8.8 can be clarified as follows: "In arriving at a score for each ITT Question, HS2 Ltd will consider the response to that ITT Question as a whole and apply the scoring methodology described in this Part 6.8 and in Table 6.8 above but will also take into account the factors described in the Evaluation Guidance in Appendix C and the strength of the evidence provided by Tenderers in the response to that ITT Question."

77. I accept that the Assessors had to use their professional judgement as subject matter experts when applying the scoring descriptors to the Factors and ultimately coming to a consensus on the appropriate score for a particular response to a question. When considering the response as a whole, the Assessors did not, therefore, have a mathematical formula; they would consider the scores for each of the factors and simply decide, based on those answers, what the overall scores should be for each question. It was therefore a matter of judgment what the overall score should be, based upon the degree of confidence given to the assessors considered as a whole.

78. It is important to note the following points. The ITT in general, and Vol. 0 in particular, set out the rules of the competition, and the framework within which the tenders would be evaluated. Tenderers are entitled to have their tenders considered fairly and evaluated in accordance with the rules set down in the competition, which here means the ITT. It is an important document. Equally, a contracting authority (here, a utility) has a wide scope to design its procurement competitions as it sees fit, and in order to suit the particular project in question. So, for a hypothetical example, had it wanted to increase the score available for the lowest fee, it could have given that section 50% of the marks, as long as this was included in the terms of the ITT from the beginning and as long as the design of the procurement did not breach the principles of equal treatment.

79. Of course, competitions cannot be designed in such a way as to disadvantage particular bidders, or groups of bidders. An example of this is C-243/89 ***Commission of the EC v***

Denmark, where the competition for the construction of a bridge across the Western Channel of the Great Belt in Denmark required the greatest possible use of Danish materials and Danish labour and equipment. In the subsequent litigation, this was called the Danish content clause. This clause plainly disadvantaged non-Danish bidders. But that type of situation does not arise here. Utilities have a wide margin of discretion in terms of how they design evaluative features of procurement competitions.

80. I will refer to this point in further detail below, but it is, in my judgment, important to note at this stage that the potential 20% score available for Price was *not* dependent upon the level of a bidder's resources included in E001, which was to be evaluated and scored separately. Indeed, the Staff Rates exercise (which was for J001, one half of the score in the Commercial Envelope) was precisely designed so that those rates could be considered absent resource levels. This was made clear in the ITT and also can be seen from the way that the Rates were drawn out of the bid and imposed (the technical term is populated) into a table automatically by use of the Rates Template. This enabled the rates themselves, independent of resources, to be evaluated by HS2.

81. Tenderers were to provide their price bids in response to Appendix C2 which comprised:

(1) The Staff Rates Schedule containing the tenderer's tendered rates for specific staff roles (provided against a template resource model); and

(2) The Fee Schedule which when it was completed by a particular bidder would contain the tenderer's proposed Lump Sum Fee and its breakdown. More details of the actual percentages for the Lump Sum Fee tendered by both BBVS and Bechtel are contained in the Confidential Appendix.

82. Paragraph 6.11 of the ITT stated the following which explained how the price evaluation would operate:

(1) The Staff Rates Schedule would automatically multiply the day rate tendered for a particular role by the average forecast days for that role set out in the HS2 template resource model, resulting in an overall rate card price (emphasis added in this judgment). The lowest rate card price would gain full marks (100) with higher rate card prices having 1 point deducted for every 1% variance from the lowest rate card price. The phrase "HS2 template resource model" makes it entirely clear that this was the resources identified, for comparison purposes, by HS2. It was not based upon the volume of the resources that were bid by the tenderer in, say, its answer to E001. This had two benefits. Firstly, it enabled HS2 to compare Staff Rates on a like by like basis. Secondly, it would prevent a bidder gaining an advantage in this section of the tender, affecting its price, by under-bidding on its resources. I consider both of those benefits to be somewhat obvious. They certainly would have been obvious to a RWIND tenderer.

(2) The lowest Lump Sum Fee (representing the tenderer's margin and contribution to overheads expressed as a percentage of the Incentive Target, which was £1.054 billion for Old Oak Common) would receive full marks (100) with higher Lump Sum Fees having 1.5 points deducted for each 1% variance from the lowest. The greater the variance from the lowest bidder, the higher the

number of points would be deducted, and hence the lower the score the next lowest bidder would obtain. The so-called "Fee Collar" of 7% was designed to prevent unsustainably low bidding. If a tenderer set the Lump Sum Fee below 7%, it would score 0 marks for this element of evaluation (paragraph 6.11.21). The Fee Collar is considered further in Section J, Abnormally Low Tender.

83. The ITT also contained the following provisions which are relevant to these proceedings. HS2 reserved a broad discretion to change the tender rules or timetable and hold discussions with tenderers at paragraph 2.5.3 of the ITT in light of its evolving requirements. This was stated in the following terms:
"Tenderers shall note that due to the nature and complexity of the HS2 Programme, HS2 Ltd's requirements may continue to evolve throughout this procurement. HS2 Ltd accordingly reserves the right to (i) delay any stage; (ii) change any time period or deadline; (iii) make other changes to the timetable and/or introduce new or additional stages into the procurement as it considers appropriate; (iv) revise the ITT documentation; (v) require revised submissions; and (vi) discuss issues with Tenderers as necessary (including with the top-ranked Tenderer(s) alone, provided the evolved requirements would not have impacted on evaluation). HS2 Ltd will inform Tenderers of any such changes."

84. In paragraph 3.21.1 of the ITT the following was stated:
"Tenderers should note (and Tenderers shall submit their Tenders on this basis) that HS2 Ltd reserves the right to make changes to the scope of the services and works and thus to vary the scope of the Contract(s) (either by omission or expansion of scope or by movement of scope from one Lot to another) during the course of the procurement process and/or during the term of the Contract."

85. Post tender negotiations were permitted between HS2 and the winner of the competition, with HS2 having a wide degree of discretion in how this was done. This is because this was expressly stated in paragraph 2.11.3 of the ITT in the following terms:

"2.11.3 Tenderers should note that any post Tender negotiations that do take place, may be conducted with Tenderers by HS2 Ltd through the HS2 eSourcing Portal, through face to face meetings or through a combination of both, as HS2 Ltd considers appropriate. HS2 Ltd reserves the right to discuss issues with Tenderers as necessary (including the top-ranked Tenderer or Tenderer(s) alone, provided this would not have impacted on evaluation).

86. The point was repeated as follows in paragraph 6.15.9 of the ITT:

"6.15.9 HS2 Ltd reserves the right to discuss the final Conditions of Contract and ancillary suite with the top-ranked Tenderer or Tenderers for each Lot only, but will not do so in a way which distorts competition or would have affected the outcome of the evaluation".

Meetings to clarify matters were also expressly provided for, at paragraph 6.18.1:

"HS2 Ltd may hold a series of post-Tender clarification meetings for the purposes of clarifying Technical Submissions and to conduct negotiations as described above but is not obliged to do so."

87. The agreements that would be necessary on an annual basis throughout the life of the project going forwards were also explained in the ITT, both for the CP's management staff levels and reimbursement of costs. This was expressly stated in paragraph 3.7.3 of the ITT. This stated that, notwithstanding that bidders provided their staff rates in the Staff Rates Schedule and set out their proposed resources in the Management Resources Schedule ("MRS"), the Guaranteed Maximum Management Price or GMMP was to be agreed for the first and subsequent years as set out:

"(b) In each contract year (or such other period as is set in WI 800 Commercial Management), the total amount payable in respect of the Construction Partner's People will be capped at the GMMP. The GMMP will be based upon agreed Staff Rates and an agreed resource plan ...

(c) The GMMP for the first year will be derived from the Tenderer's Staff Rates provided at Tender within the Staff Rates Schedule in response to ITT Question [J001] and the resources included in the Management Resource Schedule Template provided in response to ITT Question [E001], as discussed and agreed prior to Contract award. Thereafter, the GMMP will be agreed annually utilising the resources included in the Management Resource Schedule Template as a basis for agreement, with the GMMP ultimately being determined by the Project Manager if not agreed. ..."

Therefore, although bidders provided their staff rates in the Staff Rates Schedule (part of the Commercial Envelope) and set out their proposed resources in the MRS, was part of the answer to E001, this paragraph provided that the GMMP would be agreed each year after that. The MRS did not specify, in prescriptive form, the level of resources for the whole life of the project.

88. There was also provision for making changes to resource levels during the life of the project. The following paragraphs of the ITT stated the following in this respect:

"3.20.3 HS2 Ltd recognises that the requirements of the Contract will change over the life of the Contract and similarly that the Construction Partner's organisational structure and its management team will also need to change to reflect those changing requirements as the Contract and Works progress. Accordingly, the Tender response requirements and the Contract are designed to recognise that the organisation and management team will be amended and agreed on an annual basis and to allow the Construction Partner to focus on providing the right organisation and level of resources to successfully deliver the Contract.

3.20.4 At Tender stage, Tenderers are required to identify the level of resources they anticipate throughout the life of the Contract and these resource proposals will be evaluated as part of the Technical Submission (see ITT Question [E001] and further information at Part 5.8 below)."

"5.8.2 a)….The completed Management Resource Schedule Template … is then intended (subject to any refinement during post-tender negotiations) to be the first accepted Management Resource Schedule."

(emphasis added)

89. The Contract Data Part 2, which was part of the tender documents, also stated the following:
"The *management resource schedule* for GMMP Period 1 is attached at Annexure…….(to be agreed prior to award of contract)." (italics present in original)

The words in italics, which were present in the original, means that the term is defined within the contract terms themselves. The definition is included in the Contract Data Part 2. This is an important entry in the contract. It demonstrates that the MRS which was to be attached to the contract itself was the one for GMMP Period 1, a period that was also, in some of the evidence, referred to as Year 1. The relevance of this will become clearer after the dispute in these proceedings is considered in respect of BBVS' answer to Question E001, and what happened after the tenders were submitted, in terms of reassurance provided to HS2 by BBVS at the meeting of 5 September 2018.

90. The passages above show, with a high degree of clarity in my judgment, that the resource plan was to be agreed for all subsequent years. What was provided by any tenderer in the MRS Template as part of the tender was to be the "basis for agreement", but this did not fix that level of resources for Years 2 and onwards at the same level as those for Year 1, or those included in the MRS at the tender stage. If the parties could not agree, then the Project Manager would determine them. It was also clear that the MRS submitted with a bidder's tender would be subject to refinement, and that could take place during the post-tender period. This is all clearly set out in the ITT.

91. A method to assess Qualifications was also included at paragraph 6.14 of the ITT in the following detailed terms:

"6.14.3 HS2 Ltd reserves the right to reject any Tender which contains Qualifications which, from the point of view of HS2 Ltd, are commercially unacceptable because, without limitation, they contain positions which expose HS2 Ltd to significantly greater risk, do not represent value for money or distort the principles of equal treatment and fairness between Tenderers. Such a Tender may not be considered compliant and therefore may be rejected on that basis...

....

6.14.6 HS2 Ltd intends to remove any Qualifications submitted by first seeking withdrawal of the Qualification from Tenderers. For any Qualifications that remain, HS2 Ltd will determine for each such remaining Qualification:

a) Whether the Qualification is significant enough to constitute an unacceptable Tender (see paragraph 6.14.3 above). If so, the Tenderer will be advised that if it does not withdraw (or modify to make compliant) the Qualification then the Tenderer will be disqualified as having submitted a non-compliant Tender;

b) If not, then HS2 Ltd will determine whether the Qualification contains any real movement to the risk profile (i.e. a proposed change to wording that does not in HS2 Ltd's opinion engender a material additional risk for which HS2 Ltd might, for example, require contingency) or any additional costs (e.g. administrative costs for HS2 Ltd);

c) If there is a material risk which can be quantified and the Tender has not been rejected, an adjustment may be made by HS2 Ltd in relation to the Qualification in accordance with Part 6.13 above, after first notifying the Tenderer that such adjustment will be made."

(emphasis added)

92. In their submissions, the parties referred to this mechanism as the Withdrawal Ultimatum. Bechtel drew comfort from, and prayed in aid of its case on its

qualifications, the fact that HS2 did not issue it with such an ultimatum. HS2 did however request that Bechtel withdraw its qualification to clause 6.2, and on numerous occasions. Following each request, Bechtel did not withdraw the qualification. Perhaps internally Bechtel had decided it would not do so, unless and until HS2 issued a Withdrawal Ultimatum, and because none was issued, it had no need to withdraw its qualification. However, that is speculation and, in my judgment, the reason for Bechtel declining to withdraw the qualification does not matter. HS2's evidence on this was that a decision to issue such an ultimatum would itself be a major issue, could itself lead to litigation, and would have been done had Bechtel won the competition. Given Bechtel did not win, there was no need for HS2 to go through all of these different steps, including getting internal authorisation to do so (which would have been required at a high level), and potentially dealing with an expensive legal challenge, for something that was purely academic.

93. HS2 also included within the ITT a mechanism for assessing tenders which might be abnormally low. Paragraph 6.16 of the ITT stated:

"6.16.1 As part of the evaluation of Tenders, the Commercial Submissions (and any other related aspect of the Tenders) will be reviewed to consider if any Tender appears to be abnormally low. For this purpose, an assessment will be undertaken by HS2 Ltd including (but not necessarily limited to) using a comparative analysis of the Commercial Submissions received from all Tenderers, drawing on the information included within the Tenderer's Commercial Submission.

6.16.2 If, after this assessment and analysis, HS2 Ltd considers that a Tender appears to be abnormally low, then HS2 Ltd will require the relevant Tenderer(s) to explain the price or costs proposed in the Tender(s), including but not necessarily limited to an explanation of the matters listed in UCR 2016, reg. 84(2).

6.16.3 HS2 Ltd shall assess the information provided by the Tenderer(s) by consulting the Tenderer in accordance with UCR 2016, reg. 84(3).

6.16.4 If, after the written explanation, assessment and consulting, HS2 Ltd is of the opinion that a Tender is abnormally low, HS2 Ltd reserves the right in its absolute discretion to accept or reject the Tender."

94. In the event, no tender appeared abnormally low and HS2 had no need to proceed under paragraph 6.16.2 and seek an explanation from the tenderer. Notwithstanding this, Bechtel maintains in these proceedings that BBVS' tender was abnormally low and should have been rejected as a result. This is addressed in Section J of this judgment.

95. The ITT also provided for a process of moderation to take place, after evaluators had individually set out what they had each, in isolation from the other evaluator, considered the score should be. This was set out at paragraph 6.8.9 of the ITT in the following terms:

"In the first instance, Assessors will score the submissions independently. <u>These will be deemed to be draft scores</u>. Following this initial assessment and independent scoring process, a process of moderation will take place at which the individual Assessors for each ITT Question will meet with a Moderator to discuss their initial assessment, proposed scores and accompanying rationales and arrive at a final agreed score for each criterion, appropriately given in accordance with the Evaluation Methodology and the Tender."

(emphasis added)

96. In addition, the ITT provided for a moderation assurance process "to ensure that final scores are all in accordance with the scoring descriptors and evaluation guidance as shown against the relevant ITT question in Appendix C". In my judgment, this was an ex post facto sense-check; it was to ensure that the final scores had been prepared or arrived at by considering the relevant descriptors and guidance correctly. However, that assurance process was not intended to be part of the scoring exercise. The scores were to be arrived at independently by the two evaluators jointly, albeit in an environment in which a moderator was present.

97. As will be seen when the individual areas of complaint are examined, in some cases each of the assessors had arrived at an initial score which then moved to a different score, after moderation had taken place. Bechtel complains where that movement, from draft score to final score, was to its disadvantage, in the sense that (usually for the areas under scrutiny in this case) BBVS obtained a higher score after moderation in a few areas. In some cases, both draft scores were the same as one another, yet the final score was different. Bechtel maintains that there were failures in transparency, equal treatment and/or manifest error involved in these changes from draft to final scores.

98. However, although changes of score without explanation might initially look puzzling, when one considers that the original scores were only initial *draft* scores, and were reached by evaluators in isolation, the fact that the final score was different simply demonstrates, in my judgment, how carefully the evaluators were performing their task. Their initial draft scores were never intended to be more than drafts. Even if their draft scores were the same as one another, they properly considered the factors and correct scores, and were prepared to move from their draft initial scores to a different score reached consensually. Those who gave evidence and were cross-examined about this explained, perfectly sensibly, how points made to each of them by their co-evaluator in the evaluation process had changed their view, which was admittedly only an initial view in any event. The final moderated score was reached much more carefully, and after discussion with their co-evaluator, whereas the initial draft score was precisely that – a draft. Further, some factors within a question were more in the area of experience of their co-evaluator than their own. In my judgment, one benefit of requiring draft scores first, reached independently, was that each evaluator would be fully prepared for the meeting with their co-evaluator. But the evaluation and moderation process was not intended only to require one score reached in isolation by each evaluator. It was designed to achieve a final score that was jointly agreed by the two evaluators, following discussion and agreement between them. The draft scores were merely steps along the way to achieve that.

101. The different areas of the evaluation that fall to be considered in these proceedings are as follows. These are the areas that Bechtel maintains were evaluated by HS2 in manifest error and/or in breach of equal treatment and/or not transparently. They all arise in the Technical Envelope. All save one are in Section E, Technical Evaluation, and the last one is in Section I Commercial Qualitative. They are as follows:

Question E001:	Organisation
Question E002:	Resource Management
Question E004:	Contractor's Management Plan ("CMP")
Question E005:	Works Package Strategy ("WPS")

Question E006:	Early Works Plan ("EWP")
Question E007:	Procurement Plan ("PP")
Question E008:	Design Management
Question E009:	Programme Management
Question E010:	Risk Schedule and Management
Question I001:	Delivery within Incentive and Programme Targets

102. Question E001 contained the Management Resource Schedule, or MRS, to which I have already referred. That was not the only part of E001, but it was the part that was concentrated upon a great deal in the trial. Paragraph 2.5.3 of the ITT set out the procurement timetable which originally envisaged tender returns for OOC by 30 April 2018 (this was extended by Bravo message to 11 May 2018), a clarification, evaluation and negotiation period between March and August 2018 and contract award in September 2018. The contract award date was delayed to February 2019 due to an extended period of governance and delay in obtaining approval from the Secretary of State. Other Key Dates were also changed. HS2 also relies upon the automatic suspension caused by the issuing of proceedings as part of the justification for this delay. Bechtel relies upon the change of dates as part of its case seeking to demonstrate that the contract as entered into between HS2 and BBVS is materially different from that the subject of the procurement competition.

103. The Regulations that govern the conduct of the procurement are the Utilities Contracts Regulations 2016 (SI 2016/274). Those most relevant are as follows. The headings in bold are part of the Regulations.

Regulation 36:
Principles of procurement
(1) Utilities shall treat economic operators equally and without discrimination and shall act in a transparent and proportionate manner.
(2) The design of the procurement shall not be made with the intention of excluding it from the scope of these Regulations or of artificially narrowing competition.
(3) For that purpose, competition shall be considered to be artificially narrowed where the design of the procurement is made with the intention of unduly favouring or disadvantaging certain economic operators.

Regulation 47:
Negotiated Procedure with prior call for competition
(1) In negotiated procedures with prior call for competition, any economic operator may submit a request to participate in response to a call for competition by providing the information for qualitative selection that is requested by the utility.
(2) The minimum time limit for the receipt of requests to participate shall, in general, be fixed at no less than 30 days—
(a) from the date on which the contract notice is sent; or
(b) where a periodic indicative notice is used as a means of calling for competition, from the date on which the invitation to confirm interest is sent, and shall in any event not be less than 15 days.
(3) Only those economic operators invited by the utility following its assessment of the information provided may participate in the negotiations.
(4) Utilities may limit the number of suitable candidates to be invited to participate in the procedure in accordance with regulation 78(3) and (4).

(5) The time limit for the receipt of tenders may be set by mutual agreement between the utility and the selected candidates, provided that they all have the same time to prepare and submit their tenders.
(6) In the absence of such an agreement on the time limit for the receipt of tenders, the time limit shall be at least 10 days from the date on which the invitation to tender is sent.

Regulation 84
Award of the Contract: Abnormally low tenders
(1) Utilities shall require economic operators to explain the price or costs proposed in the tender where tenders appear to be abnormally low in relation to the works, supplies or services.
(2) The explanations given in accordance with paragraph (1) may in particular relate to—
(a) the economics of the manufacturing process, of the services provided or of the construction method;
(b) the technical solutions chosen or any exceptionally favourable conditions available to the tenderer for the supply of the products or services or for the execution of the work;
(c) the originality of the work, supplies or services proposed by the tenderer;
(d) compliance with the applicable obligations referred to in regulation 76(6);
(e) compliance with obligations referred to in regulation 87;
(f) the possibility of the tenderer obtaining State aid.
(3) The utility shall assess the information provided by consulting the tenderer.
(4) The utility may only reject the tender where the evidence supplied does not satisfactorily account for the low level of price or costs proposed, taking into account the elements referred to in paragraph (2).
(5) The utility shall reject the tender where it has established that the tender is abnormally low because it does not comply with applicable obligations referred to in regulation 76(6).
(6) Where the utility establishes that a tender is abnormally low because the tenderer has obtained State aid, the tender may be rejected on that ground alone only—
(a) after consultation with the tenderer; and
(b) where the latter is unable to prove, within a sufficient time limit fixed by the utility, that the aid in question was compatible with the internal market within the meaning of Article 107 of TFEU.
(7) Where the utility rejects a tender in the circumstances referred to in paragraph (6), it shall inform the Commission.

Regulation 88
Modification of contracts during their term
(1) Contracts and framework agreements may be modified without a new procurement procedure in accordance with these Regulations in any of the following cases—
(a) where the modifications, irrespective of their monetary value, have been provided for in the initial procurement documents in clear, precise and unequivocal review clauses, which may include price revision clauses, or options, provided that such clauses—
(i) state the scope and nature of possible modifications or options as well as the conditions under which they may be used; and
(ii) do not provide for modifications or options that would alter the overall nature

of the contract or the framework agreement;

(b) for additional works, services or supplies by the original contractor, irrespective of their value, that have become necessary and were not included in the initial procurement where a change of contractor—

(i) cannot be made for economic or technical reasons such as requirements of interchangeability or interoperability with existing equipment, software, services or
installations procured under the initial procurement; and

(ii) would cause significant inconvenience or substantial duplication of costs for the utility;

(c) where both of the following conditions are fulfilled—

(i) the need for modification has been brought about by circumstances which a diligent utility could not have foreseen;

(ii) the modification does not alter the overall nature of the contract;

(d) where a new contractor replaces the one to which the utility had initially awarded the contract as a consequence of…..

(e) where the modifications, irrespective of their value, are not substantial within the meaning of paragraph (7)…

…

(7) A modification of a contract or a framework agreement during its term shall be considered to be substantial within the meaning of paragraph (1)(e) where one or more of the following conditions is met—

(a) the modification renders the contract or the framework agreement materially different in character from the one initially concluded;

(b) the modification introduces conditions which, had they been part of the initial procurement procedure, would have—

(i) allowed for the admission of other candidates than those initially selected;

(ii) allowed for the acceptance of a tender other than that originally accepted; or

(iii) attracted additional participants in the procurement procedure;

(c) the modification changes the economic balance of the contract or the framework agreement in favour of the contractor in a manner which was not provided for in the initial contract or framework agreement;

(d) the modification extends the scope of the contract or framework agreement considerably;

(e) a new contractor replaces the one to which the utility had initially awarded the contract in cases other than those provided for in paragraph (1)(d).

(8) A new procurement procedure in accordance with these Regulations shall be required for modifications of the provisions of a contract or a framework agreement during its term other than those provided for in this regulation.

Regulation 101

Notices of decisions to award a contract or conclude a framework agreement

(1) Subject to paragraphs (5) and (6), a utility shall send to each candidate and tenderer a notice communicating its decision to award the contract or conclude a framework agreement.

Content of notices

(2) Where it is to be sent to a tenderer, the notice referred to in paragraph (1) shall include—

(a) the criteria for the award of the contract;

(b) the reasons for the decision, including the characteristics and relative advantages of the successful tender, the score (if any) obtained by—

(i) the tenderer which is to receive the notice, and

(ii) the tenderer—

(aa) to be awarded the contract, or

(bb) to become a party to the framework agreement,

and anything required by paragraph (3);

(c) the name of the tenderer—

(i) to be awarded the contract, or

(ii) to become a party to the framework agreement; and

(d) a precise statement of either—

(i) when, in accordance with regulation 102, the standstill period is expected to end and, if relevant, how the timing of its ending might be affected by any and, if so what, contingencies; or

(ii) the date before which the utility will not, in conformity with regulation 102, enter into the contract or conclude the framework agreement.

(3) The reasons referred to in paragraph (2)(b) shall include the reason for any decision by the utility that the economic operator did not meet the technical specifications—

(a) in an equivalent manner as mentioned in regulation 60(13); or

(b) because compliance with a standard, approval, specification or system mentioned in regulation 60(14) does not address the performance or functional requirements laid down by the utility.

(4) Where it is to be sent to a candidate, the notice referred to in paragraph (1) shall include—

(a) the reasons why the candidate was unsuccessful; and

(b) the information mentioned in paragraph (2), but as if the words "and relative advantages" were omitted from sub-paragraph (b).

Exemptions

(5) A utility need not comply with paragraph (1) in any of the following cases—

(a) where the contract or framework agreement is permitted by these Regulations to be awarded without a call for competition;

(b) where the only tenderer is the one who is to be awarded the contract or who is to become a party to the framework agreement, and there are no candidates;

(c) where a utility awards a contract under a framework agreement or a dynamic purchasing system.

(6) A utility may withhold any information to be provided in accordance with the preceding requirements of this regulation where the release of such information—

(a) would impede law enforcement or would otherwise be contrary to the public interest;

(b) would prejudice the legitimate commercial interests of any economic operator; or

(c) might prejudice fair competition between economic operators.

Meaning of "candidate" and "tenderer"

(7) In this regulation—

(a) "candidate" means a candidate, as defined in regulation 2(1), which—

(i) is not a tenderer, and

(ii) has not been informed of the rejection of its application and the reasons for it;

(b) "tenderer" means a tenderer, as defined in regulation 2(1), which has not been definitively excluded.

(8) For the purposes of paragraph (7)(b), an exclusion is definitive if, and only if, the tenderer has been notified of the exclusion and either—

(a) the exclusion has been held to be lawful in proceedings under Chapter 2 of this Part;

or

(b) the time limit for starting such proceedings has expired even on the assumption that the Court would have granted the maximum extension permitted by regulation 107(4) and (5).

Regulation 104

Duty owed to economic operators from EEA States

(1) This regulation applies to the obligation on a utility to comply with—

(a) the provisions of these Regulations; and

(b) any enforceable EU obligation in the field of procurement in respect of a contract or design contest falling within the scope of these Regulations.

(2) That obligation is a duty owed to an economic operator from the United Kingdom or from another EEA State.

104. These Regulations are similar to the Public Contracts Regulations 2015 ("PCR 2015"). The underlying principles are the same, but the terms are not identical. The majority of the cases concern the PCR 2015, but their reasoning can be applied to UCR 2016. There is a difference in terms of the negotiated procedure in Regulation 47, which has no exact counterpart in the PCR 2015. I deal with that point further at [485] below.

E: The Witnesses

105. These were as follows. Bechtel called three witnesses of fact.

Mr Paul Roberts

106. The first was Mr Paul Roberts. He had served four witness statements, although the first one related to the application by HS2 to lift the automatic suspension. His evidence in chief was therefore contained in his second, third and fourth statements. Since July 2016 he has been the UK Commercial Manager with Bechtel Limited. He has worked at Bechtel for 22 years and has been employed in the industry for about 30 years. He is responsible for Bechtel's commercial performance under their existing UK contracts and for providing advice and input into the commercial aspects of bid submissions. He therefore had oversight of Bechtel's participation in this competition. He was not involved in drafting any of the answers to the technical questions.

107. He gave evidence about Bechtel's understanding of the importance of the level of resources in the bid, and the proposed Management Resource Schedule (or MRS) which formed part of the submission for the technical question E001. He also explained what he considered to be the link between the proposed resource levels and the tendered Fee percentage, and the link between the proposed resource levels, the programme and the requirements in HS2's Contract Data Part One (including the manner in which he said changes to HS2's Contract Data would have impacted upon Bechtel's submissions).

108. He was questioned about Bechtel's understanding of the mechanism of the contract, including the Guaranteed Maximum Management Price ("GMMP") and the MRS. In particular, he was asked about the attempts HS2 made to have Bechtel withdraw its

qualifications, the fact Bechtel would not (or did not) do so, and also about his understanding of the Fee Collar and how Bechtel calculated its level of fee. This involved not only profit, but also 25 other different areas of overhead, all of which fed into the calculation performed to arrive at the Lump Sum Fee. He was also challenged on how Bechtel had dealt with some of its variable overhead, and what was said, by Bechtel, to be a mistake in their submissions. This particular mistake was said to have been made by a fee estimator where items that should have been individually identified were not, but were spread across general overhead instead. This mistake was not apparent on the face of the Bechtel tender. Mr Roberts accepted that at least three items had been entered at zero as they were included elsewhere, but Guidance Note 5 to the template expressly stated that "Where a value is not entered against an item, for example not applicable, included elsewhere or zero, then the tenderer must include a commentary explaining why." This also applied "Where the commentary indicates the value for the rows [was] included elsewhere." Mr Roberts accepted that Bechtel had not complied with this Guidance Note and had included nothing in "Comments".

109. HS2 cannot possibly have known of this mistake, if mistake it was. Further, given Bechtel's acceptance that it had not complied with the Guidance Note, in my judgment they are not entitled now to rely upon this mistake, even if doing so would benefit them in these proceedings. However, even if Bechtel can rely upon this mistake, it does not benefit them in these proceedings in any event. The way the MRS was to be scored, and the way the Fee Collar, level of fee and also Rates under J001 functioned was set out in the ITT. Mr Roberts' evidence was basically that if Bechtel had known how HS2 was going to approach the MRS (and subsequent changes thereto) then Bechtel could or would have constructed its own bid differently. That is not relevant to the issues in this case. He also confirmed that "the bottom line percentage" would not have changed in any event, and none of the six items relied upon were resource-dependent in any event.

110. He explained Bechtel's global infrastructure rate, and he also explained how changes to the sectional completion dates made by HS2 (such as that for SC1) would have had an effect upon Bechtel's resource levels. I mean no disrespect to Mr Roberts by stating that his evidence, although of general interest in how Bechtel chose to construct its bid, was of limited relevance at best to the issues in the case. The way that the MRS formed part of the answer to E001, and the impact (if any) upon other elements of the bid, are matters that can and ought to be taken from the ITT itself. The subjective understanding of a bidder, or of a senior person within the bidder such as Mr Roberts, are of no legal relevance to how the procurement was constructed or intended to operate. I consider the concept of the reasonably well informed and normally diligent (or RWIND) tenderer below at [135] and following below.

111. Equally, although it is of some peripheral interest in a business sense to the court to receive explanations regarding the internal mechanics behind Bechtel calculations, which led to its tendered profit at a particular percentage, the procurement was constructed so that HS2 would ascribe a particular score to each bidder's fee. Profit was only one part of how the fee would be calculated, and it was the level of Lump Sum Fee or LSF tendered by the bidders that was important in question J002. Without being unduly dismissive, with the exception of the requirement for the LSF to be above 7% (explained further in Section J Abnormally Low Tender below), HS2 would not have been particularly interested in the background workings to how each tenderer

approached its internal business calculations in terms of recovery of overhead. The LSF was to be expressed as a percentage of the Incentive Target. What HS2 was interested in, and what was to attract a percentage score in the evaluation (up to a maximum of 10%), was the *actual* LSF percentage tendered by each bidder. That is what a commercial competition of this nature involves, certainly when it is organised as this procurement was, and given the terms of the ITT. Therefore, the fact that Bechtel utilised a global infrastructure rate, and this may have had an impact upon how it calculated the level of Lump Sum Fee to put in its tender, may potentially be interesting from a business point of view, but would be of no interest at all to HS2 when scoring J002. It is of limited, if any, interest or relevance in a legal procurement challenge.

112. Further, the changes to the dates made by HS2 are either actions that HS2 are permitted to do, or they are not. The fact that – as Mr Roberts explained – Bechtel would have constructed its resource levels differently for its bid had the dates been different, is not of great, or any, importance. The ITT explained that HS2 retained the discretion in terms of dates. I appreciate that these date changes are alleged to be impermissible substantial modification and/or material change to the basis on which HS2 invited final tenders for the contract, and that Bechtel alleges these were in breach of HS2's duties of equal treatment and transparency. They form the factual subject matter to Issues 14 and 15. However, that must be determined from the contents of the ITT itself, and the nature of the changes. The fact that Bechtel, subjectively, might have approached matters different does not of itself answer those issues.

113. Finally, if one excludes the different level of profit tendered by each of BBVS and Bechtel, the Lump Sum Fee for each of them was very similar, and the two figures were very close for overheads. The exact figures are included in the Confidential Appendix. The higher level of profit sought by Bechtel (the precise figure is in Confidential Appendix II) compared to BBVS cost Bechtel such a differential in the marks awarded to each of these bidders on J002. This was not caused by any marked difference in the level of resources included in the MRS. As it happened, Bechtel came in third place both on Lump Sum Fee on J002, and also Rates (called "Rate Card Price") in J001. This was set out in the Quantitative Commercial Evaluation – High Level Summary document put to Mr Roberts by Ms Hannaford. This shows that Bechtel was awarded only 5.76% on fee, and 6.11% on rates, a total of only 11.87% on the Commercial Envelope (against a potential total of 20%). Neither of these scores is explained away by concentrating on the level of the resources included in the MRS under E001. The scores are explained by Bechtel being outscored in commercial terms by two other bidders. It is of note that the winning bidder, BBVS, came in first place on fee (therefore gaining the maximum score of 10%), and second place on rates.

Mr Paul Watson

114. Mr Paul Watson was, at the time, the Construction Manager for the OOC bid by Bechtel, and is now a Project Manager working in the Bechtel business development team. He is a Chartered Engineer, has a PhD in Engineering and has over 30 years of experience in the infrastructure industry. Prior to becoming involved on this bid, he had been heavily involved in the Crossrail Project and managed 13 of Crossrail's advanced works and main works contracts. He was the Project Manager for all tunnel portal construction works, the construction of Paddington Station, and other stations too, including Canary Wharf. Mr Watson was not in the confidentiality ring and therefore

frankly admitted that some of his criticisms of the BBVS bid might be misplaced, in the sense that he had not seen the whole bid.

115. His evidence dealt with what he termed “issues regarding the way in which Bechtel's scores for some of the E questions were adjusted following the initial scoring by the assessors.” He also referred to, and developed, what he termed “concerns regarding the scoring of the BBVS bid”. In particular these related to Questions E004, E007, E009 and the moderation process. Broadly, Mr Watson was of the view that the Bechtel responses were more complete and detailed. For each of the factors, he explained what he considered to be the relative merits of the different answers, and that the Bechtel responses were far better than those of BBVS. It is not correct, in my judgment, to describe Bechtel’s scores as being “adjusted”. The initial scores were only drafts, and were steps along the way to reaching a single consensus score from the two assessors for each question.

116. As an example of Mr Watson’s evidence and his criticism of the scoring, for Question E007 Bechtel proposed the use of a commercially unique analytical tool, further details of which were contained within evidence restricted to the confidentiality ring. It is not necessary to describe this further. This Bechtel tool was to be used in terms of delineation of the works or construction packages. Mr Watson contrasted this (unfavourably for BBVS, in his view) with the less sophisticated response from BBVS which proposed to enter directly into multiple large "Tier 1" contracts with works contractors, with the "Tier 1" contractors thereafter appointing Tier 2 sub-contractors. In his view, this would drive supervision of the works into the supply chain (i.e. the Tier 1 contractors) and away from BBVS itself, which he considered would dilute (not his word) the level of management input and oversight from BBVS.

117. I provide the following passage from his evidence as another example of this comparison exercise, this one dealing with Question E009. In respect of Factor 3 he stated that “Bechtel's response was detailed and robust. It introduced a programme understanding right up to handover. We demonstrated our ability to robustly plan OOC possessions and set out a fully up-to-date federated BIM model. We identified a commitment to monitor planning resources and respond rapidly when required. We also provided examples on Network Rail projects where we had provided added value.” This was contrasted with his view of the competing and winning bidder. He stated “BBVS in contrast provided no examples and/or innovation within their response.”

118. He stated the following concerning another of the factors on the same question:
“Factor 5 [Mr Watson corrected this from factor 6, in his evidence on Day 2] required us to demonstrate "station specific activities where the Tenderer considers potential efficiencies or opportunities are available"; We identified seven key areas where efficiencies could be made whereas I note that BBVS' response is very brief (only four examples) and it set out no narrative on how potential efficiencies or opportunities would be developed.”

119. This approach was used to justify, or underpin, Bechtel’s case challenging the correctness of the evaluations of the two bids. However, this is not the correct way to approach this matter.

120. Firstly, HS2 was not involved in the evaluation in comparing each answer from each of the bidders and ranking them in terms of which ones were better than answers from other bidders. This type of "ranking" approach was only to be used in one sense and for two Questions, namely those in the Commercial Envelope for the level of the Lump Sum Fee tendered and the rates. The lowest was to be given 10% in the evaluation, with the others scored a percentage based upon the differential level between their bids and the lowest. For all the questions in the Technical Envelope, the scoring was to be done in accordance with Table 6.8 in the ITT, namely whether HS2 had Major Concerns; Concerns; Minor Concerns; Moderate Confidence; Good Confidence; Very Good Confidence; or Excellent Confidence. Depending upon which of these was awarded, a certain score was attributed for that question. The level of confidence the assessors had in the answers would lead to the relevant score.

121. This is not a comparative exercise and would not have been understood by an RWIND tenderer as a comparative exercise. The evaluators for the questions in the Technical Envelope were not supposed to compare the answers of Bidder X and Bidder Y (and Bidder Z), decide which was "better", and then rank them in some way. They were not supposed to compare the answers at all. The answer of Bidder X to each Technical Question was to be considered independently of the answers of Bidder Y. If an answer gave the assessors a certain level of confidence, they would be scored (for example) with Good Confidence, and that bidder would receive the appropriate score towards its total. The fact that, say, for one factor within Question E009 Bechtel identified seven key areas, and BBVS gave only four examples, is not relevant. What is relevant is the degree of confidence that the answers by the bidders gave the evaluators when considering the different factors for each question.

122. Secondly, in order to succeed on this area of the case, Bechtel must demonstrate that the evaluations in questions that are challenged (both in respect of its own bid, and for the relevant areas in the bid of BBVS) were done manifestly erroneously, and/or that the scores were manifestly erroneous, and/or in breach of the obligations upon HS2. Mr Watson's evidence did not, in my judgment, even come close to doing so. Mr Watson is a highly experienced person in his field and I do not doubt that the views he expressed in his evidence are genuinely held. However, he can hardly be considered an objective judge of which bid answers were "better" as between Bechtel and BBVS, even if that were relevant to the scoring matrix.

Mr Chris McMonagle

123. Mr Chris McMonagle is currently also a Project Manager at Bechtel in the business development team. At the time of submitting the bid, he was the Manager of Business Development for the UK infrastructure business at Bechtel. Included within that role was oversight of tender proposals and obtaining the internal approvals necessary within the organisation. He is a Chartered Civil Engineer with the Institution of Civil Engineers ("the ICE") and has in excess of 20 years' experience in the infrastructure industry.

124. One area of Mr McMonagle's evidence that was of considerable importance in the trial was the qualification Bechtel placed upon its tender, namely that to clause 6.2 of the contract. He was involved in this, but was in no respect the sole or individual decision-maker in this respect. He explained that from the beginning – the project was presented to the tenderers by HS2 at something called the "hot start meeting" on 22 February

2018 - it was made clear that HS2 wanted what Mr McMonagle described as a "true partnership" with the Construction Partner or CP.

125. I deal with the issue of the Bechtel qualifications in Section G, Qualifications below, due to its importance. However, two important points can be made from Mr McMonagle's evidence on this subject. Firstly, the decision to include the qualifications to clause 6.2 was not a decision that was made by him, it was made at a higher level within Bechtel. It follows that the decision on whether to withdraw those qualifications, or not, was not one that he could make alone either. Indeed, Mr McMonagle did not claim that he was the decision maker in this respect. Secondly, when Bechtel were asked to withdraw the qualifications – a request made more than once by HS2 - Mr McMonagle explained that Bechtel wished to have a meeting with HS2 about this. The repeated requests by HS2 to Bechtel to withdraw the qualification, were met with repeated requests by Bechtel for a meeting. Bechtel did not tell HS2 that the qualifications would *not* be withdrawn or removed; equally, Bechtel did not withdraw them either. Bechtel seemed to me to "hedge its bets" in this respect. It did not want to withdraw the qualifications, and therefore did not do so. On the other hand, specifically to refuse to withdraw them could have potentially restricted Bechtel's options going forwards, so Bechtel was also very careful not to refuse expressly. Requesting a meeting enabled it (or it must have been thought at Bechtel that it enabled it) to tread a careful middle ground. However, regardless of its specific motivation, the bare fact remains that Bechtel did not withdraw the qualifications, even though it was asked on several occasions by HS2 to do so. In my judgment, the evidence demonstrates that Bechtel is to be treated as leaving these qualifications in place in its tender. There is no evidential basis whatsoever for Bechtel to be treated as though it had withdrawn its qualification to clause 6.2; or for it to be treated as being prepared to withdraw its qualification, whether it was issued with a Withdrawal Ultimatum or not.

126. By declining the express requests from HS2 to withdraw them, Bechtel was taking a risk. That this risk was known to Bechtel can be seen from various emails, but the best to quote for this purpose is a series just before the August bank holiday weekend in 2018. This arose because Bechtel found out that one of the other bidders had been asked by HS2 to attend a meeting. This was the meeting of 5 September 2018 which took place between HS2 and BBVS for clarification purposes (there was a similar meeting on the same day with the winning bidder for Euston, one meeting being in the morning, one in the afternoon). Mr McMonagle sent a message to a colleague called Martyn on 24 August 2018 saying the following:

"Martyn - not sure if you saw HS2's message? we believe that one of our competitors has been asked in for a meeting.

Here it is:

'Further to our message of 24th July 18 'Negotiation', the IFT permitted HS2 Ltd to conduct face-to-face meetings if any post tender clarifications are required. HS2 Ltd does not require a face-to-face meeting with you in the period 24 August to 7 September. Hence, communications between you and HS2 Ltd will continue to be conducted through the Bravo e-sourcing portal.' "

127. This meant that Bechtel knew another bidder was being asked for a meeting, and it was not. This information could mean that Bechtel were not in pole position. As it happened,

BBVS had out-scored Bechtel on the evaluation, but Bechtel did not know that at the time. Neither, for that matter, did, BBVS. Mr McMonagle drafted a message to send to HS2 and circulated it to others within Bechtel. He did this at 1929 hrs on Friday 24 August 2018. This was just before the bank holiday weekend. The bank holiday was on Monday 27 August 2018, which meant the next working day would be Tuesday 28 August 2018.

128. The message that he sent internally was as follows, and included a proposed draft response. His message was:
"All,
The following is proposed to the message received this morning from HS2. Any objections to this going tonight? with it being a bank holiday weekend, it could wait but we should certainly send before people come back to work on Tuesday.

"Thank you for the message.
Please confirm if your message of 23 August 18 is simply a clarification period during which you do not need any clarification from Bechtel and when there will be a separate negotiation meetings which we will be called to.
As noted and offered during the procurement, we believe that a face-to-face meeting, with the appropriate attendees, is required to adequately understand HS2's intentions and to allow us to confirm our best value-for-money offer to ensure that HS2 achieves the right risk and reward outcome and avoids potentially significant unintended consequences. Previous meetings, and electronic communication, have not been sufficient to discuss and resolve these issues on a procurement of this complexity, magnitude, and importance where the team and corporate commitment to the confidence of outcome is as important to that conveyed in the written proposal.
To date we have not been notified regarding any possible intent to moderate our tender score in any way or disqualify us with respect to the qualifications we have submitted.
In accordance with clause 6.14 of ITT Volume 0, HS2 Ltd would be required to notify any tenderer before taking any such action. Could you please confirm that our tender score has not been moderated and we have not been disqualified.
We look forward to a clarification of the status and to a mutually beneficial negotiation meeting."
(emphasis added)

129. The response was sent by him to HS2. One of his colleagues, Nisrine Chartouny, replied to him at 2329 on the same day, Friday, stating:
"I can't wait for them to reply!! I'm finding it hard to accept a scenario where we're completely out! :(".
He replied to this the next day, Saturday 25 August 2018, saying:
"They haven't read it yet. I just checked!"

130. There are four important points that need to be made in respect of this response to HS2, and the internal messages within Bechtel.
1. A face-to-face meeting should not be required for any bidder to understand a contracting authority's intentions, or for that bidder to provide any further detail or confirmation. Bechtel were suggesting, by use of the phrase "where the team and corporate commitment to the confidence of outcome is as important to that conveyed in the written proposal" that there was the need for some sort of subjective consideration required by HS2 for it properly to understand the written bid response, and that it was

necessary to have a meeting for Bechtel to provide this. That would be contrary to the principle of equal treatment. No meeting was required between HS2 and Bechtel for HS2 to understand Bechtel's bid – or for HS2 to understand Bechtel's qualifications, either. Indeed, in my judgment such an event would be contrary to the regulations governing procurement competitions. These are required to be conducted fairly, transparently and with equal treatment between bidders. All of the necessary detail was both in the ITT and in Bechtel's bid.

2. Bechtel knew that there was a real risk of disqualification from the competition under the terms of the ITT, and that was why it sought confirmation that it had *not* been disqualified. It had been asked to remove the qualifications to Clause 6.2 and had chosen not to do so. That was a risky strategy. The risk in this instance - in my judgment, a very substantial risk – was that Bechtel would be disqualified.

3. Bechtel also knew that clause 6.14 of the ITT required HS2 to issue a formal notification prior to disqualifying a bidder.

4. The terms of the ITT similarly entitled HS2 to hold meetings either for clarification or for negotiation. The meeting of 5 September 2018 was, in fact, held to clarify certain aspects of BBVS' bid, as by that stage BBVS had emerged as submitting the most economically advantageous tender. Yet even in the knowledge that a meeting was being held with a competitor, Bechtel *still* did not choose to withdraw its qualification to clause 6.2.

131. The email exchanges show that those at Bechtel were almost holding their collective breath at the time, waiting to see if they would be disqualified. Mr McMonagle was asked about this by Ms Hannaford QC for HS2. Some of the evidence on this from his cross-examination was as follows:

"Q. And she says:

"I can't wait for them to reply!! I'm finding it hard to accept a scenario where we are completely out!"

You then reply:

"They haven't read it yet. I have just checked!"

I repeat: you were trying to dare HS2 to disqualify you, weren't you? What were all the exclamation marks about?

A. So I can't talk about Nisrine's. We found it really quite difficult to get our head around why HS2 would refuse a discussion on this contract qualification, on what is a very significant and hugely complex project and hugely complex contract and execution. And we had spent two years bidding it. And we were constantly shocked that they would not accept that.

So, you know, we were saying -- Nisrine's view was:

I can't believe we are thrown out because of this, I can't believe they would have already made a decision to disqualify us. And I am checking have they read it.

Q. Did you think it was funny, Mr McMonagle? Is that why you put exclamation mark in your reply?

A. No, it was far from funny. It was highly frustrating.

Q. You agreed with me earlier that your qualification changed the risk. You agreed with me earlier that your qualification and HS2's response were perfectly clear. It was entirely clear to you, wasn't it, Mr McMonagle, that HS2 was not going to accept this qualification?

A. It could not have been entirely clear to me. We did not know what discussions were happening within HS2."

132. Mr McMonagle also explained that on earlier occasions (by which he meant on other contracts) HS2 had said something that had been qualified was unacceptable, but had then changed their mind, and permitted it. I find that HS2's position on the qualification to clause 6.2 was entirely clear, and demonstrated on multiple occasions to Bechtel by requesting the qualification was withdrawn. Equally clearly, Bechtel communicated to HS2 that it was not prepared to withdraw it, simply by not withdrawing it. Its constant requests for a meeting does not change that.

133. Bechtel is a very large and commercially experienced company, and those witnesses who appeared before me are clearly commercially experienced and intelligent. Bechtel wished to win the bid for Old Oak Common; it is a high profile project, the overall project sum was over £1 billion, and the Lump Sum Fee would be very sizeable. However, Bechtel was not prepared to bid for it on the important terms as to budget and programme which HS2 required – the Incentive Target and the Programme Target. It knew, within the terms of the competition, that the qualification it included with the alternative proposed clause 6.2 was a fundamental and central qualification, and changed the commercial risk profile very significantly. It changed the commercial risk to Bechtel, and made it a far more palatable set of contract terms from Bechtel's commercial point of view. It would not, however, lead to HS2 having the contract with the CP on the terms that HS2 wanted to achieve, set out in the procurement competition. Those involved at Bechtel could not, however, bring themselves to accept that HS2 would actually disqualify Bechtel as a result of this qualification. They simply could not believe it. They found it very frustrating that HS2 held the line on this point. As Mr McMonagle said in cross-examination, the team putting together the bid at Bechtel had worked on this for two years. Those individuals must have wanted to win the bid. Yet this important qualification remained in place.

134. The email exchanges that were put to Mr McMonagle captured the sense of tension at Bechtel as those involved in the bid feared they would be disqualified as a result. Bidding on a project like this is time-consuming, expensive and important, particularly within an organisation such as Bechtel that had expressly chosen not to bid at all for Euston, and to put all its collective effort into winning the OOC contract. Were Bechtel to win, the company would be involved in the project for many years; those involved wanted to win the bid. The exclamation marks and internal communications demonstrate to me that those involved at Bechtel were not finding it amusing, nor were they being flippant. They were, metaphorically, on the edge of their seats, waiting to see what would happen. As Ms Chartouny put it, Bechtel were "finding it hard to accept a scenario where we are completely out!" Yet they were consciously running the risk of that scenario due to the inclusion of the qualification to clause 6.2 to reduce Bechtel's risks in terms of the Incentive and Programme Targets. By Bechtel choosing to run that risk, HS2 became entitled to disqualify the Bechtel bid.

General observations on the evidence of Bechtel

135. HS2 submitted that a great amount of the contents of the statements of the three Bechtel witnesses was not factual evidence at all, but rather contained submission and comment, including subjective explanation of what the ITT meant. Doubtless for this reason, Ms Hannaford QC for HS2 decided only to cross-examine these three witnesses over a fairly short period, 1½ days in total, out of a trial of many weeks. Further, the Bechtel witnesses, and also Mr Bowsher QC for Bechtel, sought to address what a reasonably well-informed and normally diligent tenderer (a so-called "RWIND tenderer") would

have understood by certain elements of the ITT, by explaining what those terms of the ITT subjectively meant to Becthel, or were understood by Bechtel as meaning. How tender documents are to be construed is not something that is approached subjectively; evidence from a tenderer that it subjectively believed a particular provision to have a particular meaning is of no relevance. What matters, as a matter of law, is what those provisions would mean to a RWIND tenderer. Mr Bowsher at one point in opening submissions stated that Bechtel was the only RWIND tenderer before the court, as though that clothed the Bechtel subjective understanding with objective RWIND status. That approach is misconceived.

136. I accept the criticisms levied by Ms Hannaford as to the scope of much of the evidence advanced by Bechtel. All the Bechtel witnesses were being straightforward with the court, and there were no substantial issues of primary fact. In my judgment, her decision not to cross-examine on so much of the evidential material advanced by Bechtel was justified. Much of the statements were inadmissible; or at the very least, if not technically inadmissible, of such marginal relevance to the issues as to play an extraordinarily limited role in assisting resolution of this case. The Bechtel witnesses could speak to the documents, and did so, and they explained the thinking at Bechtel behind matters such as the qualifications which were included in the Bechtel tender. They could also give their subjective opinion as to the evaluations that were performed by HS2. However, just because a Bechtel witness thinks that the evaluation of a particular question was too low for the Bechtel answer, and/or too high for the BBVS answer, does not advance the case appreciably. Bechtel have to demonstrate manifest errors in evaluation in order to succeed, or other breaches of obligation by HS2. None of the Bechtel evidence did this successfully, although I have considered all the criticisms raised by each of the Bechtel witnesses. There was no manifestly erroneous evaluation demonstrated by any of the Bechtel witnesses in respect of any of the Technical Questions.

137. Additionally, as set out in ***Healthcare at Home v Common Services Agency*** [2014] UKSC 49 (and also as accords with common sense), the evidence of a particular and specific tenderer's subjective understanding of the tender documents is irrelevant. The whole purpose of the concept of an RWIND tenderer is to create an objective construct; a notional tenderer with the relevant qualities to understand the requirements of the tender– that is why they should be reasonably well-informed and normally diligent. As Lord Reed JSC stated in ***Healthcare***:

> "[25] In relation to the tender criteria, the appellant submits that the Inner House erred in treating the RWIND tenderer as a hypothetical construct, and in applying the RWIND tenderer standard not according to the evidence of witnesses as to what an actual tenderer did or thought, but according to the court's assessment of what a hypothetical RWIND tenderer would have done or thought. The evidence of witnesses from an actual tenderer as to their understanding of the tender criteria, far from being irrelevant, established what RWIND tenderers actually understood, unless it were shown that the witnesses were not reasonably well-informed or normally diligent. The courts below had, it was submitted, confused the RWIND tenderer test with the interpretation of a contract: an objective test was appropriate in the latter context, but not in the former.

[26]. For the reasons I have explained at paragraphs 2-3 and 7-12, these submissions are in my view ill-founded. I agree with the way in which this issue was dealt with by the Lord Justice Clerk:

"The court's decision will involve it 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 juridical creations, such as the man on the Clapham omnibus (delict) or the officious bystander (contract), the court decides what that person would think by making its own evaluation against the background circumstances. It does not hear evidence from a person offered up as a candidate for the role of reasonable tenderer. In a disputed case, the court will, no doubt, need to have explained to it certain technical terms and will have to be informed of some of the particular circumstances of the terms or industry in question, which should have been known to informed tenderers. However, evidence as to what the tenderers themselves thought the criteria required is, essentially, irrelevant.

[27] As the Lord Justice Clerk made clear, evidence may be relevant to the question of how a document would be understood by the RWIND tenderer. The court has to be able to put itself into the position of the RWIND tenderer, and evidence may be necessary for that purpose: for example, so as to understand any technical terms, and the context in which the document has to be construed. But the question cannot be determined by evidence, as it depends on the application of a legal test, rather than being a purely empirical enquiry".

(emphasis added)

138. Evidence from claimant witnesses does have an important role in procurement challenges; not least the claimant tenderer has to prove its own case, given that it bears the burden of proof. It may also have to explain detailed aspects of the project subject matter, and technical terms. However, in circumstances where (as here) so much depends on the particular evaluation by the contracting authority of the claimant's bid – and sometimes (again as here) on the evaluation of the winning tenderer's bid – a great amount of the documents speak for themselves. The most important areas are usually as follows. The terms of the competition contained in the ITT; the scoring methodology; the detailed contents of the bids themselves; the records of the evaluations and the way that the procurement was conducted. Some of these may be areas where a claimant's witnesses do not have very much direct knowledge at all, which will inevitably affect the extent of their relevant evidence. A claimant's witnesses will know about the terms of the ITT, the scoring methodology and the detailed contents of the claimant's own bid, but absent technical explanation, only the latter of those three aspects of their evidence is likely to require substantial evidence from them.

139. Although ***Healthcare*** started life as a Scottish case, it is a decision of the UK Supreme Court and the ratio is of equal application in England. A tenderer's subjective understanding of the terms, meaning or effect of the ITT will not be legally relevant, given the concept of the RWIND tenderer. A claimant's witnesses will have their own views on how its own bid *should* have been evaluated. These personnel are also likely

to have personal qualitative views about their competitors' bids too. However, these matters will not, usually, be of primary relevance. In this case, there were no particular technical terms that required explanation by witnesses so that the court could follow or understand the procurement documents.

140. One major aspect of the challenge brought by Bechtel related to the level of management resources proposed by BBVS, which Bechtel maintain were insufficient. This occupied much of the oral evidence. Not only do Bechtel maintain this, but it is complained that HS2 effectively knew the resources proposed by BBVS were, or were likely to be, insufficient, which is why BBVS was given a score of only "Concerns" for this aspect of Question E001, and a score of "Concerns" for E001 overall. Bechtel maintain that BBVS ought to have been given a score of "Major Concerns", and also that BBVS should have been disqualified as a result. There is no doubt that BBVS did not do well on this part of the evaluation on Question E001, the title of which was Organisation. This is a conclusion which can perhaps be discerned from the score awarded – that for "Concerns". This specific issue was further discussed at a meeting on 5 September 2018 held for clarification purposes between HS2 and BBVS. I deal with that meeting below at [260].

141. One difference between Major Concerns and Concerns in the scoring matrix (and I summarise) was whether the matter in question represented a "substantial risk to HS2" – in which case it would be awarded Major Concerns, with zero % towards its score as a result for E001– or "a significant risk to HS2", in which case it would be awarded Concerns and a score of 10% of the total available for that question. The actual definition in the scoring matrix used "and/or" before each of these descriptions of risk, but also used other terms too. I have chosen the risk description for illustrative purposes. However, although the award of Concerns has been seized on by Bechtel – and there is no doubt that so far as the MRS is concerned, it was not BBVS' finest hour – far more than that is required to demonstrate manifest error by the evaluators. Bechtel must show that the assessors were in manifest error in assessing that the risk posed by the resources in BBVS' MRS constituted a significant risk, and that they should have assessed the risk as substantial. When one considers that assessors are granted a margin of discretion on matters within their subjective professional judgment, it can be seen that the task Bechtel face in so doing is difficult.

142. I deal below with the witnesses for HS2 who evaluated both this question, and the other areas of challenge. But it is worth repeating the point that whether the answer to the question demonstrates or represents either a "substantial risk" or a "significant risk" to HS2, this is a subjective judgement call for the evaluators. They will reach their answer based on their expertise and experience. It is only if the score is awarded manifestly erroneously, or otherwise in breach of the obligations upon HS2, that the court will interfere.

143. HS2 called the following witnesses of fact.

Mr Geoff Gilbert

144. Mr Geoff Gilbert had also, like Mr Roberts, served a witness statement for the automatic suspension application. His witness evidence for the trial was therefore in his second statement. He is currently the Head of Commercial for MWCC SCS, leading the HS2 commercial team in the contract management for that contract, which concerns the

tunnelling and ancillary civils works for the section of the Phase One route from Euston to West Ruislip. He has been in that role since February 2020. During the procurement, he was the Head of Commercial for Phase One Area South, starting in that role in November 2017; prior to that he had been seconded to the Procurement Directorate.

145. Whilst seconded in 2017, he had also been involved in the procurement of the station design contracts ("SDSCs") and the Construction Partner Contracts (or "CPCs") of which the one for Old Oak Common was one. He had overall responsibility for the development of the OJEU Notice, prequalification documents and the ITT in its early stages. He did not moderate, evaluate or score the bids, save for one element of the Behavioural Assessment. His evidence dealt with changes to the Contract Data by HS2, keeping of records by HS2 and the Bechtel qualification. In respect of the latter he described this as a "showstopper" and explained it would have given Bechtel as the CP significant commercial leverage at the Consolidation Point. He also described the qualifications by Bechtel as significant qualifications. This was challenged by Mr Bowsher on the basis of colour coding used in one particular document but Mr Gilbert was clear that it was "flagged red" in some of the presentation documents used in the governance process described in [147] below. Had Bechtel been the winning bidder, HS2 could not have contracted on the basis of the qualification; Mr Gilbert explained that it would have had to be removed. I accept this.

146. Initially, the anticipated date for the award of the contract at the time the ITT was published was September 2018. However, in fact, the Contract Award stage did not take place until a year later, in September 2019. Mr Gilbert explained that this was due to a number of factors, including governance (delays in obtaining Secretary of State approval) and also the automatic suspension imposed by Bechtel issuing proceedings. That was only lifted in August 2019. He also gave evidence that HS2 had decided that resources would be agreed for Year 1 as part of the GMMP and then agreed annually thereafter, due to the difficulty at bid stage of any bidder predicting their resource level for the whole life of the project. That is replicated in the information provided in the ITT.

147. HS2 had set up two Review Panels in respect of the procurement competition, with review at two points in the process called RP1 and RP2. Although Mr Gilbert was not a member of the Review Panels, he attended the first meeting because another member could not (Mr Poole); he then also attended the second meeting too, because he had attended the first. The purpose of the panel meetings was to consider the preliminary evaluation results and the evaluation process itself, and to endorse the approach taken in the evaluation. RP1 was on 17 August 2018, when the preliminary evaluation was available. Mr Gilbert agreed that this was "rather a passive event" and that no minutes were kept of it. RP2 was later, on 3 October 2018, and followed the clarification meeting of 5 September 2018. Mr Gilbert was away at the time of that meeting on 5 September 2018 and did not attend. He received news of what had occurred at that meeting through the Tender Evaluation Report which followed it. It was put to him several times that, during this period, HS2 had engaged in a process to ensure that BBVS committed to providing a higher level of resource than was included in the BBVS tender, a suggestion that he rejected. I accept his evidence on this too.

148. Following RP2 the Commercial Investment Panel ("CIP") endorsed the outcome of the competition, which was then forwarded to the Commercial Investment Committee ("CIC"), which did likewise. The latter is an HS2 non-executive committee. Following

approval by the CIC, the matter went to the HS2 board, the Department of Transport and the Secretary of State. The HS2 board approved it on 1 November 2018.

149. I found Mr Gilbert's evidence persuasive, and in particular concerning the inability of HS2 to contract on the basis of Bechtel's qualification and proposed new clause 6.2, entirely in keeping with all of the contemporaneous documents and the other witnesses. I find that HS2 simply could not have contracted with Bechtel on the basis of that qualification. Mr McMonagle had explained that, on other contracts, HS2 had said something was unacceptable but had then subsequently accepted it. That may have been the case earlier or on smaller contracts (the point was not pursued in any event) but for this contract, on such a substantial project, and upon such a central commercial point, it plainly was not the case here.

Mr Keith Blair

150. Mr Keith Blair was cross-examined partly in closed confidential session due to the nature of some of his evidence, in particular dealing with the level of Lump Sum Fee, the Fee Collar and the matters which are dealt with in Confidential Appendix II.

151. He works for Turner and Townsend Cost Management Ltd but was seconded to HS2. He moved to HS2 in 2017. Initially he was the commercial lead for the Procurement of the Southern Stations Construction Partner Contracts, which meant being the lead on both Euston and Old Oak Common. By the time of the trial he was carrying out a senior commercial management role at HS2 in relation to Euston Station, where his duties involved the implementation of the Euston Construction Partner Contract. He has over 40 years of experience in the construction industry, and is greatly experienced on rail projects, particularly stations. He developed the commercial model and the commercial terms for the procurement, which essentially comprised Questions J001 and J002, Staff Rates and the Lump Sum Fee respectively.

152. He explained that HS2 wished to avoid the possibility of tenderers indicating the type and level of staff of their own accord, "as this would result in tenderers being able to 'game' their bid approaches", as well as making evaluation for HS2 difficult based on inconsistencies between approaches. The intention of HS2 in the design of the procurement was to ensure that tenderers could be evaluated on comparable rates across all bids, not resource levels. This was what led to the Staff Rates template and the way that Question J001 was designed. Rates, or the rates card, were to be considered by using a rates template that was in spread sheet form. This was fully explained by Mr Blair. It enabled HS2 to compare rates across the different bids, in isolation from the resource levels bid by each tenderer. I find that this is what the template and Question J001 achieved.

153. If a contractor failed to achieve construction of the project within the Incentive Target, although they would be paid the cost above the target, they would not be entitled to any more fee, which would consequently reduce their margin. Also, because of the way that Key Performance Indicators or KPIs were awarded, failure to achieve the targets of budget and programme would not entitle the contractor to earn all of the fee. Financial incentives were therefore built into the structure of the contract to encourage the CP in terms of meeting both the Incentive Targets. It was this that the qualification to clause 6.2 of Bechtel was aimed at. I find that the qualification was aimed to avoid or reduce

Bechtel's exposure to the commercial risks associated with meeting the two Incentive Targets.

154. He also explained how the Fee Collar was designed and its purpose in avoiding any tenderer submitting a bid with an unsustainably low level of fee, and to ensure that the successful contractor would achieve a fair level of profit. He explained that anything below the Fee Collar of 7% would be considered abnormally low. He also gave evidence about the abnormally low tender assessment which was performed on the only two elements of the bid that a tenderer could reasonably price at the outset, namely rates and the fee (or J001 and J002). Given the nature of the contract, which was of the management contractor type, I find that this is a correct assessment by Mr Blair. All of the other elements of the ultimate overall price that would be paid by HS2 for the construction of the station would be costs incurred by the Works Contractors, and these could not be included in the bid at tender stage, not least because the station was not yet designed. The different bidders were not bidding to construct the station, they were bidding to be the Construction Partner in doing so. Mr Blair also supervised Mr Kwok Chan (also called as a witness before me) who performed an analysis of resource profiles to assist the evaluators of Question E001, which contained the MRS. This analysis included graphs with days per grade, and days per year across the life of the project.

155. Mr Blair attended the meeting of 5 September 2018. He explained that this lasted a little over an hour with BBVS and he attended as an observer. He took some limited notes but was not the designated note taker, and he did not know if any of the HS2 attendees was given that role. The notes that he made suggested that BBVS may have been intending to offload some of the management resource to the supply chain (which means using personnel at the Works Contractors to do some management) and also that there may have been a confusion. This confusion or mistake was due to the fact that the programme period for Year 1 was 13 months, which meant that BBVS had allocated a greater amount of particular grades' time to month 1, namely over 100% (the entry was 175%). This is evidently a physical impossibility. It was however capable of ready clarification (the purpose of the meeting) and correction; it was done to reflect the fact that month 1 was longer than an actual month, and nearer two months in duration (it was actually 7 weeks). This certainly does not invalidate the bid by BBVS in some way, or the score. I find that the clarification given was permitted by the ITT, which gave HS2 the right to hold such a meeting.

156. Mr Blair was asked about part of the report that was generated after RP1 that stated "Kappa's [this was the code word for BBVS] management resource schedule appeared insufficient and this needs to be resolved prior to contract award." He said that an explanation was needed from BBVS about their resource schedule and how it applied to their approach and methodology to managing the contract. This clarification was obtained at the 5 September 2018.

157. He also, in his second statement, refuted an allegation made by one of the Bechtel witnesses, Mr Roberts, that there was a direct correlation between the level of resources and the fee. Mr Blair explained why this was not the case. I accept his evidence on this, but in any event, evidence was not required. The point can be identified and decided by studying the make-up of the ITT, the way that the evaluation scores were arrived at, and in particular studying the working of the rate card (the name given to the template which was derived as part of the function of

evaluating Staff Rates in J001). There was no such direct correlation. The way that the Staff Rates were evaluated was through the template, and this was expressly constructed to enable HS2 evaluators to consider the rates on a resource-neutral basis.

158. I found Mr Blair to be a persuasive witness and I accept his evidence.

Mr Kwok Chan

159. Mr Kwok Chan also works for Turner & Townsend and is seconded to HS2. He has 15 years of experience and is dual qualified in civil engineering and procurement and a member of the Chartered Institute of Procurement and Supply. He joined Transport for London ("TfL") in 2009 on the graduate scheme as a Graduate Engineer and left TfL to join Turner & Townsend in 2016, joining the HS2 scheme in 2018. He is currently the Commercial Lead for the HS2 Station Common Components. He led the commercial evaluations for both Euston and Old Oak Common between March 2018 and February 2019.

160. He used the Cost Analysis Templates as part of the commercial evaluation. This included using graphs to assess rates and fees, and check compliance with the Schedule of Cost Components. As well as the Cost Analysis Templates, a Cost Analysis Template Summary was produced to consolidate all bidders' commercial submissions into a single document for evaluation and scoring. This included checks for abnormally low tenders or ALT, and used formulae to calculate the variance between the different bids. He also prepared the commercial sections of the Tender Evaluation Report.

161. Whether any bids were abnormally low tenders was assessed by considering the Lump Sum Fee and the Model Rate Card. Each of these was a separate part of the Commercial Envelope, J002 and J001 respectively. The rate card was not linked the volume of resources in the MRS. He rejected the suggestion that was put to him that the "starting point for your analysis" was the data that a bidder put into the MRS. He was very clear, that the MRS did not form any part of the commercial evaluation. I accept that as entirely accurate, both evidentially in the sense that I fully accept what Mr Chan said, and also in the way the template works in terms of how it is constructed.

162. He also performed other exercises, such as benchmarking the BBVS rates against the previous HS2 MWCC procurement once BBVS was confirmed as submitting the Most Economically Advantageous Tender. This showed that the lowest comparable MWCC rates were consistently lower than those submitted by BBVS, although the BBVS rates were lower for three roles. Even those, however, compared with the other tenderers in the OOC procurement and there was no instance of BBVS having the lowest rate. He gave detailed examples of rate variance. In my judgment, this is very important evidence. It demonstrates that, as well as the Fee Collar, HS2 took steps based on real-world evidence taken from previous procurements to analyse the rates included in the winning tender. The conclusion that was drawn by HS2 at the time was that the BBVS tender was not abnormally low. I accept that conclusion, although I consider the subject further below in Section J Abnormally Low Tender.

163. Mr Chan was also involved in February 2019 in the updating of BBVS MRS due to the fact that the first GMMP period changed. The contract starting date and Key Date

1 changed, from 11 September 2018 to 25 February 2019, and 19 July 2019 to 9 September 2019, respectively. This change therefore required a revision to BBVS' tendered MRS. The first GMMP period was changed from a little over 12 months (it had been 12 months and 3 weeks) to 8 months. Mr Chan pro-rated the resources by about one third to do this. He also formatted the GMMP into a printable PDF version, broken down into Annexures 1 and 2 to align with the Contract Data Part 2.

164. I accept all of this evidence and I found Mr Chan's evidence of great assistance. The exercises he had done, in terms of spreadsheets and analysis, were all internally coherent and fully matched his oral evidence, and his explanations of what HS2 sought to achieve. Particularly his evidence in respect of J001 and J002, and how the level of resources had no impact on rates or fee, were of considerable relevance. It also shows that HS2 took substantial steps to deal with the potential for abnormally low tenders. HS2 fully satisfied itself that the BBVS tender was not abnormally low, an evidential conclusion, but one that I accept.

Mr Chris Pybus

165. Mr Chris Pybus has been working in the rail industry since 2003, and has been extensively involved in procurement for some years. He joined HS2 in 2015 as a Procurement Lead. He is responsible for developing, managing and overseeing procurements and contracting strategies for aspects of the Phase One Programme for the overall HS2 project. He was the Procurement Lead for OOC, and his opposite number within HS2 for Euston was Mr Udunuwara. They therefore worked together on the procurement plan and developed the ITT.

166. He explained the intent behind Question E001 which included the submission of the MRS, but again this is something that can be discerned from the ITT itself. Certainly an RWIND tenderer would have had to analyse and assess the requirements of all the questions in the tender without the benefit of evidential explanation from Mr Pybus. I accept that the provision of an MRS was not intended to bind the tenderer to a final definitive level of resource that could be employed in the operation of the actual performance of the works and the project. It was plainly intended to allow HS2 to decide how much confidence HS2 had in the structure and logic of the tenderer's approach to resources, and whether HS2 considered the tenderer had provided appropriate staffing levels for the anticipated tasks across a range of disciplines. This is obvious both from the ITT and the terms of the contract appended to it.

167. He explained the working of the evaluation process, the use of the AWARD system, and the moderation process. Moderators were given training by Ms Nicola Sumner, who was also called as a witness. Materials from the training showed that moderators were told the principles behind procurement regulations, and also demonstrated an awareness on the part of HS2 of the risk of a potential challenge to the outcome of the competition.

168. Two of the bullet points in the training materials were:

"Maintaining an audit trail — ensure moderation and moderation assurance is fully documented and all score changes and reasons for changes are fully explained and justifiable

Mitigate risk of successful procurement challenge - evaluation is the key risk area in terms of possible procurement challenge!"

169. One of the slides from the training was devoted to "NDA case – key messages". This refers to a successful challenge in a very high-value procurement case, namely ***Energy Solutions EU Ltd v Nuclear Development Agency*** [2016] EWHC 1988 (TCC). The value of the contract in that case was over £4 billion, and success in those proceedings by a losing bidder had obviously led those at HS2 involved in procurement to consider the lessons available from that case. The key messages impressed upon the moderators were stated in the slide as follows:

"Apply published evaluation methodology and follow your declared process.

Treat all Tenderers in a consistent manner.

Keep written records of evaluation process.

Keep full audit trail of changes in scores and reasons for changes.

Rationale to include all the reasons for the score.

Devote sufficient time and resources to the evaluation process to make the above possible."

170. In my judgment, this is a helpful summary of what is required in evaluation. It does not replace the requirements in the regulations – such as transparency, equal treatment and so on – but in terms of sketching out for moderators what the intention is, it would have been helpful training. Mr Pybus was the moderator for a number of questions, including Questions E001, E005 and I001 which are the subject of these proceedings. His evidence explained the way the moderation meetings were conducted, the role of the moderation minute taker (a separate person to the moderator), how the moderation minutes were produced, and the process of moderation assurance.

171. So far as the BBVS answer to Question E001 and the MRS was concerned, Mr Pybus explained that Mr Avery and Mr Botelle (the two Assessors for E001) had initially allocated draft scores of 'Minor Concerns' and 'Major Concerns' respectively to BBVS, based on the Scoring Descriptors. After a detailed moderation discussion on that factor, Mr Botelle accepted as part of that moderation discussion that he had over-emphasised the lack of confidence in his original rationale, and he had considered and described in his individual assessment that there was a "significant delivery risk". That description equated to the reference to "significant" risk referred to in the Scoring Descriptor for "Concerns", rather than "substantial" risk referred to in the Scoring Descriptor for "Major Concerns". Mr Botelle had also decided he had higher or better than 'no confidence' (which would or should equate to a Major Concerns score) in the Tenderer's overall response to Question E001, when considering the question as a whole. The assessors therefore reached a consensus view that the BBVS response to Factor 5 would be scored as "Concerns", as that was the Scoring Descriptor that reflected their joint view. One had moved up; the other had moved down. I accept that evidence, which was consistent with and corroborated that of Mr Avery and Mr Botelle. That was also the score for Question E001 overall.

172. Moderation minutes were kept but as Mr Pybus put it, “the drafting was owned by the assessors” which means they were in charge of the language used in the drafting. He was very clear that he was not choosing the language of the drafting of the outcomes of the moderation, although it was often suggested to him in cross-examination that he did. As he put it, he “facilitated conversation” and the assessors used their professional judgment and the scoring descriptors. It was also suggested to him that the assessors would wish to avoid giving a score of “Major Concerns” because of the potentially adverse consequences. He did not accept that.

173. One passage of cross-examination by Mr Bowsher QC for Bechtel that demonstrates this approach is as follows.

> “Q: We will obviously have to come back to Mr Botelle on this, but I want to try and understand what you are suggesting was happening. I think you are suggesting, are you, that Mr Botelle never really meant "Major concerns", he meant something different? Is that what you are saying?
> A. I'm not saying that, no.
> Q. What are you saying? Are you saying he changed his mind?
> A. Are you asking me the question of how the moderation was conducted or the --
> Q. I want to work through what your understanding as to how -- you start with Mr Botelle saying major concerns. My first question is: are you saying that he was in error about this, or are you saying that you thought he changed his mind?
> A. I had no opinion of this particular point. I moderated the moderation meeting, I facilitated conversation on this factor between the two assessors, they came to a consensus rationale, which is recorded in the third column. If you would like to turn to the minutes, I can tell you the factual reasons for the change.”

174. This passage of cross-examination demonstrates the way that Bechtel approached the issue of draft initial scores reached by the assessors. These were elevated by Bechtel to being equivalent, in effect, to finalised consensus scores, such that some sort of cogent explanation was required from HS2 as to why these initial scores were not identical to the ones awarded by the assessors after the moderation, and after the two assessors had collectively reached consensus on the final scores. There is no basis for approaching the initial draft scores reached individually in this way, or granting them this elevated status. Further, for this question, it can be seen that in his initial notes for his draft score Mr Botelle had used the term “significant” which directly related to “Concerns” and not “Major Concerns” in any event.

175. Mr Pybus attended the meeting of 5 September 2018. He took some notes of that meeting. These notes are somewhat sparse. He did not agree that he was the designated minute taker for that meeting, and I accept that evidence. I find that there was in fact no designated minute taker, something which is both regrettable and surprising, and which I deal with further below when I deal with the meeting itself at [257255260]. However, Mr Pybus is a somewhat senior person within HS2 and there is no basis for ascribing this role to him ex post facto. He would have been a senior person to task with taking the minutes, a feature which I consider supports my conclusion that no person was tasked with keeping the minutes. Mr Pybus also gave evidence that there was no change to the BBVS Technical submission at, or after, the meeting of 5 September 2018, evidence which I accept, and which is made out on the documents too. He also explained that the assessment of whether qualifications by bidders were significant or not was something undertaken by HS2 Legal.

176. I found Mr Pybus to be credible, and I accept his evidence. He did keep notes of his own of the meeting of 5 September 2018 with BBVS, but they are more in the style of brief, personal notes, rather than the type of notes that would be kept by someone who was keeping minutes of a meeting. They were not circulated amongst the attendees after the meeting (whether for correction, comment or approval) either, another customary feature of minutes of most meetings. When, in February 2019, it was realised within HS2 that no minutes of the meeting of 5 September 2018 had been kept – something which I find remarkable, in terms of the length of time it took HS2 to realise this – two documents were typed up and used as minutes. These were the agenda for the meeting (also referred to as a script, in that it preceded the meeting and set out what points were to be covered by the HS2 attendees) and parts of Ms Serrelli's notes. Mr Pybus' notes were not used, and this reinforces my conclusion that he was never tasked with keeping minutes. His notes were not minutes, and never intended to be. I deal further with the issue of the minutes of that meeting at [260] below.

Mr Gregory New

177. Mr Gregory New has 15 years' experience in the construction industry, predominantly in the field of infrastructure, and he is a qualified surveyor. He joined HS2 in 2015 and is currently Head of Commercial (Align). Align is an integrated project team whose job is to deliver part of the physical HS2 route that goes from just inside the M25 and ends just north of the Chiltern Hills. At the time of the procurement, he was an assessor for Questions E007 and I002, and prior to becoming an assessor he had no involvement in the procurement. The only area in which he was an assessor relevant to these proceedings is E007 which was entitled Procurement Plan. After moderation had been completed, he had no further involvement in the procurement competition.

178. In his evidence he explained that he underwent the training prepared by HS2 for assessors and explained how thorough it was. The assessment which he performed took place in the Canary Wharf Office of HS2, in a secure area there; this was the case for all assessments. He was impressed with BBVS' procurement strategy and plan and thought that BBVS had invested considerable effort. BBVS had, so far as he was concerned, developed the procurement and contract strategy well, and clearly explained the underlying considerations and theoretical models. The moderator chaired the discussion between him and the other assessor, Mr Culver, but did not interfere in their decisions as to the correct score for each question. There was some delay in signing off the moderation minutes but that was due to the moderation assurance process.

179. He rejected the suggestion that he was "harsher" with Bechtel's responses than with BBVS, and he also rejected that he should have scored down BBVS on its response to E007 due to the content of E001 (the resource question involving the MRS). I accept his evidence on the first point, and I also reject that the ITT can be properly construed as requiring the latter. This part of the case involves Bechtel finding a weakness in one part of the bid of BBVS – namely the "Concerns" awarded due to the MRS – and maintaining that weakness, or low score, ought to have been reflected across and into other scores awarded to BBVS on other questions in the Technical Envelope. I reject that argument, for which there is no proper basis. Mr New also rejected the approach contended for in Annex 3 of the Re-Re-Re-Amended Particulars of Claim which was a comparative exercise, subjectively seeking to demonstrate that Bechtel's bid was better than that of BBVS on certain questions, and using this to demonstrate that the scores ought to be changed. This was not how the scoring was done, or how it was required to

be done under the terms of the ITT (save for the Commercial Envelope, in which Mr New was not involved). However, even if a comparative exercise were to be done, he explained how Bechtel's answers were far less good and certainly less detailed than those of BBVS. I accept his explanation and his evidence.

180. For Question E007, Procurement Plan, BBVS were awarded "Very Good Confidence" and Bechtel were awarded "Moderate Confidence" (the band sitting between those two was "Good Confidence", which attracts a score of 75% of the marks for that question, rather than 55% for "Moderate Confidence"). In my judgment, Bechtel failed to demonstrate that there was any error, manifest or otherwise, in either of the scores for it or for BBVS. Nor is there any breach of the obligations of equal treatment or transparency in the way these answers were scored by Mr New.

Mr Robert Avery

181. Mr Robert Avery is a Chartered Civil Engineer with the ICE and a Chartered Project Manager with the Association of Project Managers. He has 18 years of experience in the industry and joined HS2 in March 2017, although he has been working on the project since 2012. He is a Senior Project Manager and selected the team members to be assessors on all the technical questions in the Technical Envelope which included E001 to E010 and I001. He also was the assessor himself on some of them. Mr Botelle was his line manager. In terms of those the subject of these proceedings, he was an assessor for E001, E002, E004, E005 and E006. He and Mr Botelle were the two personnel who assessed E001 jointly. Mr Avery performed these assessments in the sequence E002 to E006, and then E001, as this was the order in which the moderation meetings were timetabled to take place.

182. He explained that both for the assessments and the moderation meetings, responses from other questions were not to be considered and the assessors were only to take account of the tenderer's response to the particular question being assessed at that time. Exceptions were E006 and E001 where access to E005 was provided to check one of the sub-factors. Actually, some factors expressly referred to other questions, but these were isolated. As the co-assessor with Mr Botelle for Question E001 (which included the MRS) he had jointly awarded the score of Concerns given to BBVS. So far as this question was concerned, he considered the resources proposed by BBVS in the MRS were, as he put it, "very light" but not in all disciplines, predominantly in the areas of Project and Commercial.

183. He said the resources proposed by BBVS in the MRS were on the threshold of acceptable and not what he termed "showstoppers". He also noticed and identified that 175% had been applied to the core hours for the first month for some categories; he concluded this was an error. His initial view on Question E001 was one of "Moderate Confidence" in his draft score but when he considered the factors and scoring descriptors in moderation he concluded his initial score should have been "Minor Concerns". Mr Botelle had scored it "Major Concerns" at the individual draft stage, and at moderation they discussed and agreed the final consensus score which was "Concerns". His explanation of the process and the meeting was thorough and credible, and I accept it. I also find that this is an example of how two assessors would be expected to reach a single joint score; they might (and in this instance, did), individually, have each awarded different scores to one another, but those initial scores were simply drafts. In discussing the answers together in moderation, the intention was

that the two assessors would arrive at a single score reached consensually. That this may be (and in this instance, was) different from the initial draft scores does not, in my judgment, matter. It certainly cannot be relied upon to demonstrate any manifest errors in evaluation.

184. He explained that he used the graphs and tables provided by the tenderers when evaluating E001, as well as using the secondary analysis prepared by Mr Chan. He also made the point that the moderation minutes were not a verbatim account of moderations that took between 3 and 8 hours. He explained the following in his cross-examination in terms of his concerns regarding BBVS' resources.

"From an E001 perspective, I had concerns on, if you like, the peak years. So it is an eight and a half year project. I was confident with the front and then -- but I did have concerns, and I think I referenced it within my witness statements and within my evaluation, about an insufficient sized team, and that was more to do with the peak periods during the delivery of the contract. And I think I had identified, yes, on paragraph 33, years 2 to 4, when -- when we would be in the peak of the construction, due to the works taking place.
Q. So that was a relevant part of the E001 analysis?
A. I reviewed the resources, based on the programme that I knew, not based on their submitted programme.
Q. But it was relevant -- a relevant part of the E001 analysis to look at what they had projected to see whether or not they were putting forward sufficient resources for the project?
A. Yes. We -- I looked at the analysis of the year-on-year and looked at it from a basis of: what is it in that years 2 to 4, so that I could get an understanding. Are they going to be stretched or are they within a comfortable means to deliver the project? And they were in that, kind of like, stretched area. They could deliver, especially at the beginning, as they have actually proved to have done so. And during the moderation, Matthew and I discussed this and Matthew has a lot more delivery experience than myself, and so it was good to be able to have that discussion with him at the moderation. And when I put forward the first year, the first -- the one to two years comments and discussed it with him, we then determined: well, actually, the shoulders can work of the delivery and it is just that peak area where there may be some concerns on what they can deliver. But it's not saying that they couldn't. We did not say they could not deliver it. I think my words were more, yes, an insufficient sized management team. So it's not saying they couldn't deliver it; it's just it was extremely tight."

185. He also said the following in terms of his level of confidence, namely that a score of Major Concerns would only be given if the assessors had no confidence, or as he put it "zero confidence". He accepted that there were two parts to the scoring methodology that would entitle the assessors to give a score of "Major Concerns". One was if there was a major concern in relation to the proposed approach to delivery; the other was if there was a substantial risk. He accepted this and I find that he – in common with the other HS2 assessors – were applying the correct interpretation of the scoring methodology.

186. I accept the evidence of My Avery, which in my judgment is credible. It is also substantiated by the documents such as the moderation minutes. His evidence also clearly demonstrates two things. These are, firstly, assessors working to achieve a single score in consensus, after discussion between them, in circumstances where their initial

views were somewhat different. I find that this is exactly what was envisaged in the design of the scoring approach and moderation. Secondly, it shows the exercise of professional judgment by assessors in the areas in which they had expertise.

187. I also accept Mr Avery's evidence in respect of the assessment of the other questions with which he was involved, and that he was not acting manifestly erroneously in arriving at the scores awarded to each of them. In particular on E004, which he assessed with Mr Devlin, Mr Avery clearly and readily demonstrated that Bechtel's response (which was challenged in these proceedings as receiving too low a score) was lacking in important detail in respect of Key Dates, which was the subject of factor 5 within that question. The two assessors concluded that there was a significant lack of detail in Bechtel's response, a point of view which is entirely understandable given the content of the answer (and in respect of which I agree) – or rather lack of content. Bechtel did not even refer to 50% of the Key Dates, which were not mentioned. Bechtel was given "Moderate Confidence" for Question E004 and although the initial assessments were higher than this, those initial scores were draft scores. BBVS was given "Very Good Confidence"; given they had specifically dealt with all of the Key Dates, and not ignored more than half of them, the different scores are understandable. They certainly cannot be shown as either being manifestly erroneous, or demonstrating any lack of equal treatment or transparency.

188. Although a challenge was mounted by Bechtel both to its own score on a number of questions, and that of BBVS – each said to be too low, and too high, respectively – Bechtel simply could not demonstrate any errors in evaluation in any of the questions assessed by Mr Avery. Nor, in my judgment, could Bechtel demonstrate any instances of breach of equal treatment or lack of transparency on any of the questions assessed by Mr Avery.

Mr David Steward

189. Mr David Steward gave his evidence remotely. He is the Senior Project Manager at Old Oak Common, having joined HS2 as a Senior Project Manager in 2016. His only involvement in the procurement was as an assessor of Question E008, which is entitled Design Management. He had also been an assessor for some of the design factors for the OOC Station Design Services Contract, a procurement which resulted in WSP being appointed to that role. His co-assessor on E008 was Adrian Hooper. The two complemented each other in that Mr Hooper had a greater depth of knowledge as an engineer, whereas Mr Steward had more experience in project management. He explained that neither of them was senior to the other, and they were peers.

190. He was challenged because the draft score for Bechtel for its answer to Question E008 was initially "Good Confidence" but the consensus score was only "Moderate Confidence". This was because of a lack of significant detail on Factor 4. His explanation was that the initial assessments were only draft scores; and the scoring was not an average of the scores for each factor. The assessors were using their judgment, collectively, when deciding the final consensus score, based on their view of the different factors, and this might be different to those initially considered. Indeed, the final score *was* different. Bechtel expressed themselves, through Mr Bowsher, at being "puzzled" as to why the final score was only "Moderate Confidence". However, Mr Steward showed that the Bechtel response did lack significant detail on factor 4, which related to maintenance, testing and handover, and as he expressed it this "had quite an

impact on the whole of the technical assurance for" that particular question. He said that the two assessors "mutually agreed that there was a significant lack of detail in that area, which is particularly important to the design of this station".

191. The Bechtel answer to the question was contrasted with the BBVS answer, which was given "Good Confidence". Challenges were again made to resources – it was put to him by Mr Bowsher that "if you were wanting to understand whether or not that function was actually going to be fulfilled properly, you would have to be sure that there was, in fact, in place the team, the actual people, to deliver those functions" but Mr Steward explained that this question concerned organisation, and was not related to whether it was resourced properly. I accept that. None of the points put to Mr Steward demonstrated, in my judgment, that there was any manifest error in evaluation of either the BBVS or the Bechtel answers to Question E008, nor was there any breach of equal treatment or transparency.

192. Mr Steward only assessed one of the questions in this procurement. However, I consider that his careful and obviously frank evidence is a good example of the way the case unfolded in evidential terms. Mr Bowsher for Bechtel skilfully put all the possible points available to him to seek to demonstrate manifest error, or to obtain answers in cross-examination that would assist him in submitting that there had been manifest error in scoring, either to Bechtel's detriment or BBVS' benefit, and also to demonstrate unequal treatment. However, regardless of how Bechtel did this, the answers obtained from the witness clearly demonstrated that there were no such errors, or even arguable errors, in the evaluation, let alone any instances of manifest error.

Mr Matthew Botelle

193. Mr Matthew Botelle is a Chartered Project Professional and Fellow of the Association for Project Management; a Chartered Fellow of the Chartered Institute of Logistics and Transport, and an Associate Member of the ICE, amongst other qualifications and memberships. He has 25 years of project and programme management experience. He was at the time the Project Director for Old Oak Common, and was an assessor for Questions E001 and E003. E001 was the Question that included the MRS. He was named as the Project Manager under the contract, although by the time of the trial he no longer occupied that role due to a re-organisation within HS2. I would add that Project Manager under the NEC forms is always a specific individual. He had not, however, by that time been formally replaced as the named person within the contract for that post, who was to be Mr Lee Holmes. Mr Botelle is also a member of the Senior Leadership group at HS2.

194. He explained how he performed his individual assessment to arrive at his draft scores, undertaking this in secure rooms at the HS2 offices in Canary Wharf over several days. He considered that BBVS had proposed what he called a "lean organisation structure" in their response to Question E001. He considered BBVS' resources in the MRS to be very low. He would have expected to see staff numbers of approximately 200 and there were fewer than this, with the peak being only 142. He was also concerned about over-utilisation of individuals, with some being shown at 175%. That latter point turned out to be a mistake due to the fact that Year 1 was longer than 12 months, something clarified at the meeting of 5 September 2018, although Mr Botelle did not know this at the time he was assessing the tenders to determine the correct score.

195. He was concerned that the lower level of resources might give BBVS a commercial advantage in the evaluation, but it was explained to him at the moderation meeting by Mr Pybus that this would not be the case as the Commercial Envelope did not include the MRS as part of the assessment. He also had reconfirmed that resources would be agreed for each year after Year 1 on an annual basis. Mr Avery had looked at the first year in more detail than Mr Botelle, who was more concerned at the whole life of the project. Mr Botelle said he was focused on the technical side, not the commercial. He said the question for him was, did he have "no confidence", or did he have "very low confidence"? He decided he did not have no confidence.

196. He was asked about RP2, which he attended at very short notice, and the fact that the report before RP2 stated expressly that BBVS' MRS "appeared insufficient and this needs to be resolved prior to Contract Award". He had not drafted that but said anyone who had read their assessment of E001 could have come to that conclusion. He accepted that the low score for E001 meant there was a significant risk in terms of resources. It was put to him that it was a "dramatic conclusion" to reach without coming back to the people who had reached that conclusion (the assessors) but he accepted there was nothing factually incorrect about that and said "it obviously got a low score. We've all scored it low, so yes". I find that it is not "a dramatic conclusion" for the author of that report to have reached on the resources proposed by BBVS without consulting the assessors of E001. It is the sort of conclusion that logically flows from the award of a score of "Concerns", and what that means in terms of the level of risk to HS2 evaluated by the assessors. It must however be remembered that the score of Concerns was in relation to one part of the Technical Envelope, and provided the score was awarded without manifest error, BBVS was entitled to be treated in accordance with the terms of the ITT.

197. Mr Botelle attended the meeting of 5 September 2018. He said his initial reaction when he heard there was to be such a meeting, and that HS2 wanted him to deliver the technical questions, was "did they really need me to go? We could have done those things through Bravo or via letter. But they said, no, they wanted me to go. So I went to the meeting." The first questions were essentially all along the same lines but phrased differently: could BBVS meet the programme for consolidation, early works and the whole project? Mr Botelle said there was a long discussion about the Saigon Metro and Whitechapel Station, which related to the past experience BBVS had. He knew there was a list of concerns on the part of HS2 and he recognised these from his own assessment. It was said that the resources, sequencing and programme would change, that being recorded in the document prepared by Ms Serrelli (on the day of the meeting, and hence contemporaneous). Mr Botelle confirmed that this matched his recollection. He was asked further about this:

"Q. Did you follow up looking for more detail thereafter as to what those changes would be?
A. I believe at the meeting we just sought verbal confirmation that they could meet the programmes. They confirmed they could; that they thought that the profile of the resources may change over that period, but the overall quantum wasn't expected to be much different, and they confirmed that their methodology would not change. It was just effectively moving working time and parallel working, etc. What was made clear, and I think it was Jon Wagstaff who reiterated it, is that HS2 might come back and ask them to do a submission, a detailed submission, but there was no requirement for

it in the meeting. I think if you go to the previous document we were looking at, I think one of the items, it just says: "We may require you to put in a submission." I don't think we ever asked for that submission."

198. Mr Botelle said Mr Pybus was the principal note-taker at the meeting. Mr Botelle was going to be doing the talking so he told the others he would not be taking notes. I observe, wholly in passing, that it seems a little curious to ask a bidder (then the unknown winner of the evaluation) if they could meet the programme. One imagines very few bidders in such a situation would ever answer such a question in the negative, and state that they could not. However, the terms of the ITT permitted HS2 to seek clarification in this way, and it did so. Mr Botelle explained that his concerns were resolved in his mind at moderation. He said "that was the process, and that was made very clear to me; that the moderation was the closure of that assessment process". A different way of expressing this is to state that nothing that took place at the meeting changed the assessments made by the assessors, or the scores. Mr Botelle said that the meeting "wasn't to go over my evaluation and revisit the moderation, and that was made very clear to me by the procurement team in advance of this meeting. It was completely made clear that that was not to be picked up by this meeting". He said that this justified his initial view, which was to ask why it was even necessary for him to attend.

199. It was put to him, somewhat critically, that he was "happy to proceed with the MRS that you had criticised" in terms of how matters proceeded after this meeting. However, in my judgment, this avenue of attack is misconceived. It is to elide two completely different things. The first is the evaluation of each of the different tenders, treating them all equally and transparently, following assessments across a wide range of different Questions, both technical and commercial, to arrive at the most economically advantageous tender. It was entirely possible for different assessors to be critical of elements of any bid, given the scoring matrix, yet that bidder win the competition overall. The second is Mr Botelle's subjective views, whatever they might be, as to sufficiency of resources or BBVS' likely performance once the contract was awarded and underway. Subjective views of that nature have no place in second-guessing, or overturning, the outcome of an evaluation once it is completed. BBVS had won the competition. The clarification sought by HS2 at the meeting of 5 September 2018 was for precisely that purpose – to clarify. It was not to entitle or oblige HS2 to go back and change the assessments, or the scores that had been finalised. Indeed, to have done so would have been potentially unlawful. As Mr Botelle explained, "I logged my concerns. We moderated them and the result followed the process. So I wasn't going to rework the process after the process had followed due course".

200. I accept that evidence, and I also find that the way adopted was the way that the regulations require contracting authorities to proceed. It would have been entirely wrong, and unlawful, for HS2 to have interfered with the outcome of the competition because BBVS had been awarded a score of "Concerns" on E001, or because the assessors concluded that the MRS presented a risk to HS2, provided the assessments, the score, and the overall result of the competition were reached without manifest error. Even had Mr Botelle, after the assessment had been completed and the score finalised and signed off, been troubled by a potential lack of resources, there was no scope for Mr Botelle to have reconsidered the scoring methodology in the ITT, and to have asked internally "ought we to have made sufficiency of resources a pass/fail?". Any lack of confidence Mr Botelle had regarding resources was to be evaluated in the score for

E001. The competition could have been designed to make adequacy of resources a simple "pass/fail" originally, and had that been done, all the tenderers would have known in advance of submitting their bids how important sufficiency of resources was to be in the evaluation. But it was not designed in that way.

201. I found Mr Botelle a credible and helpful witness, who undertook his task of assessing certain questions carefully and professionally. I find that assessments in which he was involved to have been reached without error, let alone manifest error. Nor is there anything to justify any finding of breach of the obligations of equal treatment or transparency.

Mr David Poole

202. Mr David Poole was employed initially by GE Aviation Systems (where he was Supply Chain Director) and then by Highways England, firstly as Procurement Director and then as Executive Director, Commercial and Procurement. He was at Highways England for 9 years before he moved to HS2, where he has worked since March 2018. Initially he was the Procurement and Supply Chain Director, and he has been the Procurement and Commercial Director since October 2019. He, like Mr Botelle, is a member of the Senior Leadership group.

203. He was a member of the Review Panel and his evidence was concerned with Qualifications to the tenders. The two review points when the procurement was reviewed by the Panel were called RP1 and RP2. The issue of qualifications was brought to the Panel. Qualifications generally were first considered by the HS2 Procurement team, then the HS2 Legal team if necessary. Thereafter they were, where necessary, brought to the Panel.

204. He explained that he "considered the nature of Bechtel's qualifications to be fundamental". Because HS2 must deliver the stations on time and within budget, it was essential that the Incentive Target was fixed. He explained his understanding of the Bechtel qualification to clause 6.2, which was that the tenderer would be given the option of not agreeing the Incentive Target at the time of consolidation (the Consolidation Point) and – as he put it – "to force a termination" if HS2 was not prepared to amend the Incentive Target. This went to the heart of the consolidation mechanism. He explained that HS2 could not possibly accept this as it would remove the commercial bargaining position otherwise available to HS2 concerning the level of the Incentive Target. It would also risk delays if termination did occur, because HS2 would have to conduct another procurement competition to find an entity to replace the Construction Partner for all the works from the Consolidation Point onwards. I consider the effect of the clause 6.2 qualification further in the section of the judgment "Qualifications", but Mr Poole is broadly correct in terms of this summary of the effect of the qualification. As might be expected of organisations as commercially developed and well-advised as Bechtel and HS2, those witnesses who gave evidence of their understanding of the effect of the qualification and the new proposed clause 6.2 correctly understood its impact.

205. Mr Poole took part in a telephone call on 21 September 2018 with Andy Wood, Nicole Geoghegan, Andrew Cuthbert and Roseanne Serrelli, the last three all being legally qualified. A decision was taken at that meeting to ask all bidders to remove their qualifications. Mr Poole had not attended RP1 as he was in Greece on holiday, but Mr

Pybus took him through the slides for that meeting before he left. He did attend RP2 on 3 October 2018. At that meeting it was recommended that a message be sent to all tenderers asking qualifications to be removed. This was done, a message was sent to Bechtel asking for this and on 11 October 2018 Bechtel again declined to do so. Each time Bechtel had been asked prior to that, the qualification had not been removed. Part of the response on 11 October 2018 by Bechtel reads as follows:

"It is regrettable that you indicate no face-to-face meetings will be held with bidders before the scheduled award date. The Old Oak Common Station project is complex and is proposed to be delivered through an unconventional contracting structure and yet the project is critical to the success of HS2. In the circumstances, it would therefore be prudent for HS2 to meet with each of the bidders in order that bidders can better understand HS2's intentions and HS2 can have a deeper understanding of the various approaches proposed by the bidders and allow for more informed decision-making. By engaging in meaningful dialogue with each of the bidders, HS2 would also go some ways to demonstrate that the evaluation of bids has been conducted on "a fair and equal basis" as committed to by HS2 in the ITT.

We reiterate that we are committed to successfully delivering Old Oak Common Station for HS2. To enable this, we considered the whole project in detail, and in particular how we could help to deliver more scope for less cost. The qualifications, which were submitted with our tender on 11th May 2018, were developed to achieve this objective."

206. This is not the whole of the Bechtel response, but it is sufficient to demonstrate what occurred. Bechtel again declined to remove the qualifications; again requested a meeting; and also, for good measure, suggested that a failure to "engage in meaningful dialogue" meant there was a risk that HS2 was not evaluating the bids on a fair and equal basis. There was no basis for that suggestion; this was simply a threat by Bechtel. The requests by Bechtel for a meeting had been declined several times before; perhaps it was thought that by adding this threat, HS2 might agree to a meeting. In any event, and regardless of what was thought at Bechtel, HS2 did not agree to a meeting.

207. Mr Poole's evidence was that had Bechtel been the leading bidder, and scored the highest in the evaluation, HS2 would have had no option but to issue a disqualification ultimatum to Bechtel under paragraph 6.14.6a of the ITT. HS2 could not, and would not, have accepted the qualification proposed by Bechtel. He also stated that because the qualifications were not commercially acceptable, HS2 would have had to consider other options (including abandoning the procurement altogether) had no other bidder been prepared to contract on an unqualified basis.

208. Mr Poole was, as with the other witnesses, credible and helpful. I accept his evidence. In my judgment, those at HS2 tasked with the procurement knew that the qualification proposed by Bechtel was simply not acceptable to HS2. It was substantial, and central to the commercial strategy and risk profile of the whole of the projects for both stations to have them constructed to the Incentive Targets. It was a fundamental requirement of the CP for each station that they accepted this. Equally, HS2 knew that formally disqualifying Bechtel would be troublesome, and may well lead to litigation, further expense and delay. There was simply no reason to do any of that if, in any event, Bechtel had not won the competition. HS2 therefore did not do so.

Mr Simon Reading

209. Mr Simon Reading works for WS Atkins Ltd and is seconded to HS2. He has in excess of 20 years' experience as a Project Manager and Project Director. He has worked on Gautrain in South Africa and on Crossrail between 2007 and 2016, and on both of these projects he worked as a Project Manager. He was the Technical Delivery Lead or TDL for HS2 for the Phase One Stations, which means not only Euston and Old Oak Common, but also the two Midlands stations, Interchange and Curzon Street in Birmingham.

210. As TDL for the tender evaluation, he undertook an exercise called the alignment review. Each of the questions in the Technical Envelope included a final factor, which required that the tenderer's approach be aligned to its responses to all the other ITT Questions in Section E. I001 included the same requirement. In these proceedings this has been referred to as the Alignment Factor. It is this that Mr Reading considered. He had other responsibilities too, including ensuring a consistent approach by HS2's assessors across the evaluations for Lots 1 and 2, and assisting commercial assurance in facilitating discussions between assessors where there was disagreement on technical matters. He also managed the identification and development of the Tender Promises, as well as preparing specific technical sections of the Tener Evaluation Report.

211. His role in assessing the Alignment Factor was not to conduct any assessment, but to identify lack of alignment in tenderers' responses. He did not evaluate the responses or the materiality of any inconsistencies. If he did identify any inconsistencies, these were fed into the assessment process. If he did identify any, he would be invited into moderation meetings. He did identify one such misalignment in the BBVS bid between E001 and E005. The latter was Work Package Strategy or WPS, and in E001 BBVS had stated that its MRS was aligned to the WPS. No specific package was identified by BBVS and so Mr Reading concluded that he could not positively identify this as an alignment. He also identified one in BBVS' response regarding key dates in E004, and the fact they did not align with those in the E009 response. This lack of alignment had no impact, however.

212. He had, for his evidence in the proceedings, also conducted an ex post facto comparison analysis of three different versions of the MRS. These were the MRS that was tendered by BBVS; the one dated 12 February 2019 that was resubmitted by BBVS just after BBVS was told it had won the competition; and the one in the contract which was part of Contract Data Part 2. This exercise done by Mr Reading was to assess whether the resources tendered by BBVS in the tender MRS had been increased. He concluded that 17 of the 20 disciplines in the later versions of the MRS were comparable with the tender version. The other three would require a far more complicated exercise for Mr Reading to be able to come to a conclusion. I accept his evidence on this comparison exercise, but it is of marginal relevance. What is of direct relevance is not whether BBVS have subsequently increased any of its resources; it is whether the evaluations conducted by HS2, including the factor in E001 that included the MRS, were assessed absent manifest error or other breaches of obligation. Part of Bechtel's case in the proceedings was aimed at demonstrating that the MRS submitted by BBVS contained inadequate resources. Given the consensus score of Concerns awarded for E001, which was effectively driven by the score of Concerns for Factor 5 which included the MRS, there is no doubt that the MRS contained inadequate resources. Had the MRS generated confidence on the part of the assessors, it would not have been given such a score. The

resources tendered by BBVS in the MRS had to undergo some change, in any event, due to the change in the programme dates.

213. I found Mr Reading a credible witness and I accept his evidence. I find that Mr Reading undertook the alignment review exercise without manifest error, and without breaching any of the obligations upon HS2 of equal treatment and transparency.

Ms Katrina Olson

214. Mr Katrina Olson is a member of the Association of Project Management and is currently Senior Project Controls Manager for OOC for HS2, where she is extensively involved in risk management. She started her career at London Underground Ltd ("LUL") in 2004, and has also worked for Turner and Townsend. She worked at LUL on many major projects during her ten years there, including the Power Upgrade programme, where she gained extensive procurement expertise. She has also worked in Paris for the CNEN EDF Project for Hinckley Point C, as well as being the Lead Planner for the Heathrow Airport Passenger Experience portfolio of works.

215. For the procurement evaluation she was an assessor for Questions E010 (Risk Schedule and Management) and I001 (Delivery within Incentive Target). She was given a maximum period of two weeks to assess these questions but was told it should take her about two days of time; she had to travel to the secure area at Canary Wharf to do this work. In fact, it took her almost the whole of the two weeks that had been set aside. Her evidence explained in considerable detail the careful and thorough way in which she went about her task. Her co-assessor on Question E010 was Mr Pang and, on Question I001, Mr Culver.

216. It was put to her that she "drove the assessment" on E010 because the moderation rationale was similar to her drafting for her initial scoring. She disagreed with this and said that the two assessors had very similar views on most of the factors. She said she used the factors, the scoring descriptors, and her professional judgment when assessing the tender responses to these questions.

217. She was also challenged as to whether the concerns about BBVS' resources were taken into account by her. One passage of her cross-examination was as follows:

> "Q. Was it ever drawn to your attention that other assessors, Mr Botelle in particular, had considered that there was an under-resource in stakeholder and consents management in the BBVS resourcing?
> A: I was not aware of that, but I don't really think that that is relevant to this question [meaning the question being evaluated]. The question is about the process of how they would manage risk within a project team, and the bullet points that follow, coaching and training of staff, promoting risk champions and having a positive risk culture and also using a web-based app to also substantiate that it would be the entire risk team who would be working on risks together, I think for me, that was why this [response] was excellent. And the stakeholder manager was just one person, but what was excellent about this was that they actually said that everybody should be part of this risk culture.
> Q. Okay, but that's the way you have assessed this. But was it ever a concern to you that, for example, as I have said, stakeholder and consents management was under-resourced? Mr Botelle also had concerns about the level of project management. Would it not be a concern that you should have been considering whether or not the

plan was actually capable of being delivered with the resources that were provided? A. No, I don't believe so. So the project managers, they actually lead for all of their work packages and they normally, as well, chair or co-chair all of the meetings that are held with external stakeholders, as well as internal. So I don't really think that's relevant to this question, I am afraid –
Q. But for –
A. -- and I don't think seeing a resource plan would have changed my -- I'm definitely certain that seeing a resource plan would not have changed my view on how I scored this question.
Q. Okay. Were you ever asked to consider how this particular answer might be reflected in the way in which this aspect of the contract would actually be delivered? A. I was literally only given the tender responses for E010 and I001. That's all I saw and that's all I could use for my assessment for those two questions.

218. Adequacy of resources was not one of the factors for question E010 (for which both BBVS and Bechtel were given a score of Very Good). There is no reason why the concerns expressed by Mr Botelle when assessing E001, relating as they did to the MRS and to BBVS' tendered resource, should have been communicated to Ms Olson, or if they were, why they should have been taken into account when assessing E010. To have done so would, in my judgment, have been to act in error; it would also have involved evaluating the answer to E010 in a way other than set out in Appendix C. Ms Olson demonstrated very clearly that she had assessed E010 correctly, and without error, still less manifest error. The same conclusion arises in respect of I001, which she assessed with Mr Culver, the Head of Commercial for OOC.

219. Ms Olson accepted that the part of her witness statement which stated "I acted within the margin of my discretion" was "legal jargon" that had been put in to her statement for her by one of the HS2 solicitors, but she said she agreed with it. Given that this is a question for the court, not for a witness, and also given that a witness statement should be in a witness' own words and not deal with legal issues, this sentence plainly should not have been included in her witness statement. No witness has any personal knowledge of the margin of discretion available to their own actions or judgments. Solicitors drafting witness statements need to pay proper attention to the rules concerning how these important documents are prepared. However, this does not affect my view of Ms Olson's evidence, or my conclusion that Bechtel were unable to demonstrate any error in assessment by her, or any breach of the other obligations upon HS2.

Mr Kin Pang

220. Mr Kin Pang is a chartered civil engineer and an associate member of the Chartered Institute of Arbitrators. He has 15 years of experience and has worked for HS2 since 2017. He was, at the time of the trial, the lead planner for OOC. He had worked on procurements when he was at TfL, which was before he moved to HS2, but nothing on the scale of the procurement in these proceedings. Mr Pang submitted three witness statements, including one just before the trial commenced which amended spreadsheets he had exhibited to his earlier statements.

221. He was involved in the procurement for the SDSC, and for OOC he helped with Works Information preparation and assisted in preparing parts of the ITT. He was an assessor himself in addition to this, and he dealt with Questions E009 and E010. He assessed the latter with Ms Olson, and the former with Mr Vincent Lalaurette. Both BBVS and Bechtel scored "Good" on E009, the title of which is Programme Management. Question E010 is entitled Risk Schedule and Management, for which both tenderers scored "Very Good".

222. Mr Lalaurette was not called as a witness by HS2. His draft scores for BBVS had been an assortment of different scores for different factors, including Good for Factor 1, Minor Concerns for Factors 4 and 7 and Moderate for the others. This had led Mr Lalaurette to give an overall draft score of Concerns, whilst Mr Pang had given an overall draft score of Excellent (with all factors Excellent save for Factor 3, which was Very Good). Mr Pang said that he had a lot of experience as a planner, and Mr Lalaurette had a lot of experience on project management.

223. Mr Bowsher therefore pursued this change of position by Mr Lalaurette with Mr Pang, seeking to demonstrate error in evaluation, and also to show that the draft scores of Mr Lalaurette were more closely aligned with what the overall score should have been. Mr Pang explained how the moderation process was undertaken.

"Q: I was drawing -- my question is: what is it that led you to move from or persuaded Mr Lalaurette to go from "lack of significant detail" in the top assessment to "lack of detail" in the moderated response? What's the change in his assessment of the level of detail that leads to that change in assessment?
A. Because I have highlighted to Vincent that, and he agreed, that these are industry best practices, those particular points, that is, and the bullet point, although I agree with him there is a lack of detail on how these techniques, for example, could be -- could be used. So that's what we have summarised in the top document, in which I have referred to the response to this factor is in line with the best industry practice; the lack of detail as listed follow.

(there was then a short query about a reference)

MR BOWSHER: I am puzzled as to how that can be -- can you explain how that can be what changed Mr Lalaurette's mind in this significant factor? Because Mr Lalaurette already had it in mind that these were best industry practices. That's already in his rationale, isn't it? So I don't think that can have been your, as it were, persuading him to come up. Something else, and I don't see it recorded anywhere, has changed him to go from -- do you see, the fourth line -- "significant detail" to "detail". It can't have been the best industry practice point, because he already had that in his original assessment.
A. By mentioning those points, there is obviously some detail, but not -- but there's still lack of detail, but not a significant lack of detail.
Q. Okay. Well, let me come back to this. What is the difference, then? Because he has formed the view that regardless of it being the best industry practice, it is a lack of significant detail. That is his initial assessment.
A. Mm-hm.
Q. His mind has been -- apparently he has been persuaded to agree a different view when we come to the moderated response. I don't understand what it is that has changed his mind because it can't be the best industry practice reference that has changed his mind to get from "significant detail" to "detail".

A. We also went through the specifics of those points, going back to the tenderer's submission, and on reflection, I believe Vincent has changed his mind to agree that is just a lack of detail, not a significant lack of detail. So we have re-read the tenderer's submission as part of the moderation.

224. These questions were aimed at what had led an assessor to change from "lack of significant detail", to "lack of detail", as a result of further consideration, moderation and discussion with his co-assessor. The conclusion as to the level of detail that was missing is obviously a matter of professional judgment, in respect of which the assessor is given a margin of discretion. The court, in this case and on this evidence, is in no position to conclude that the assessors were in manifest error in concluding that the degree of detail that was missing ought to have been characterised as "significant". There was no error shown by Bechtel in the challenge to this witness. The court is in no position to interfere with the final conclusion reached by the two assessors, after discussion by them over a number of hours, challenging one another and exploring their different points of view to arrive at a consensus score. Mr Pang said in re-examination that the whole exercise on E009 was done over two days. Further, the questioning in cross-examination also has, implicit within it, the flawed premise that an individual draft score is to be equated with a final consensus score. There were two assessors for a reason; in this case their expertise was not the same, and their skills complemented one another. Mr Pang started with higher draft scores and moved down; Mr Lalaurette started with lower draft scores and moved up. They arrived at a joint final score different to the ones they started with at the draft stage. This is a good example of the process of moderation working as it was intended to, in my judgment.

225. Mr Pang was also asked, as had been Ms Olson, whether he was aware of Mr Botelle's concerns about the MRS. He said that he was not, but it would not have mattered even had he been, because Question E001 was dealing with a different subject, and those concerns related to management resources and programme delivery. None of the factors in E010 related to level of resources. That was the correct approach by Mr Pang, given the way the scoring was explained in the ITT. The MRS was not part of E010 and adequacy of resources was not a Factor for that Question. It would therefore have been quite wrong to have adopted adequacy of resources as a feature of the evaluation applied to answers to E010.

226. There is no basis for any finding of error in the scores for these two questions, still less manifest error, or for any breaches of the obligations of equal treatment or transparency upon HS2.

227. Mr Pang was also asked about the changes in dates contained in Contract Data Part 1. He had attached a table dealing with all the changes to his third witness statement. He explained that some delays could have a longer effect than the actual initial delay in the programme. For example, delays could be caused to works that have to be done during Christmas possession, what is also sometimes called disruptive possession. Certain critical works can only be done over the Christmas period, when continuous operation time is needed and the lines that are otherwise active can be closed for longer periods. If one Christmas period was missed due to a delay of a few weeks, the works would have to be done in the next Christmas period, one year later. That affected some of the date changes, for example that for SC1 and KD5. The date for SC1 was adjusted to align with the agreed staging of works on the Great Western Main Line and to meet

Christmas possessions. Although there were changes to a number of the dates – and these changes were made at different times, namely August 2018, February 2019 and September 2019 – Mr Pang considered that the terms of the ITT permitted HS2 to do this. I agree.

228. Indeed, it would have been extraordinary had the very detailed ITT *not* included express provisions permitting HS2 to change the dates. On a project of this nature – possibly the largest infrastructure project in the UK since the construction of the Channel Tunnel - changes to start dates and key dates could be seen as almost inevitable, for any number of perfectly understandable reasons. It is not necessary to provide an exhaustive list of what those reasons might be. As has been seen, on contract award alone, all that was required to cause delay was the issue of proceedings challenging the result of the procurement, which would (and in this case did) lead to the automatic suspension causing delay. Although such suspensions can be lifted by agreement or by court order, each of those steps take time to accomplish. Bechtel's line of argument on the changes in dates was put by Mr Bowsher at the end of his cross-examination:

> Q. If bidders had had these different dates available to them, the dates as of February [2019], those are dates they could have taken account of in preparing their bid. A. Yes, if they were asked to or be asked to bid on these, yes, they then would have -- they could have -- obviously they could have submitted a different programme.

229. I found Mr Pang a credible witness and I accept his evidence. However, plainly the hypothetical scenario shown in the question and answer at [228] above is precisely that – entirely hypothetical. Of course, different dates could have been included in the ITT, and those dates would have been taken account of by the bidders in their tenders. This is, however, irrelevant. The issue is whether by changing the dates HS2 was in some way acting contrary to the terms of the procurement, or advantaging the winner bidder, or disadvantaging Bechtel, or placing a contract for such a different project that the procurement award was in breach of the regulations. Given the terms of the ITT and the nature of the project, none of these consequences arise. Mr Pang was entirely correct in his answer; had the new dates been known about at tender stage, those were the dates that the bidders would have used. But they were not known until later, so they were not used at tender stage. The dates upon which Mr Bowsher concentrated, namely those of February 2019, were not, in any event, the ones used in the contract because these dates changed again, due to the delay caused by the automatic suspension. However, the point about their lack of relevance remains a valid one. None of the evidence about the changes to any of the dates advances Bechtel's case.

Mr Benjamin Rooke

230. Mr Benjamin Rooke is a Senior Procurement Manager at HS2 in the Phase 2a Construction Procurement team and has been employed at HS2 since 2014. He worked on the procurement for the Phase One South Stations in 2017 before he moved to Phase 2a. He was involved in the development of the ITT, namely Volume 2 Works Information. He would collate and coordinate drafting from Subject Matter Experts for inclusion in the Works Information or WI. He submitted one short witness statement dealing with a specific document, the Low Scores Check document, which Bechtel maintained HS2 would use to address concerns it had over BBVS' tender submission. Bechtel also maintained that, in reality, BBVS' tender was unacceptable without further negotiation with HS2.

231. Mr Rooke's evidence was that this document was not used. He had created the document in July 2018 dealing with scores of Concerns or Minor Concerns by tenderers on both Lots 1 and 2. This was at the request of Mr Udunuwara, his line manager, and was to flag areas that may need to be clarified or negotiated. The document was archived and was not used.

232. He had also drafted the Tender Opening and Evaluation Plan or TOEP in collaboration with the procurement team including Mr Pybus, Mr Udunuwara and Mr Wagstaff. Mr Rooke was also the moderator for Questions E004 and E005, on the final day of three days of moderation. That had concerned one of the other tenderers, and neither BBVS nor Bechtel. The other two days were done by Mr Pybus. He was asked about the process of moderation, both generally and specifically, again highlighting any changes from the draft scores of the assessors to the final consensus scores. He explained that his role as moderator was to record the views of the assessors, who were jointly responsible for the final score. None of the evidence arising out of this demonstrated any error in evaluation, in my judgment, or breach of obligation by HS2.

233. Mr Rooke was asked about a form regarding conflicts of interest that assessors had to sign relating to previous working relationships with tenderers. Assessors had to confirm a conflict of interest declaration on first accessing the AWARD portal in any event. This part of his evidence did not seem to be of any relevance, but given it was elicited in cross-examination and not in his witness statement, this is not a criticism of Mr Rooke. He was also asked about documents that recorded reviewing the draft rationale by assessors before moderations took place. He rejected any suggestion that he was trying to influence assessors, and I accept his evidence. The document demonstrated that assessors' attention had been drawn in some instances back to the scoring descriptors. That does not constitute interference with the assessment or the evaluation, in my judgment.

234. He also had a role in preparing some parts of the Tender Evaluation Report, namely the generic areas that covered both OOC and Euston. He had lifted the text within that archived document that dealt with the BBVS MRS from AWARD, so the same text appeared in the Tender Evaluation Report for RP1, but he was not responsible for that part of the document. The text was the same merely because it came from the same source, AWARD. Mr Rooke led on the post-tender clarification that was dealt with at the meeting of 5 September 2018, but on the Euston lot. He was not involved in the OOC meeting on that day as he was leading on Euston. He was clear that the meetings on that day were for clarification, not negotiation. I accept that evidence too.

235. He was also involved in finalisation of the documentation necessary for contract award, and for changes necessary to the GMMP that was to go into the contract. Mr Chan assisted him with this. These changes to Contract Data were made so that the contract documents reflected the state of play at the time the contract was entered into, which did not occur until after the automatic suspension was lifted. I found Mr Rooke's evidence of assistance and I accept it. None of it assisted Bechtel's case in terms of either manifest error in evaluation, interference with assessors' scoring, or breach of obligations by HS2.

236. The final two witnesses called by HS2 are both partners of Sharpe Pritchard, a well known firm of solicitors. They are both procurement specialists and are seconded to HS2, but are engaged as consultants and not employees. HS2 has its own legal

department. They both manage external lawyers, and provide what was called an interface between commercial, legal, procurement, consents and delivery teams. Neither of them provide legal advice to HS2.

Ms Roseanne Serrelli

237. Ms Roseanne Serrelli is a procurement specialist, a lawyer and a partner of Sharpe Pritchard. She qualified as a solicitor in 1994. She was engaged in 2015 by HS2 as a consultant, although she remains a partner at Sharpe Pritchard. Her role at HS2 includes spotting procurement or legal issues early, so that HS2 can seek legal advice at an early stage; she also ensures guidance from the legal team is provided to other teams within HS2 and acted upon; and she reviews comments and queries from tenderers and discusses appropriate responses. Her role at HS2 does not involve providing legal advice herself. Depending upon the workload at HS2, she splits her time between HS2 and being at Sharpe Pritchard, doing other legal work. She is not exclusively engaged only upon HS2 business.

238. There were mid-bid meetings with tenderers in March and April 2018, which were an opportunity for tenderers to meet the Specialist Teams and seek clarification of requirements. She attended the first one with Bechtel on 8 March 2018 but not the second one, which was in April 2018. Her evidence went predominantly to the issue of qualifications. Qualifications by tenderers were first considered by a team of which Ms Serrelli was a member, including others such as Mr Pybus (for Old Oak Common) and his opposite number on Euston, Mr Udunuwara, together with the respective commercial leads for the two stations. For Old Oak Common this was Mr Blair. Ms Serrelli had no involvement with the moderation or moderation assurance process. Matters were thereafter referred to the HS2 Senior Leadership Team where necessary.

239. HS2 did not impose a blanket ban on qualifications, as this would have – to use Ms Serrelli's phrase – "reduced market appetite". Qualifications were therefore permitted, but HS2 had the right under the ITT to seek withdrawal of them. This was included in paragraph 6.14 of the ITT. HS2 could reject tenders. As matters transpired across both Lots, on some non-important qualifications HS2 conceded; the majority were withdrawn. On 6 August 2018 a revised set of contract conditions was produced to reflect this.

240. Ms Serrelli was very clear in her evidence, both in her witness statement and when she was cross-examined on this subject. The qualifications proposed by Bechtel to clause 6.2 were fundamental and changed the risk profile for both the Programme Target and the Incentive Target. They were considered both by the HS2 legal and commercial teams. The qualifications to clause 6.2 were considered to be serious at HS2.

241. Bechtel were not willing to accept that they would be bound by either the Programme Target or the Incentive Target at the Consolidation Point, which paragraph 3.12 of the ITT made clear was required. This was central to the commercial strategy of the contract to be entered into with the Construction Partner. Instead, Bechtel were proposing what amounted to a break clause if it chose at the Consolidation Point not to confirm that either the Programme or the Incentive Targets (or both of them) was (or were) not achievable. This qualification was not acceptable to HS2. It would not have been practical for HS2 to have exercised the break clause proposed by Bechtel and to have terminated the contract with Bechtel at the Consolidation Point. HS2 would have

no commercial leverage at that point. It would also have put the OOC contract out of step with the Euston contract.

242. The Bechtel qualification to clause 6.2 was unacceptable to HS2. Bechtel was given numerous opportunities to withdraw this qualification, and did not do so. Had Bechtel been the winning bidder otherwise, it would have been disqualified. There was, however, no need to do this as BBVS was the winner of the competition. Ms Serrelli explained that there was another qualification from Bechtel that could potentially have been as significant, namely that lowering the limit on liability, but that did not take as much time as the clause 6.2 one did.

243. There were good reasons for HS2 not to issue a disqualification ultimatum to Bechtel, not least something might happen to BBVS prior to contract award (such as insolvency, as had recently happened to another major company, Carillion), and also time and governance would be expended in doing so. Those involved at HS2 also expected Bechtel to "react badly" to such a decision. By reacting badly, I interpret that to mean potentially the issue of legal proceedings. This would lead to distraction from the process of finalising the procurement and also potentially increase costs, which would have to be met from the public purse. She also said that if Bechtel had won the evaluation, and there had been a second placed bidder without qualifications, HS2 would have awarded the contract, not to Bechtel, but to that second placed bidder, due to the qualifications issue.

244. I accept Ms Serrelli's evidence on this important area of the case. Her analysis of the impact of the qualification to clause 6.2 upon the contract terms is correct. Her analysis of the options that would have been available at the Consolidation Point to HS2 under the new clause 6.2 is also correct, although terminating the contract with Bechtel at that point would essentially constitute no option at all. Her explanation as to the potential or likely consequences had a disqualification ultimatum been issued by HS2 to Bechtel are also, in my judgment, correct. HS2 had requested these be withdrawn and Bechtel would not do so. Issuing an ultimatum to Bechtel when BBVS was the winning bidder was not necessary. On the balance of probabilities, Bechtel would have issued legal proceedings had such an ultimatum been issued. This would have caused extra expense to HS2 and delay.

245. I also accept her explanation of the reasons for HS2 declining to have a meeting with Bechtel when Bechtel, numerous times, asked for one. It was the stock response of Bechtel each time HS2 asked for the qualifications to be withdrawn. Ms Serrelli took the view that to have such a meeting would be dangerous and potentially unlawful under the regulations. She explained that this would have been potentially unfair to other bidders. I accept that is the correct analysis. I also consider that there was no valid reason why HS2 should agree to such a meeting. For some reason, Bechtel persisted with these requests each time HS2 requested withdrawal of the qualifications.

246. I have dealt above with qualifications when I summarised the evidence of Mr McMonagle. I also deal with it further below. However, in terms of evidence, Ms Serrelli made clear her depth of experience in this field by reason of her input on this subject, both during the procurement generally, and also in particular throughout September and October 2018. This was when HS2 took its final decision on how to deal with this subject, including issuing Bechtel with a request for removal, which led to Bechtel confirming on 11 October 2018 that it did not withdraw the qualifications.

247. Ms Serrelli was also at the meeting of 5 September 2018 when clarification was sought from BBVS. She described this meeting as "awkwardly short" and said it took less than an hour. She said there was some embarrassment about how short the meeting might be, and light-hearted discussion about potentially having to engage in small talk due to this. She said clarification was given by BBVS about resources, which could also be described as reassurance, the word used in the report prepared for RP2, and she said there was nothing further dealt with in the meeting of 5 September 2018 than what was included in the agenda, the script for the meeting (pre-prepared at HS2) and Mr Pybus' notes. She said it had been agreed beforehand that Mr Pybus would keep the notes of the meeting. She had prepared a document herself of matters upon which she sought legal advice, but she did not keep a note of the meeting in that document, it merely happened to be prepared on the evening of the same day as the meeting. She was not keeping notes herself, and made the point that there was a lawyer for HS2 at the meeting, namely Mr Andrew Cuthbert, but she did not know if he kept his own notes or not.

248. She maintained that the handwritten notes by Mr Pybus constituted the handwritten minutes of the meeting, which I do not accept, at least not in the formal sense that the word "minutes" usually conveys. I do not consider his notes could be elevated to that status, although I accept that Ms Serrelli believed he was keeping the minutes, so in a way her description of that is understandable. The only part of her evidence that I do not accept is her description of his notes. I accept that it was agreed Mr Pybus would keep notes, but I do not accept that it was agreed Mr Pybus would keep minutes of the meeting. The fact that Mr Pybus' notes were not used to create the minutes in February 2019 is further evidence of this. In my judgment, nobody was tasked with keeping minutes of the meeting. Ms Serrelli was, however, giving me wholly sincere evidence, and she obviously thought at the time that was what Mr Pybus was doing.

Ms Nicola Sumner

249. Ms Nicola Sumner is also a lawyer and partner of Sharpe Pritchard, and she was also engaged in 2015 at HS2 on the same basis as Ms Serrelli. She qualified as a solicitor in 1995. She advised DEFRA and local authorities on the waste infrastructure PPP/PFI programme between 2000 and 2013, and she was also involved in the procurement of the Thames Tideway Tunnel project between 2012 and 2015. She therefore has extensive experience of procurement. She has been involved in all the Phase One procurements at HS2, including the Enabling Works Contracts, the MWCC, the Interchange and Curzon Street stations, and the SDSC.

250. She was involved with preparing some parts of the ITT and was also involved in providing training to moderators and assessors. She gave the assessor training in conjunction with a colleague, Lauren McNally, who was the Senior Procurement Manager at the time. She explained that the process of evaluation and moderation was "very strictly managed and controlled in order to ensure compliance with HS2's published ITT evaluation methodology. Assessors conducted their assessments in a specific evaluation room with access only to the documents relevant to the questions they were assessing." The moderation meetings were also held in a secure room. AWARD was used, and she re-iterated certain points of the training in an email to all the moderators on 10 May 2018, the training having been done in April.

251. She also performed the moderation assurance role, which was to review and quality assure the outcome of the moderation process for the technical questions. This was provided for in the ITT itself. For this purpose, she was given access to the responses to the Technical Envelope ITT questions on AWARD. She also attended some moderation meetings and reviewed the draft moderation minutes. She had no technical input to the assessments, or to the scoring. Moderation assurance was to consider issues such as typographical errors, drafting in the minutes not making sense or appearing to be inconsistent, and to identify areas where the moderation minutes did not adequately explain the rationale. Mr Cuthbert performed part of this role in her stead when she was on holiday for some of July, namely 12 to 22 July 2018. In particular, in her capacity concerned with moderation assurance she attended part of the moderation for E001. Two minor clarifications were required, but neither of them related to the bids or scoring for either BBVS or Bechtel. She also attended some of the moderation meetings for E002, E004 and E007, and also part of that for I001.

252. There was a pleaded allegation from Bechtel that she and Mr Cuthbert encouraged alteration of the documentary record (the word used was "curate") to drive down certain consensus scores. She strongly refuted this in her written statement, and when the matter was pursued in her cross-examination (although more from the point of view of Mr Cuthbert doing it, rather than Ms Sumner to any appreciable degree) she rejected it too. In any event, I find that there is no sound evidential basis for such allegations. Emails from Mr Cuthbert showed him requesting clarification due to draft minutes that were not sufficiently clear, but none of the material available showed attempts or encouragement to change, or drive down, scores. There were passages where Mr Cuthbert asked the assessors to consider the balance they had struck between the scores for the different factors and the overall score. She explained that in moderation assurance those involved sought to achieve consistency. She also said that she did not believe any scores were changed as a result of the moderation assurance review process.

253. I accept her evidence, both concerning the aim of the moderation assurance process, and how in practice it operated on this procurement. None of the evidence that emerged during either her cross-examination, or that of her colleague Ms Serrelli, advanced Bechtel's case.

254. The only area which remained somewhat unsatisfactory, following the evidence of both of these highly qualified solicitors who are extremely experienced in procurement, was the lack of proper minutes for the meeting of 5 September 2018. This was not something in which Ms Sumner was involved, and she had not attended that meeting. I deal with this subject further below.

General observations on the evidence of HS2

255. I heard evidence from a great many of the assessors. They were taken through numerous moderation minutes, and the draft entries were also available that showed what the assessors' initial views were when they arrived at their draft scores. The moderation process led to these scores moving in some instances, and the final score that emerged as a result of the consensus reached by the two assessors was jointly agreed by them. Their explanations for their final scores were recorded, and the moderation minutes were reviewed by the moderation assurance team. Mr Bowsher QC for Bechtel cross-examined all the HS2 witnesses closely, and did his best to try and identify areas, in respect of many of the factors that underlay each question, where the assessors had

fallen into error. He also attempted to demonstrate interference by the moderators with the assessors and their scoring, and failures by the assessors properly to score the answers both of BBVS and Bechtel, and also alleged failures in explanation for the final scores in the minutes. This exercise took about 70 to 80% of the hearing time allocated for the trial, due to the number of different witnesses called by HS2.

256. Mr Bowsher is very experienced leading counsel and an accomplished cross-examiner. However, no matter how he tried, in my judgment he simply could not demonstrate or expose any errors at all in the evaluations or the scores, still less any manifest errors. This is because there were none. I remind myself of the most recent judicial statement concerning manifest error, per Stuart-Smith J (as he then was) in ***Stagecoach East Midlands Trains Ltd v Sec of State for Transport*** [2020] EWHC 1568 (TCC) at [63] and [64]:

> "[63] In Case T-250/05 ***European Dynamics v Commission*** (at [89]), which concerned a procurement by the EU institutions conducted under the Financial Regulation, the Court stated as a general preliminary point that:
>
> "… it should be recalled that the Commission has broad discretion with regard to the factors to be taken into account for the purpose of deciding to award a contract following an invitation to tender, and that review by the Court must be limited to checking that the rules governing the procedure and statement of reasons are complied with, the facts are correct and there is no manifest error of assessment or misuse of powers … ."
>
> This is a salutary reminder that the Court should always resist the temptation simply to substitute its view for that of a contracting authority and should only intervene where sufficiently material breaches of obligation are shown.
>
> [64] It is common ground that "…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": see ***Energy Solutions*** at [273] to [277]."

257. Any errors would therefore need to be clear ones. Here, there are none. This failure on the part of Bechtel to demonstrate, evidentially, any errors, has a fundamental impact upon the majority of its case against HS2. It leads to legal arguments being advanced by Bechtel from within an evidential vacuum. The court will not interfere if there are simply errors in evaluation; they must be manifest errors. This is a high bar, as has been said many times. An evaluator has a margin of discretion in any event, but manifest error has a broad equivalent of irrationality. The court will give proper consideration to the expertise of the assessors, and here, where matters of judgment by evaluators are concerned, all of these different legal expressions present insurmountable obstacles to Bechtel's challenges to the different scores that were awarded, both to it and to BBVS. However, before one even comes to consider the degree of error and whether it is manifest, there must be some error in evaluation. Here, no such errors could be demonstrated by Bechtel. Further, there was no lack of equal treatment or lack of transparency either. The only area which merits further explanation is the unsatisfactory minuting of the meeting of 5 September 2018 which I deal with further below.

258. In this case, so far as the evaluation, assessment and scoring are concerned, the "errors" that are alleged amount to no more than subjective disagreements from Bechtel that

BBVS ought to have been scored lower in certain respects, and that Bechtel ought to have been scored higher, on some of questions. There is, however, no judicial remedy for subjective dissatisfaction at losing a procurement competition. Bechtel has no evidential basis for any of its criticisms of the evaluation and the scoring.

259. This alone is not fatal to all of Bechtel's claims. Those areas of the case that concern abnormally low tender, changes to the contract and abandonment do not depend upon the finding of manifest errors in evaluation. However, the evidential picture does have one very telling result, which is that all of the issues which allege manifest errors of assessment, or other breaches of obligation, in respect of the scoring of specific answers to the Questions in the Technical Envelope, must fail. I find no such errors.

The meeting of 5 September 2018

260. This was a post-clarification meeting, held with the highest-scoring bidders for each of Old Oak Common and Euston. The ITT expressly permitted HS2 to hold such meetings, stating as it did at paragraph 2.11.1 the following: "HS2 Ltd reserves the right to hold post-Tender clarification meetings and/or to require Tenderers to present their Tenders."

261. One meeting was held in the morning, one in the afternoon. Mr Blair said that the meeting for Old Oak Common was the one that took place in the morning and lasted a little over one hour (he corrected this, in chief, from the original period stated in his witness statement of two hours). This was a curious correction, given in cross-examination he would, from time to time, state that his memory of the meeting did not extend to certain matters he was being asked about. In my judgment, the actual duration of a meeting that took place two years ago is less likely to be memorable than what was discussed. Further, he seemed when he drafted his witness statement to be clear that it took two hours, which leads one to wonder how his recollection on this subject could suddenly become clearer just before the trial, and when the meeting was further in the past than it was when he prepared his statement. However, it may be that his statement was drafted by reference to the agenda, which stated that the time window for the meeting was to be two hours. In any event, I find that this minor correction does not matter, and certainly does not affect my view of him as a witness.

262. A document was created in advance of the meeting entitled "Guidance to HS2 attendees" and a "Meeting Script" was prepared. This is because the HS2 attendees knew that there were limitations on what could be said in the meeting. There was a list of agenda items, and discussion was not to go wider than these. Also, the purpose of the meeting was to "close out" the remaining qualifications on BBVS' existing tender and to clarify certain matters (including resources) and achieve confirmation that the contract dates – which had been revised - were achievable. Different HS2 attendees were allocated specific agenda items to speak to in the meeting, depending on their specific involvement and expertise. BBVS did not know, at that meeting, that they were the first-ranked tenderer for OOC.

263. HS2 took a specific decision not to inform any tenderer of their ranking within the evaluation process until the issue of the standstill letters giving the outcome of the competition, which did not occur until February 2019. However, as has been seen in [128] to [131] above, news that the meeting was happening became known to at least

Bechtel, and it was this that led to Mr McMonagle's email messages of 24 August 2018, and the associated concern at Bechtel that they may have been disqualified.

264. Mr Andrew Cuthbert, who was HS2's Senior Legal Counsel, led the agenda item relating to the qualifications that remained in BBVS' bid. BBVS agreed to withdraw each one, save for one relating to amendments to clause Z19.2 (which was minor and which HS2 was prepared to accept). Save for one qualification in respect of which BBVS asked for time to consider, the decision to withdraw these was communicated to HS2 at the clarification meeting itself.

265. Mr Botelle led the item relating to BBVS' resources. BBVS clarified that they would be obtaining further resources from other London rail projects which were approaching completion, and answered the questions raised to the satisfaction of the HS2 attendees who were concerned with this subject. There was also a discussion about the fact that the tendered MRS had indicated that certain staff would be operating at 175% utilisation for the first month of the Contract. The explanation for this was not that BBVS intended to utilise the time of any individual team member 175%, as seemed to be suggested in the MRS. The reason for it was that month 1 of the first GMMP period was to cover a period of 7 weeks, as "Year 1" appeared to be 57 weeks long. Month 1 was therefore longer than one month. This was, therefore, an error in the MRS document; although perhaps a more accurate way of expressing it was that this was an attempt by BBVS to deal with the month 1 issue by inserting 175%, which was the error. Regardless of how it is expressed, this was explained by BBVS in the meeting and the explanation was accepted by HS2. "Year 1" in the ITT was indeed longer than 52 weeks; and month 1 was longer than one month.

266. BBVS was already the first-ranked tenderer prior to the 5 September 2018 Meeting. Those involved at HS2, having considered input from the HS2 legal team, decided that there was no reason to revisit the scoring of BBVS' tender as a result of the discussions held, or clarifications given, by BBVS at the meeting. The scores were already finalised prior to the meeting as all the evaluation, moderation and assurance processes had been completed by then. The expression used by some of the HS2 witnesses was that the scores were "locked down".

267. There are the following points that are important in respect of this meeting:

1. The holding of such a meeting was expressly provided for, and permitted, under the express terms of the ITT.

2. BBVS was the bidder with the highest score going into the meeting. I find that nothing occurred in the meeting which would justify changing that score. There is simply no evidence to support such a suggestion, and all the evidence that is available is contradictory to that suggestion. Provided therefore that the score of BBVS (and that of Bechtel) had been reached absent manifest error or other breach of obligation, neither the holding of this meeting, nor its content, assists Bechtel in these proceedings. The reassurances that were provided by BBVS were of a post-tender clarification kind that were expressly permitted by the ITT, and were also consistent with the principle of equal treatment. In my judgment, there is no basis for any suggestion that they were impermissible material changes (or promises to make such changes), or that HS2 was in breach of its duties of equal treatment and transparency, or manifestly erroneous, in respect of them.

3. The clarification which was sought by HS2 in respect of the BBVS resources, given the score of "Concerns" awarded to the answer to Question E001, was not only understandable, but in my judgment required. The descriptor for such a score was that this would represent "a significant risk to HS2". Although less severe than "a substantial risk to HS2", which would have led to an award of "Major Concerns", "significant" still represents a large risk. HS2 could only, sensibly, have required further clarification in order properly to assess the level and organisation of resources proposed by BBVS. This was provided, and the matter proceeded thereafter.

4. The clarification sought in respect, for example, of the 175% MRS point (readily explained due to the month 1 issue) is precisely the sought of detail that required clarification. It was a simple point, and appears to be have been simply explained.

268. However, and this point does not appear to be fully understood by Bechtel, even if the clarifications had *not* been provided by BBVS, this would not have changed the score given by HS2 to BBVS for E001 to one of Major Concerns. The level of risk assessed by the assessors due to BBVS' MRS would have remained significant; it would not have changed to substantial. The score of Concerns given to BBVS was one that was awarded without manifest error. It was not a score that was given conditionally, or in some way dependent upon, later clarification.

269. There is, however, one area in respect of which HS2 are properly open to some criticism in respect of this meeting, and that is the lack of comprehensive minutes. Although the scores for the different tenders were finalised prior to this meeting, and therefore strictly speaking this meeting was not part of the evaluation process, it was part of the life of the procurement and it did come prior to contract award. It was therefore important that a proper record was kept of what took place.

270. Yet there were no minutes kept. I find that nobody was specifically tasked with taking the minutes of the meeting, and nobody was tasked with drawing up the minutes. Mr Pybus said that Ms Serrelli was taking a note; he was mistaken in that, but the document in which she referred to part of the meeting (parts of which were subject to legal professional privilege) was disclosed (with those parts properly redacted). This document is not a minute. Ms Serrelli said that Mr Pybus was taking the minutes, but that is not correct either. He was taking some notes, certainly, but he denied that he was the taker of the minutes. This confusion about this subject ought not to have occurred. The meeting should have been properly minuted, and if necessary, someone should have attended the meeting specifically to take the minutes. Minuting a meeting is not the same as being an attendee who just happens to take some notes. Usually in larger minutes, a specific person is tasked with taking minutes, and those draft minutes are circulated to at least some (if not all) attendees to consider and approve. Neither of these things happened.

271. In February 2019 – therefore nearly six months after the meeting– it was realised by HS2 legal personnel (whether from Sharpe Pritchard seconded to HS2, or within the HS2 legal department) that there were no proper minutes. At attempt was made, therefore, very belatedly, to have some minutes drawn up. Whoever realised that there were no minutes, must have plainly also realised that minutes of such a meeting were obviously required. The documents used for this purpose were the agenda or script, and parts of the document created by Ms Serrelli. These were not particularly fulsome; in fact, they are sparse in the extreme (although not as sparse as those taken by Mr Blair)

This lack of minutes is not the fault of Mr Pybus; his notes were plainly taken for his own purposes, and I find that they were never intended to be minutes of the meeting, or even draft minutes. Mr Pybus' notes were not used as a baseline for the minutes drawn up in February 2019. The document said to be the minutes of the meeting cannot therefore be described as "minutes" in the sense that term is normally used, but typed up versions of sparse and partial notes and recollections. On the question of resources, the following is the extract from "the minutes":

> "3.2.1 *At the meeting HS2 Ltd requested clarification from BBVS on their resource levels and approach, including on Project and Contract Management, Commercial Management, Stakeholder and Consents Management, Engineering Management, Procurement Management, Estimating / Cost Planning and Logistics. A discussion was then held where BBVS provided further insight into their resource levels and approach*.
>
> ***No further action required"***

272. That paragraph adds very little in terms of substantive detail, a situation probably caused by the lack of proper minutes. This position regarding the minutes is wholly unsatisfactory. It was necessary to hear oral evidence from the different attendees who were called as witnesses for HS2 at the trial, in order to ascertain exactly what took place at the meeting. The five attendees from HS2 who gave evidence before me were Mr Blair, Mr Botelle, Mr Pybus, Mr Reading and Ms Serrelli. Having to hear oral evidence in a High Court trial is an extraordinarily wasteful, expensive and inefficient way for parties to a procurement competition, for a project costing over £1 billion, to require, simply in order to ascertain what took place at a meeting that took about (or less than) one hour. It also unnecessarily uses court resources and increases the length of the trial. It simply would not have been necessary to do this, had proper minutes been kept, as they undoubtedly should have been.

273. The court must, therefore, consider what consequences, if any, flow from this failure to keep a proper minute of the meeting of 5 September 2018. No minute was kept of other meetings, such as RP1, but that was an internal meeting and did not involve direct, face-to-face discussions with one of the bidders, and the leading bidder at that, as did the meeting of 5 September. Record keeping is an important part of the process of procurement competitions, and records of meetings of this type are obviously going to be subject to scrutiny if there is a procurement challenge.

274. The principle of transparency requires that a utility such as HS2 maintain suitable records of its procurement process to enable (i) an economic operator to understand the reasons for which decisions adverse to it were taken in the course of that process and (ii) the Court to exercise its supervisory jurisdiction. This is clear from a number of authorities, but it is not necessary to cite them all. In ***Lancashire Care NHS Foundation Trust v Lancashire County Council*** [2018] EWHC 1589 (TCC) Stuart-Smith J (as he then was) re-stated the importance of this and stated:

> "[53] The importance of clarity as to the decisions and reasons of a moderation panel is reflected in the following observation of McCloskey J in ***Resource (NI) v NICTS*** [2011] NIQB at [35], which I respectfully endorse and adopt:

"I interpose here the observation that, under the current statutory and jurisprudential regime, meetings of contract procurement evaluation panels are something considerably greater than merely formal events. They are solemn exercises of critical importance to economic operators and the public and must be designed, constructed and transacted in such a manner to ensure that full effect is given to the overarching procurement rules and principles."

[54] In the light of these statements of principle and considerations, I look for the reasons why the Council awarded the scores that it did; and I accept the submission that "a procurement in which the contracting authority cannot explain why it awarded the scores which it did fails the most basic standard of transparency."

(emphasis added)

275. In that case, the absence of records went to the process of evaluation itself. The challenge to the outcome of the procurement succeeded. However, in the instant case, the process of evaluation is fully documented. A full explanation is available in this case on the documents for the scores that were awarded; the lack of adequate minutes goes simply to the meeting of 5 September 2018.

276. The importance of making appropriate records of key decisions in a procurement was also recently reinforced by Horner J in ***Northstone (NI) Limited v Department for Regional Development (Transport NI)*** [2020] NIQB 79 in a passage where he stated as follows:

"[29] There are no minutes of the meeting of 24 September 2015 available for the court to consider. No satisfactory explanation has been provided to the court for the absence of minutes. I would have expected the meeting to be minuted, and in particular, I have difficulty in understanding why there is no record of any discussion about "the duplication of key personnel/operatives/sub-contractors/plant in the Quality Submissions" for each of the six Contracts. This is a telling omission. If minutes had been taken and lost I would have expected to be told this in no uncertain terms. The other alternative explanations are that there are minutes but that as these undermine DRD's defence they have not been disclosed. Alternatively, the decision to keep no minutes was a deliberate one because DRD was fearful of creating a hostage to fortune. Neither of these explanations reflect well on DRD.

The court was told that the DRD (and the Civil Service in Northern Ireland) did not have any policy for when meetings should be minuted. If this is correct, then it is about time such a policy was drawn up by the Civil Service in general, and the DRD in particular. The DRD should be accountable to the tax payer and its decision should be transparent and lawful. The records of its meetings, especially where they relate to the award of contracts worth millions of pounds, should be accurately minuted as a matter of course. I would expect such a meeting, as the one on 24 September 2015, to be minuted and, if not, a good reason why no record was kept. In this instance I was offered no explanation other than it was informal meeting. I do not accept that this an adequate or acceptable explanation."

277. That judgment is being appealed, with the appeal coincidentally to take place on 4 March 2021. I respectfully agree with the sentence in the above passage that "the records of its meetings, especially where they relate to the award of contracts worth millions of pounds, should be accurately minuted as a matter of course", still more so

when the contract in question is, as here, worth a billion pounds. Bechtel submitted that there were two failures in respect of this lack of minutes. Firstly, this constituted a breach of the obligation of transparency. Secondly, that "a substantive and significant amendment" was made to the MRS tendered by BBVS at the meeting. This submission was made in paragraph 168 of Bechtel's written opening submissions for the trial. It was submitted that an inference could be drawn from other documents (such as the presentation at RP2) that "BBVS' resource levels would need to be, and would be, amended at a future date, but that it was considered too risky to formalise those amendments prior to announcement of the Preferred Bidder/Contract award" (emphasis present in original). This submission was said to be "supported by the fact [HS2] did ask BBVS to amend its Tendered Management Resource Schedule on notifying it of its status as Preferred Bidder on 5 February 2019" (emphasis again in original).

278. I reject those submissions. My findings on the two points advanced by Bechtel are as follows. Firstly, there is no evidence to support these contended-for inferences. HS2 scored Question E001 which included the MRS tendered by BBVS without manifest error. There were obviously concerns at HS2 about BBVS' intended resource in the MRS. This is what led to the score of "Concerns". It was sensible to seek clarification in respect of resources, and that was obtained. I find that the clarification that was sought and provided was entirely proper, and permitted within the terms of the ITT. There is no basis for suggesting that anything was "too risky" to deal with properly prior to the award of the contract, as though there were a hidden or implicit agreement reached at the meeting of 5 September 2018, but it could not be done until later. Secondly, by the point of contract award, HS2 had also issued the Revised Contract Data Part One. This of necessity required amendment to the MRS. I find that nothing that occurred at the meeting of 5 September 2018 affected the outcome of the competition. I also find that, although it is a technical breach of the obligation of transparency that there were no comprehensive minutes kept of that meeting, the breach is in the circumstances a technical breach only, if not *de minimis*, and had no causative effect.

279. Mr Bowsher for Bechtel submitted that a failure on the part of HS2 to comply with its obligations to keep *any* of the proper records ought to result in Bechtel succeeding upon liability. I reject that submission. There is no justification for such an automatic consequence for a failure to keep proper minutes of this meeting. It would be wholly disproportionate. In my judgment there is a distinction to be drawn between records that show how the scores were reached, and other records of what occurred during the procurement competition as a whole. There is also a distinction to be made between an isolated failure in respect of one set of minutes at one single meeting (such as here), and a widespread failure of the type considered in the ***Lancashire Care NHS Trust*** case.

280. Further, if Bechtel were right on this point, then an absence of records of even a single meeting, in a period of nearly one year, which did not affect the scores awarded in the evaluation, would result in the outcome of the procurement competition being overturned by the court, regardless of the importance of the meeting, and what took place. In my judgment, that would be to impose a counsel of perfection upon contracting authorities and utilities of a type that the Regulations do not require, which is wholly unjustified and which has no proper juridical basis. Such a disproportionate result would follow, on Bechtel's case, even if, after a full trial and hearing oral evidence from

multiple witnesses about that meeting, the court were satisfied (as I am) that nothing had occurred at that meeting which was untoward or in breach of any of the regulations, or in breach of any of the relevant principles, or affected the outcome of the competition. In my judgment, there is no authority for such a draconian result flowing from inadequate minutes of the meeting of 5 September 2018.

281. I am also content that my approach in the preceding paragraph is consistent with, and applies, the decision in ***Lancashire***. That case involved an absence of an entirely different type of records, with a different result. This is made clear in the following passage:

"[58] It follows that I accept the specific criticisms made by the Trusts in support of this submission…..viewed overall, I am satisfied that the notes do not provide a full, transparent, or fair summary of the discussions that led to the consensus scores sufficient to enable the Trusts to defend their rights or the Court to discharge its supervisory jurisdiction. First, there is evidence, which I accept, that other reasons (including some agreed reasons) were in play and are not reflected in the notes. Second, pervasively there is no or no sufficient account of the reasoning and reasons that led panel members to resolve their differences (if they did) so as to arrive at consensus scores."

(emphasis added)

282. In that case, the lack of records went to the award of the scores themselves, not to the type of minutes kept of a single meeting held afterwards. In that case, the available records were insufficient to enable the court to discharge its supervisory function. Here, the absence of minutes of the meeting of 5 September 2018 is of a wholly different character. There is an agenda for that meeting, and both Mr Blair and Mr Pybus took notes, of a kind. The absence of proper minutes has made the court's task more lengthy in deciding what took place, but it is not correct to portray it as preventing the court from exercising its supervisory function. I am content that I have been able to do so, and having heard evidence, I find that no breaches of obligation by HS2 took place in the meeting itself. The rather paltry minutes do not go to diminish the proper records that are available of the evaluation, assessment and moderation, and the sufficient recording and explanation of the scores awarded. The meeting of 5 September 2018 did not affect the scores; it did not affect the outcome of the procurement. It did not last long – about, or slightly less than, one hour – and the HS2 personnel collectively were very careful in terms of what was said. I have heard substantial evidence about the meeting. The single failure is one of keeping proper minutes of the meeting. In my judgment, the failure of HS2 properly to minute that meeting does not entitle Bechtel to any redress, although it may have made these proceedings longer and more expensive than would otherwise have been the case. It may be that it is necessary to consider this further at the costs stage of this liability trial.

F: The Duties upon HS2 and Records

283. Bechtel alleges various breaches of obligations by HS2, including manifest error in evaluation, breaches of transparency, equal treatment, and also breach of the obligation of good administration. It is also alleged by Bechtel that the equal treatment obligation is what is called "hard-edged" (the term used in its written submissions). HS2 argues this is wrong, and is subject to a margin of discretion. HS2 also argues that there is no

obligation upon it of good administration. This is also part of the subject matter of Issue 1.

284. Firstly, however, it is helpful to set these legal matters in their factual context. There is a substantial focus by Bechtel upon the way in which HS2 considered the MRS, for which BBVS was given a score of Concerns in the evaluation. The MRS deals with tendered management resources, and Bechtel relies upon the lack of confidence on the part of the HS2 assessors concerning BBVS' answer to Question E001. There was some doubt about the adequacy of some of the resources proposed by BBVS in the MRS and whether these would be sufficient. It is this that resulted in a score of Concerns for BBVS for that Question. These points were pursued by HS2 at the meeting of 5 September 2018, in the sense that BBVS were asked for clarification of their resources, and this was provided. BBVS was also asked about what appeared to be (and in fact was) a mistake for the first period, when the MRS had shown a figure of 175% of particular individuals' times that had been allocated to the project. This was explicable because Year 1 was actually longer than one year, and so period 1 was longer than one month (it was about 7 weeks). BBVS had attempted to deal with this by including the higher percentage of 175% (evidently higher than 100%) for the time of certain individuals, to reflect the fact that these resources would be occupied on the project for longer than one month during period 1. Without an explanation, a figure for deployment that is in excess of 100% would seem to represent a physical impossibility, which is why an explanation was sought by HS2, and then provided by BBVS.

285. Bechtel, in these proceedings, criticises the way that HS2 considered at the time, and dealt with, the resources proposed by BBVS. This argument is advanced by Bechtel through the medium of a breach of the obligation of good administration. It must be recognised that HS2 did conclude, in the evaluation, that the resources contained in the MRS put forward by BBVS were not adequate. The assessors had "very low confidence" in the MRS, which is why BBVS was given a score of "Concerns". It is how HS2 then acted upon, or dealt with, that view of the BBVS resources that is criticised by Bechtel. For example, at paragraph 110 of its Closing Submissions, Bechtel states:

"110. In any event, it is evident that, at no point during the Review Panel and subsequent governance process [which post-dated the selection of BBVS as the winning bidder] did any suitably senior and accountable individual within the Defendant give appropriate consideration to whether the resourcing issues identified in relation to the Preferred Bidder were such as to warrant abandonment of the Procurement. The Defendant's failure even to consider this option amounts to a breach of the principle of good administration, which has deprived the Claimant of a substantial chance of winning the Contract on re-tender."

(emphasis added)

286. Another instance is at paragraph 126:

"126. In this case, the Claimant put forward a well-resourced bid and BBVS did not. However, the Defendant felt able to avoid difficult and time-consuming decisions that would ordinarily have needed to follow the receipt of BBVS' under-resourced bid – in particular, decisions as to low scoring, potential disqualification and abandonment of the Procurement – on the basis of an internal view that in practice the problem of under

resourcing from year 2 onwards could be resolved by negotiation once the contract was up and running. Whether or not resourcing concerns could in fact be resolved by post-tender negotiation is wholly irrelevant to the scoring of the bids and attendant consequence under the IFT; it is also irrelevant to the proper exercise of a discretion to abandon the process in accordance with the principle of good administration."

(emphasis added)

287. That latter passage is footnoted with the following:

"The principle of good administration is a well-established principle of EU law which imposes on public bodies to treat persons in a manner that is fair and impartial. It incorporates aspects that may overlap with the principle of transparency and the obligation not to commit manifest error in exercising public functions. It is established that it applies by virtue of the TFEU and Article 41 of the Charter of Fundamental Rights and Freedoms. Specifically it binds Member States and their entities when they act within the scope of EU law. HS2 is a public body which was at all material times acting within the scope of EU law (see Case C-277/11, *MM v Minister for Justice, Equality and Law Reform* and commentary in *Peers et al*). To the extent that reliance is placed upon that principle independent of other obligations, it was plainly bound by the principle of good administration."

(emphasis added)

288. Bechtel relies upon a specific case to import this obligation. It submitted that "Good administration – or sound administration – is a general principle of EU law in the field of public procurement as recognised in, for example, Case T-211/02 ***Tideland Signal v Commission*** ECLI:EU:T:2002:232 at [37] & [42]. The Defendant was, therefore, under a duty to conduct the Procurement in accordance with that principle pursuant to regulation 104(1)(b) UCR16." That regulation states that HS2 owed tenderers a duty to comply with

"*(a) the provisions of these Regulations; and*

(b) any enforceable EU obligation in the field of procurement in respect of a contract or design contest falling within the scope of these Regulations."

289. Given the words "*any enforceable EU obligation in the field of procurement"* is used in the Regulation, it is rather circular to rely upon this to demonstrate that the principle of good administration *is* an enforceable obligation in the field of procurement. However, Bechtel maintains there is such an obligation and HS2 was required to observe the principle of good administration, in addition to the other express obligations such as equal treatment and transparency.

290. HS2 challenges that there is such an obligation upon it. It accepts that there is a principle of good administration within the EU generally, which sets standards for Community institutions but does not have constitutional status. It draws attention to Article 41 of the EU Charter of Fundamental Rights and Freedoms which, at paragraph 1, includes an obligation upon Community Agencies which states that *"Every person has the right to have his or her affairs handled impartially, fairly and within a reasonable time by the institutions, bodies, offices and agencies of the Union*" (emphasis added). It is

submitted by HS2 that there is no authority for the proposition that the concept of good administration has been elevated to an EU obligation enforceable against public bodies or utilities in the procurement sphere. In other words, HS2 denies that it falls within the wording of Regulation 104(1).

291. In ***Tideland Signal v Commission of the EU*** (T-211/02) [2002] ECR II-3785; ECLE-EU:T:2002:232 the court considered this obligation in the context of procurement, in particular the supply of aids to navigation equipment to certain ports in Eastern Europe. The claimant's tender was rejected as it was not open for the required 90 days. The Commission argued it was under no obligation to seek clarification from the tenderer regarding the period for which the tender was open for acceptance, and the following is stated at [37]:

"In response to the Commission's argument that its Evaluation Committee was nevertheless under no obligation to seek clarification from the applicant, the Court holds that the power set out in section 19.5 of the Instructions to Tenderers must, notably in accordance with the Community law principle of good administration, be accompanied by an obligation to exercise that power in circumstances where clarification of a tender is clearly both practically possible and necessary (see, by analogy, ***Cases T-22/99 Rose v Commission*** [2000] ECR-SC I-A-27 and II-115, paragraph 56, ***T-182/99 Carvelis v Parliament*** [2001] ECR-SC I-A-13 and II-523, paragraphs 32 to 34; see also, more generally, Case T-231/97 ***New Europe Consulting and Brown v Commission*** [1999] ECR II-2403, paragraph 42, and Article 41 of the Charter of fundamental rights of the European Union, OJ 2000 C 364, p. 1, proclaimed in Nice on 7 December 2000). While the Commission's evaluation committees are not obliged to seek clarification in every case where a tender is ambiguously drafted, they have a duty to exercise a certain degree of care when considering the content of each tender. In cases where the terms of a tender itself and the surrounding circumstances known to the Commission indicate that the ambiguity probably has a simple explanation and is capable of being easily resolved, then, in principle, it is contrary to the requirements of good administration for an evaluation committee to reject the tender without exercising its power to seek clarification."
(emphasis added)

292. It will be noted that for each of the cases quoted in [37] of ***Tideland***, the respondent is in each instance a Community institution, as it was in ***Tideland***; the procurement was being conducted by the Commission itself. It is also the case that no such duty is expressly included in UCR 2016 (or the Public Contracts Regulations either, for that matter). Yet further, Article 41 itself requires entities to act impartially, fairly and within a reasonable time. That latter requirement can be put to one side here, as there is no suggestion of any point arising on delay. The other two are included, four-square, within other obligations that are expressly included in the Regulations, namely that of equal treatment. Impartiality and fairness are synonymous with equal treatment, in my judgment. Yet further, in ***Healthcare at Home v Common Services Agency*** [2014] UKSC 49, Article 41 of Directive 2004/18 was considered, and the Supreme Court, in analysing the duties upon contracting authorities, did not identify an obligation of good administration. The ***Healthcare*** case considered the EU origin of procurement obligations in some detail, including the background to the Directive itself. For example, at [5], Lord Reed JSC (giving the judgment with which the other members of the Supreme Court agreed) said "the RWIND tenderer, as he has been referred to in

these proceedings, was born in Luxembourg" and then went on to consider the scope of obligations arising from the EU in some detail. It is highly unlikely that the Supreme Court would have entirely missed that there was an obligation of good administration upon contracting authorities involved in procurement, if one existed.

293. HS2 is also required to treat all bidders transparently. This is another express requirement included in the regulations themselves. It imports the requirement to keep proper records. That is enshrined in case law too, and the records have to be sufficient to enable the court to exercise its supervisory function. I have dealt with the cases on this when I considered the records available of the meeting of 5 September 2018 at [260] above, in particular at [274]. I do not consider that any obligation of good administration, even if it did apply to HS2 and this procurement, would require any greater measure of record keeping than the principle I have explained in any event.

294. Procurement law is entirely based upon EU principles, and the Regulations that are derived from those principles. I do not consider any authority is needed for such a proposition, but if any is required, one need look no further than ***Security of State for Transport v Arriva Rail East Midlands Ltd*** [2019] EWCA Civ 2279 and the first sentence of [38] of the judgment of Coulson LJ: "Public procurement derives from EU law."

295. It also sits at the interface of public law obligations and private rights. However, it is not enough for any particular legal principle to exist within the field of EU law, simply for it to be automatically imported into the procurement sphere. Since the early days of procurement law, sufficient cases have taken place with a large number of judgments, both first instance and appellate, for there now to exist a well-developed body of authority on this subject generally. In none of those cases has it been found that in this jurisdiction there is an obligation of good administration upon contracting authorities. That does not, of itself, mean that there is none, but it demonstrates that Bechtel cannot rely upon any decision positively in its favour.

296. Nowhere in any of those cases is there express authority for an obligation of good administration. Further, the submission made by Bechtel in paragraph 126 of its written submissions, referred to at [286] above, suggests that application of the obligation of good administration would give HS2 a discretion as to whether to abandon the procurement competition or not. Such discretion would usually be contained in express terms of the ITT in any event, but regardless of that, it means that in order to succeed, Bechtel would not only have to show that HS2 were wrong to have awarded BBVS the contract (alternatively, were wrong to decide not to abandon the competition, which may amount to the same thing) but that this decision must have been an improper exercise of discretion. In other words, Bechtel must show that it was outside the range of decisions properly open to HS2 as an exercise of discretion. This shows how difficult it would be for Bechtel to succeed on this claim, on the facts, even if there were such an obligation upon HS2.

297. I find that there is no obligation of good administration upon HS2. None is included in the Regulations themselves, and there is no authority for imposing such an obligation upon a contracting authority. However, even if I am wrong, it makes no difference, and would add nothing to Bechtel's case. This is because HS2 is required to treat all bidders equally and transparently in any event.

298. Therefore, the short conclusion concerning the alleged duty of good administration is that there is no such obligation upon HS2, but the duties upon HS2 would not be any different even if there were such a duty, in any event. HS2 is under a duty to treat all bidders fairly, impartially, equally, and is also obliged to act with transparency.

299. However, the extracts from Bechtel's submissions at [285] and [286] above demonstrate that, in reality, Bechtel seeks to move away from the way the tenders were evaluated, to something more. Bechtel seeks to elevate the score of Concerns on BBVS' MRS to a finding inviting the court to conclude that as a result of this, BBVS could not perform the works properly or adequately; and also to follow that finding, with another by the court, namely that as a result HS2 ought to have abandoned the competition (or to have disqualified BBVS). A failure by HS2 to act in this way is said to be a breach of the obligation of good administration. Yet further, because of the scope of the obligations upon HS2, the court finds itself invited (though only implicitly) not only to conclude that HS2 was wrong in not doing as Bechtel maintains it should have acted, but was *manifestly* in error in failing so to act. The submission in paragraph 126 of Bechtel's written submissions that invites scrutiny of "the proper exercise of discretion to abandon the process in accordance with the principle of good administration" seeks to have the court delve into – as modern management-speak might put it – the deliverability of the project by BBVS. This is no function of the court on a procurement challenge of this type.

300. There is no basis for the court interfering in this way, in a procurement challenge, in decision-making of this type. Bechtel is entitled to advance a case concerning the evaluation of its tender, and the tender of BBVS, to see if manifest error or any of the other breaches alleged justifies the grant of relief. But this aspect of the case goes far further than this. If BBVS' score for E001 was Concerns, and that was awarded without manifest error or other breach, then there is no legal foundation to have the court consider the different aspects of sufficiency of BBVS' management resources to perform the works. The role of the court is not to second-guess how the project should be resourced; nor is it to consider whether a score of Concerns should go wider than its impact on the score in the evaluation, such that it ought to have led "any suitably senior and accountable individual within HS2" to consider whether to abandon the competition; or for the court to consider whether HS2 was in manifest error by failing to consider whether to abandon the competition; or whether the decisions made at the time were within the range of proper decisions available to HS2 in its discretion. There is nothing in the ITT to justify such a step, and there is nothing in the Regulations either.

301. Further, there is no basis, evidentially, for any of these submissions by Bechtel. The duty of good administration does not grant Bechtel the necessary foundation to advance these allegations, but even if it did, there is no evidence to support a finding in Bechtel's favour. Although the evaluators of E001 had some doubts about the level of resource in the MRS submitted by BBVS, there is no basis for those doubts to be elevated into serious concerns that BBVS would not be able to perform its role in the project adequately. The score of Concerns for BBVS on E001 was reached without manifest error, and there is no scope for changing that score. A single score of Concerns does not, under the terms of the ITT, require HS2 to act in the way contended for by Bechtel. HS2 was not only not required to disqualify BBVS, but in my judgment it was not entitled to disqualify BBVS as a result of the score awarded for E001.

302. Equal treatment requires that comparable situations must not be treated differently, and different situations must not be treated in the same way unless objectively justified; ***Fabricom SA v Belgium*** (C-21/03 and C-34/03) [2005] 2 CMLR 25 at [27]. There are therefore two separate limbs to the principle of equal treatment. In ***R (Rotherham Metropolitan Borough Council) v Secretary of State for BIS*** [2015] UKSC 6 the Supreme Court rejected an argument that a margin of discretion applied only to the second limb. Lord Sumption JSC stated at [26] that there was "a single question: is there enough of a relevant difference between X and Y to justify different treatment?" This means that, rather than being "hard-edged", the contracting authority will be granted a margin of discretion in terms of the principle of equal treatment. Lord Sumption JSC also said at [28] that "the nature of the question requires a particularly wide margin of judgment to be allowed to the decision-maker." Given this finding that there is a "wide margin of judgment", applying "hard-edged" obligations as Bechtel seeks would be somewhat problematic.

303. The mere existence of differential treatment does not lead to a finding of unequal treatment. As stated by Stuart-Smith J (as he then was) in ***Stagecoach East Midlands Trains Ltd and others v Secretary of State for Transport*** [2020] EWHC 1568 (TCC) at [26]:

> "The principle of equal treatment requires that comparable situations must not be treated differently and that different situations must not be treated in the same way unless such treatment is objectively justified. There is, however, a wide margin of discretion available to a contracting authority in designing and setting award criteria and the fact that some potential bidders will find it relatively more or less easy than it is for others to comply with those criteria does not establish or even necessarily provide evidence of a breach of the equal treatment principle. What is forbidden is unequal treatment that falls outside the margin of discretion that is open to a contracting authority or that is "arbitrary or excessive"."
>
> (emphasis added)

304. I respectfully agree, and adopt that statement.

305. The obligation of transparency has at least one of its purposes as enabling compliance with the equal treatment obligation to be verified; Case C-19/00 ***SIAC Construction Limited v County Council of the County of Mayo*** [2001] WCR 1-772 at [41]. That case concerned a so-called "measure and value" contract (akin to a remeasurement contract), with estimated quantities at the tender stage, and a rate for each item to be provided by the tenderers. The council exercised a discretionary power of selection in the way that the tenders were assessed (by a consulting engineer) that resulted in the tenderer with the "lowest price" not being awarded the contract, due to the consideration of what would be the "likely ultimate cost" (the phrase used at [42] of the Opinion of Advocate-General Jacobs). The court held that the council was entitled to award the tender on the basis of the lowest ultimate cost, as long as equal treatment of tenderers had been ensured, and that pre-supposed that the transparency and objectivity of the procedure had been guaranteed. Essentially this meant that the criteria were published, and also that the professional opinion of the consulting engineer had been based on objective factors that were regarded in good professional practice as relevant and appropriate to the assessment.

306. The equal treatment obligation requires HS2 to act in the evaluation in accordance with the published terms of the ITT. Adequacy of resources, and the subjective views of the HS2 assessors of the confidence they derived from the MRS submitted by each bidder, were to be considered in the evaluation expressly under Question E001, and were to lead to the particular score awarded for that question. There is no proper or lawful basis for HS2 to have departed from that transparent and published criteria, and to consider adequacy of resources additionally, in the way contended for by Bechtel in its submissions that I have set out above at [285] and [286].

307. Turning to the records, Bechtel argues in respect of a number of different questions that the moderation minutes are insufficient and that, as a result, the draft scores are those that ought to be used, in preference to the final joint scores. I have made the necessary findings above that the records available are sufficient for HS2 to have satisfied the obligation of transparency, and also for the court to exercise its supervisory function. The records available for the moderation sessions are actually more detailed, in many instances, than the individual assessors' own notes justifying the draft scores. This is not to criticise the assessors, who at the draft stage were giving their initial views, which they knew were to be later discussed and agreed at moderation. This is entirely understandable, as the draft scoring was a preliminary exercise. But I refer to it to demonstrate the unusual approach of Bechtel to these challenges. Further, each assessor did not arrive at their *draft* score intending it to be that assessor's own final score.

308. Where two assessors have different draft scores from one another (such as for BBVS' response to Question E009) Bechtel seek to have the draft score more favourable to its case substituted for the final score, without proper justification for why the other draft score should be discarded or ignored. This is not a rational approach to evaluation. On E009, Mr Pang moved downwards from Excellent for BBVS, to Good. If draft scores are to be utilised, there is as much to justify using Mr Pang's draft score of Excellent for BBVS on this Question, as there is for the lower score of Mr Lalaurette (who gave BBVS Concerns in draft and moved upwards to Good). I find this approach by Bechtel contending for the draft score most favourable to Bechtel to be used, in distinction to the other draft score, to have no sensible foundation. Even if draft scores were to be used – and I find that they should not be – the court would, if faced with two different draft scores, have to arrive at a final score taking both draft scores into account. The result would not be that the single draft score most favourable to Bechtel would be used without question. Where, in a situation such as E009, one draft score was high, and the other was low, the court would (were it to embark on such an exercise, which in this case it will not) most likely end up somewhere between the two, in any event.

309. Transparency includes the duty to give reasons. In ***Healthcare at Home v Common Services Agency*** [2014] UKSC 49 the following was stated at [17]:

> [17] As I have explained, article 41 of Directive 2004/18 imposes on contracting authorities a duty to inform any unsuccessful candidate, on request, of the reasons for the rejection of his application. Guidance as to the effect of that duty can be found in the judgment of the Court of First Instance in *Strabag Benelux NV v Council of the European Union* (Case T-183/00) [2003] ECR II-138 , paras 54-58, where the court stated (para 54) that the obligation imposed by an analogous provision was fulfilled if tenderers were informed of the relative characteristics and advantages of the successful tenderer and the name of the successful tenderer. The court continued (para 55):

> "The reasoning followed by the authority which adopted the measure must be disclosed in a clear and unequivocal fashion so as, on the one hand, to make the persons concerned aware of the reasons for the measure and thereby enable them to defend their rights and, on the other, to enable the court to exercise its supervisory jurisdiction."

310. Comprehensive reasons were provided to Bechtel. Here, the standstill letter of 5 February 2019 sent to Bechtel contained a very considerable amount of material – in excess of 104 pages of rationale. Bechtel alleges that the documentation available is insufficient to demonstrate the decisions taken in the evaluation process, and does not contain reasons for the final scores. I reject that submission. I consider that HS2 has kept documentary records sufficient to comply with its obligation of transparency. In ***European Dynamics Luxembourg SA***, Case T-481/14 the General Court quoted the same test from ***Strabag*** quoted in ***Healthcare at Home*** (in the preceding paragraph of this judgment) and added at [81]:

> "As for a contracting authority's obligation to state reasons, beyond the principle referred to in paragraph 71 above, it must be remembered that it is apparent from Article 113(2) of the Financial Regulation and Article 161 of the Implementing Rules that a contracting authority fulfils its obligation to state reasons if it confines itself first to informing unsuccessful tenderers immediately of the reasons for the rejection of their respective tenders and then subsequently, if expressly requested to do so, provides to all tenderers who have made an admissible tender the characteristics and relative advantages of the tender selected as well as the name of the successful tenderer, within a period of 15 days from the date on which a written request is received (see judgment of 10 September 2008, *Evropaïki Dynamiki v Commission*, T-465/04, not published, EU:T:2008:324, paragraph 47 and the case-law cited)."
>
> (emphasis added)

311. In my judgment, HS2 has complied with its obligation in this case. I would add one further observation, which has not driven any of my findings, but is worth recording nonetheless. The evidence demonstrates that HS2 were acutely aware, when preparing for this procurement competition, of the risk of a challenge from an unsuccessful bidder. The training materials demonstrate that the case of ***Energy Solutions v Nuclear Decommissioning Agency*** was not only at the forefront of the minds of those designing the training, but used as a specific example of ways in which procurement competitions could go wrong. Specific deficiencies in the evaluation in that case (a substantial procurement for a contract worth £4 billion for decommissioning Magnox nuclear reactors and associated facilities) had been identified, and HS2 wished to avoid repeating those mistakes. In other words, lessons had been learned. The training in this procurement for Euston and Old Oak Common appears to have been very thorough, and the evaluation was designed comprehensively to be entirely fair. Two assessors reached a score through consensus, and in a process of moderation, all of which was recorded. Bechtel complain in their written Closing Submissions that "The Moderation Minutes generally do not record what has been said by Moderators". This is not required. Short of tape-recording every hour of moderation – which would be entirely disproportionate – minutes of moderation will inevitably not amount to a verbatim note. But no contracting authority is required to take a verbatim note of all such moderation

and evaluation sessions. There must be a sensible limit to what is required of contracting authorities in terms of recording its evaluations. The court's role is one of supervisory jurisdiction, not one of micro-managing.

312. One of the purposes of the principle of proportionality is to balance (and help limit) procedural burdens. Professor Arrowsmith in her textbook *The Law of Public and Utilities Procurement*, (Sweet & Maxwell) 3rd Ed. 1989 Vol 1 stated at paragraph 7.25:

> *"The principle of proportionality is also important, it is submitted, relevant [sic] for interpreting the directives in a balanced way to limit the procedural burdens for both contracting authorities and suppliers (which is relevant both for its own sake and to promote national and EU objectives by encouraging participation by the best tenderers), and to avoid imposing other unnecessary constraints on the discretion of national authorities to implement national procurement goals in accordance with their own circumstances. This aspect of the proportionality principle is reflected in the explicit provisions of the directive ... The issue of procedural burdens is relevant for all procedures but is particularly important in the context of competitive dialogue and negotiated procedures where procedural costs can be very high. Thus it is suggested, for example, that this principle justifies an approach to the concept of a complete tender in competitive dialogue which allows a reasonable degree of detail to be filled in after choosing the winner of the procedure: such an approach can provide adequately for transparency and equal treatment whilst at the same time avoiding unnecessary procedural costs which will not contribute to those goals but which could prejudice other national and EU interests."*
>
> (emphasis added)

313. No contracting authority or utility is required to assume an enormous procedural burden, with the associated high costs, to protect itself to the nth degree from a challenge in a procurement competition. The principle of proportionality means a sensible balance, and limit, is what is required. In reality, I consider that with the exception of the records of the meeting of 5 September 2018 (which I have dealt with at [260] above), there is nothing in the criticism by Bechtel of the HS2 record-keeping in this procurement. In any event, as I have explained, the unsatisfactory records of that single meeting do not have any effect upon the outcome of the competition, and they do not have any effect upon the outcome of this liability trial.

G: Qualifications

314. Not all of the issues are numbered in the order with which I have chosen to deal with them in this judgment. Qualifications to tenders – or rather potential disqualification of Bechtel – are part of Issues 18 and 19. However, for reasons of proportionality I intend to deal with this specific area first. This is because, if HS2's case is accepted on this important point, then this represents a complete defence to any success by Bechtel on most of the other issues (although arguably not all). Those dealt with in Sections J and K would still survive, for example.

315. I have already explained, at [46] to [51] above, the rationale behind HS2 imposing Incentive and Programme Targets in general terms. The relevant clause of the contract included in the ITT was as follows, namely clause 6.

*"6. **CONSOLIDATION NOTICE***

6.1 If:

- *the Employer has submitted the Schedule 17 Planning Approval Application and at least three (3) months has elapsed since that application was submitted;*
- *the Contractor has issued the Consolidation Deliverables to the Project Manager and the Project Manager has accepted the Consolidation Deliverables; and*
- *the Contractor has issued the final WI 800 Verification Report (as referred to in Works Information WI 800) to the Project Manager showing that the Accepted Final PWDD Forecast is equal to or less than the Incentive Target and the Employer has accepted that report,*

the Project Manager issues to the Contractor the Consolidation Notice.

6.2 If the Project Manager has not issued the Consolidation Notice by the planned consolidation point, the Employer may in its absolute discretion either:

- *instruct the Project Manager to issue the Consolidation Notice with certain conditions to be satisfied specified therein which has been agreed with the Contractor; or*
- *allow additional time for (as the case may be):*
    - *the Schedule 17 Planning Approval Application to be submitted;*
    - *the Contractor to work with the Employer and the SDSC Consultant to value engineer and optimise the design and programme in order to become satisfied that the forecast final Price for Work Done to Date is within the Incentive Target and that Delivery into Passenger Service is achievable by the Programme Target, so that the Contractor is able to issue WI 800 Verification Report; or*
    - *the Contractor to submit the Consolidation Deliverables and have them accepted by the Project Manager,*

and neither the issue of any such conditional Consolidation Notice nor any such allowance of additional time will entitle the Contractor to a compensation event."

6.3 Until the Consolidation Notice has been issued by the Project Manager, the Contractor is not entitled to be paid:

- *the Contractor's Interim Share; or*
- *any Due Moderated Annual Fee Amount.*

6.4 Upon the Project Manager issuing the Consolidation Notice the Contractor carries out the works in accordance with the Consolidation Deliverables which have been accepted by the Project Manager."

316. Bechtel was not prepared to tender on the basis of clause 6 as drafted in the proposed contract terms included in the ITT. Bechtel therefore qualified the Bechtel tender in the following terms (KPI means key performance indicators):

" In clause 6.2, delete the existing wording and replace with the following:

"6.2 If either of the conditions for the issue of the Consolidation Notice set out in clause 6.1 bullet points two and/or three, have not been satisfied by 19 July 2019 (or such later date as the parties may agree to allow for further value engineering or design optimisation), then the Project Manager shall, within 30 days either:

(1) Execute a deed of variation with the Contractor to amend the contract in order to implement changes to Clause X20 to replace those parts of Clause X20 which are linked with or depend upon the Incentive Target and the Programme Target, with such alternative KPI and incentive schemes as the parties may agree (which replacement incentive scheme will reflect the principle that 20% of the Fee which would otherwise have been allocated to the performance KPIs in Annexure 4 and the Moderated Annual Fee will instead be allocated to the replacement performance incentive scheme agreed); or

(2) Terminate under R26 on 60 days' written notice."

Add a new clause 6.5

"6.5 Nothing in this contract shall: (1) impose any liability on the Contractor for a failure to verify that the Incentive Target and/or Programme Target are achievable; or (2) require that any document prepared or submitted by the Contractor shall state that the works can be designed and/or delivered within the Programme Target and/or Incentive Target. The Contractor's sole liability for a failure to achieve the Incentive Target and/or Programme Target shall be limited to the performance KPI scheme set out in clause X20."

In Volume 1, Conditions of Contract at clause 90.2, add the following amendments which are consequential on the above change:

"Clause 90.2:

In the termination table at clause 90.2 after R21 in column 2 "Reason" add the following: "R26".

Clause 91.12:

In the last line, delete "R25" and replace with "R26".

Add new clause 91.13:

"The Employer may terminate in accordance with Clause 6.2 of the Agreement (R26)." "

317. The broad effect of this qualification is as follows. I am summarising detailed contract terms but the parties were broadly agreed – wholly understandably, given the express terms and nature of the qualification – about the effect and impact of the proposed changes to clause 6.2, with the associated changes to other terms as set out in the qualification. Indeed, the potential effect of the original clause 6.2 was part of Bechtel's evidence as to *why* the qualification was made.

318. Under the contract terms drafted by HS2 and included in the ITT, having worked on the design, a point would come at which the project for Old Oak Common would reach what was called the Consolidation Point. At that point, the Construction Partner was originally intended to issue a Verification Report to the Project Manager showing that the Accepted Final PWDD Forecast would be equal to, or less than, the Incentive Target. HS2 would accept that, and the Project Manager would issue a Consolidation Notice and the Project would proceed. However, even if the Contractor did *not* issue

such a report – in other words, if the Contractor was not prepared to verify that the Project could be constructed for the Incentive Target of £1.054 billion - then the Project Manager could be instructed to issue such a notice and the works would continue. In very brief terms therefore, the original terms in the tender would lead to a contract whereby (through the HS2 version of clause 6.2 in the procurement documents) the winning bidder would be agreeing with HS2 that the Project could be built for £1.054 billion, and to the Programme Target, or at the very least the winning bidder, would be agreeing to bear some commercial risk that these targets could not be met. Therefore, if the cost ended up at being well in excess of £1.054 billion, the Contractor would be paid the cost above the Incentive Target for its management resources, but would receive no further fee uplift (thus diluting the fee in percentage terms) and would also suffer financially through the imposition of KPIs.

319. The qualification proposed by Bechtel sought to change that fundamental allocation of contractual risk, and therefore HS2's commercial strategy. The new Bechtel clause 6.2 would operate in such a way that at the Consolidation Point, if Bechtel was not prepared to issue a Verification Report, HS2 and the Project Manager had a choice. They could either agree a Deed of Variation with Bechtel, and amend those parts of the contract which included the original Incentive Target and Programme Target, and the impact on Bechtel's fee, replacing them with other terms that would have to be agreed with Bechtel at that stage. Alternatively, HS2 would have a different course of action available - HS2 could terminate the contract with Bechtel. This would mean having to re-procure the remainder of the contract to find a new CP to undertake that function for the construction of the station. A stark way of putting this is that Bechtel's qualification would, if accepted, lead to the formation of a contract with HS2 whereby no risk (or extremely little risk) would be borne by Bechtel that Old Oak Common Station could not be built for £1.054 billion. If it could not, Bechtel would renegotiate its fee, or have its contract terminated and leave the project. Bechtel would have all the commercial leverage in renegotiating its fee; if agreement could not be reached, HS2 would only be able to terminate the contract. This would therefore lead to HS2 having a very unpalatable set of alternatives at the Consolidation Point.

320. If HS2 were to accept the qualification and proceed on the new clause 6.2 terms, it would be faced with a major risk at the Consolidation Point. It could either proceed with Bechtel, but only on commercial terms that it would have to agree with Bechtel at that point in the project (which would already be underway), or it could terminate Bechtel's agreement and re-procure the project, but from the Consolidation Point. That latter choice would, in my judgment, effectively be no real choice at all at that stage in the project. The consequences of such a termination would be extraordinarily onerous for HS2. It would have to re-tender the partially performed project, going through another procurement exercise, but at a later stage, as the project would have been underway for some time. It would have lost entirely (or substantially) its ability to bring the project to completion within the Incentive Target of £1.054 billion (and within the Programme Target too). It would have no commercial leverage in that subsequent procurement competition. Partially performed projects are rarely attractive to other bidders. Further – and this is stating the obvious - there would be the most extraordinary public and political fall-out. For HS2 to terminate a contract with its Construction Partner partially through the programme to construct only one of the two London HS2 stations would be an alternative so unpalatable, as to constitute no realistic alternative at all.

321. It would also mean, were HS2 to contract on the basis of the Bechtel qualification to clause 6.2, that it would be entering into detailed contract terms with the Construction Partner for Old Oak Common on an entirely different contractual basis to the contract put out to tender, and also to the contract for Euston, the other lot in the same procurement. That would not be the only way in which the OOC and Euston projects would then be out of step with one another. The programme for OOC would have to include a period for potential re-procurement at the Consolidation Point. The work on the two stations would thereafter, potentially, be non-aligned in programme terms. Further, the period for re-procurement would be uncertain; if a losing bidder issued proceedings challenging the outcome of that later competition, the automatic suspension would be imposed, again.

322. All of what I have explained in [319] to [321] above would have been obvious to Bechtel at the time as the consequences of its proposed qualification to clause 6.2.

323. There are a number of idioms to express the situation where a party finds itself faced with two extraordinarily unattractive options. All of them readily apply to the situation in which HS2 would find itself at the Consolidation Point, were it to accept the qualification proposed by Bechtel to clause 6.2. However, the ITT and contract terms as designed by HS2 did not contain such a dreadful future. That alternative scenario would only come to pass were HS2 to contract with Bechtel on the basis of its qualification to clause 6.2. HS2 was not prepared to accept these qualifications, and asked Bechtel to withdraw them on a number of occasions through the Bravo portal. On each occasion Bechtel would not do so. Although Bechtel was careful never expressly to refuse to withdraw them, and answered each such request by HS2 with its own counter-request for a meeting, the effect was the same. Following each request by HS2 to withdraw the qualifications, the qualifications by Bechtel remained.

324. In my judgment, the nature of the qualification to clause 6.2 proposed by Bechtel was so central to the future contractual agreement between the parties that it entitled HS2 to disqualify Bechtel from the competition. The contemporaneous emails that passed internally at Bechtel in August 2018 show that at least some personnel within Bechtel were aware of this. They seem, in my judgment, almost to have been holding their breath, waiting for, or fearing, disqualification.

325. Ms Serrelli gave evidence, which I accept, that HS2 decided that it was not worth issuing Bechtel with a Withdrawal Ultimatum because BBVS was the winning bidder following the evaluation, and there was no reason to do so. She explained that doing so would potentially incur large legal fees as Bechtel may challenge such a decision in court, a cost on the public purse that could be avoided. I accept that. She also gave evidence that had Bechtel won the competition, Bechtel *would* have been disqualified. I accept that evidence too. Mr McMonagle for Bechtel explained why the qualification had been included in the tender, and also why Bechtel desired to have a meeting with HS2. That explanation made commercial sense (when looked at solely from Bechtel's point of view), and I accept it was an explanation that those at Bechtel who gave evidence before me believed justified their stance on this issue at the time. However, the issue of qualifications is not to be decided on whether there was subjective justification for certain commercial decisions taken within Bechtel. The issue is the terms of the ITT dealing with qualifications, the type of qualification proposed, whether it would have exposed HS2 to significantly greater risk, and whether HS2 would have been entitled to disqualify Bechtel. I find that it would have exposed HS2 to

significantly greater risk. It would have also distorted competition between bidders, as not all the other bidders had such qualifications.

326. Further, the right to reject a tender which contained commercially unacceptable qualifications was expressly reserved by HS2 in very wide terms in clause 6.14.3 of the ITT. This stated:

"6.14.3 HS2 Ltd reserves the right to reject any Tender which contains Qualifications which, from the point of view of HS2 Ltd, are commercially unacceptable because, without limitation, they contain positions which expose HS2 Ltd to significantly greater risk, do not represent value for money or distort the principles of equal treatment and fairness between Tenderers. Such a Tender may not be considered compliant and therefore may be rejected on that basis."

(emphasis added)

Paragraph 6.14.6 of the ITT stated the following in respect of Qualifications:

"6.14.6 *HS2 Ltd intends to remove any Qualifications submitted by first seeking withdrawal of the Qualification from Tenderers. For any Qualifications that remain, HS2 Ltd will determine for each such remaining Qualification:*

a) Whether the Qualification is significant enough to constitute an unacceptable Tender ... If so, the Tenderer will be advised that if it does not withdraw (or modify to make compliant) the Qualification then the Tenderer will be disqualified as having submitted a non-compliant Tender [a "Withdrawal Ultimatum"]*;*

b) If not, then HS2 Ltd will determine whether the Qualification contains any real movement to the risk profile … or any additional costs… ;

c) If there is a material risk which can be quantified and the Tender has not been rejected, an adjustment may be made by HS2 Ltd in relation to the Qualification in accordance with Part 6.13 above, after first notifying the Tenderer that such adjustment will be made."

(emphasis added)

327. The right to reject in 6.14.3 is phrased as a general right and does not arise only where a Withdrawal Ultimatum has been issued, and ignored or refused by the bidder in question. In my judgment it is a general right which HS2 retained throughout the procurement. HS2 sought to have Bechtel withdraw the qualification – on a number of occasions - and this did not result in it being withdrawn. HS2 therefore retained that right to reject. The qualification to clause 6.2 plainly exposed HS2 to significantly greater risk. It was also so fundamental that it distorted the principles of equal treatment and fairness between the other tenderers. I consider that the right HS2 had survives, notwithstanding the failure to issue a Withdrawal Ultimatum, and HS2 are entitled to rely upon this right in these proceedings. I find that the qualifications proposed by Bechtel were commercially unacceptable to HS2 for entirely valid reasons, and fall within the terms of this right. HS2 acquired the right to disqualify Bechtel as a result of

the latter's qualification to clause 6.2. HS2's failure to issue a Withdrawal Ultimatum does not lead to it losing its right to reject.

328. Bechtel, in its Closing Submissions, advances the following case(s) on this subject. Firstly, that the "the Court can be satisfied, on the balance of probabilities, that the Claimant and Defendant would have discussed the Claimant's Qualifications (as the Defendant discussed BBVS' Qualifications) and reached some mutually agreeable accommodation – including, but not limited to, the Claimant withdrawing its offending Qualifications on the understanding the Defendant would take a sensible commercial position on the Incentive Target as described in the aforementioned Board papers or the Claimant and Defendant agreeing mutually acceptable contractual language in line with the Board papers." There is no basis for such findings or such satisfaction in this respect. Indeed, this is entirely wishful thinking on Bechtel's part. There could be no "mutually agreeable accommodation" and such evidence as there was from Bechtel suggests that Bechtel would not withdraw its qualifications. This passage of the Closing Submissions does not properly identify, with particularity, what it is said would have occurred, by using general non-specific terms such as "mutually agreement accommodation"; "understanding"; "sensible commercial position" or "mutually acceptable contractual language". There was one set of contractual language acceptable to HS2, and that was contained in the original clause 6.2 set out in the ITT, for all the tenderers to consider. The alternative language set out in the qualification was not acceptable. That is the correct way to approach this issue, not some vague and general aspirations about reaching a "mutually agreeable accommodation". This is a public procurement for a contract worth over £1 billion, and precision in contractual language is required.

329. Secondly, the court is invited to find on Mr McMonagle's evidence that "there is a substantial or real chance that the Claimant's Qualification on Clause 6 would have been withdrawn or accepted in its original or a varied form." Again, there is no evidence to support this. All the evidence demonstrates to me, and I find, that Bechtel was not willing to withdraw the qualification, and that HS2 were not prepared to accept it.

330. The third alternative is the submission by Bechtel that "even if the Court were of the view that the Defendant would not have met to discuss the Claimant's Qualifications were it identified as the first ranked bidder and/or that such meeting would not have resulted in a mutually acceptable outcome, the Defendant still would not have been able to disqualify the Claimant absent an Adjustment Ultimatum and/or Withdrawal Ultimatum. The Claimant would thereafter have had carefully to consider whether to maintain or withdraw its Qualifications or adjust its price, including by going through the appropriate internal governance. As no Adjustment or Withdrawal Ultimatum was ever issued, the outcome of that process is hypothetical". It is correct to identify that as hypothetical. However, I have found that Bechtel was not the winning bidder, but in any event no meeting would have occurred. Even if it had, there would have been no "mutually acceptable outcome" unless Bechtel were prepared to withdraw the qualification. The right HS2 had to reject Bechtel's tender due to this type of qualification is not phrased in the ITT as being subject to a condition precedent, that condition being the issuing of a Withdrawal Ultimatum. It is worded as a general right.

331. I will add one further point. Even if – and it is an extraordinarily large "if", given Bechtel called no evidence whatsoever on this point – Bechtel *had* been prepared to withdraw this qualification, but *only* after a Withdrawal Ultimatum had been issued by HS2, then in my judgment there can be no rational explanation for Bechtel's failure to

withdraw it on any one of the numerous occasions when HS2 requested that this be done. Any procurement, but particularly one of this scale and importance, for a project costing in excess of £1 billion, is not a game of commercial poker. It is a transparent and fair competition. The whole purpose of the Regulations and the important principles that underline them, namely transparency, equal treatment and fair competition, is so that all tenderers are treated equally, with the same opportunity to win the competition, free of distortion. Bechtel is not entitled to any finding that it was disadvantaged in any way whatsoever by reason of HS2 not issuing such an ultimatum. Firstly, there is no evidence to justify such a finding on the facts; all the evidence points the other way. Such evidence as exists is contrary to Bechtel ever being prepared to withdraw the qualification. Bechtel maintained the qualification, even though asked several times to withdraw it: there is nothing to suggest that position would have ever changed. Secondly, I find that there is nothing in the ITT itself which restricts HS2's rights in this way in any event. The issuing of a Withdrawal Ultimatum is not a condition precedent to acquiring the right in clause 6.14.3 of the ITT to reject a tender.

332. But in reality, although submissions were made by Bechtel as I have set out above that suggest that Bechtel would, or might, have withdrawn the qualification if certain circumstances came to pass (not least a meeting with HS2), in reality there was no evidence called by Bechtel on this subject. Mr McMonagle did not give evidence stating this, and he was not the decision-maker in any event. I find that on the evidence Bechtel was not prepared to withdraw the qualification to clause 6.2. The hope for a meeting was to try and persuade HS2 to accept it. I find that HS2 would not have accepted it. I find that the parties' positions would have remained the same, whether a meeting had been held or not. HS2 decided not to hold a meeting. They were not required to hold one, and there can be no criticism levied at HS2 for taking this sensible and transparent course that also complied with the principle of equal treatment.

333. The issues agreed by the parties which go to this subject are 18 and 19. They are as follows (for convenience repeated here):

Issue 18: Is the Defendant permitted to treat the Claimant as excluded from the competition for the Lot 2 Contract by reference to one or more of its Qualifications:

(a) After the conclusion of the procurement and issue of the Standstill Letter; and

(b) in the absence of any Withdrawal Ultimatum?

Issue 19: In the event that the Claimant had been identified as the Preferred Bidder for the Lot 2 Contract:

(a) Would the Defendant have issued a Withdrawal Ultimatum in respect of one or more of the Claimant's Qualifications?

(b) If so, how would the Claimant have responded to such a Withdrawal Ultimatum?

334. The answers to those issues are as follows:

335. Issue 18: (a) and (b). Yes to both.

336. Issue 19: (a) Yes. (b) There is no direct evidence from Bechtel from any witness that the issuing of such an ultimatum would have resulted in the qualification being withdrawn. On the balance of probabilities, had a Withdrawal Ultimatum been issued, Bechtel would have declined to withdraw the qualification and would, again, have requested a meeting with HS2, which would again have been refused. That would have led to HS2 properly treating this as a failure by Bechtel to comply with the ultimatum, and disqualifying Bechtel from the competition. Even had a meeting been held, HS2 would not have accepted the qualification to clause 6.2.

H: Limitation

337. HS2 maintains that some of Bechtel's challenges are time-barred. These concern certain challenges brought to the scores of certain Questions in the Technical Envelope. These are all in respect of Bechtel's score for E004, E007 and E009. They are included in Annex 3 to the Particulars of Claim which was added by amendment on 26 June 2020. Bechtel argues that the scores were inconsistent for these three questions when compared to those awarded to BBVS. Paragraph 200 of Bechtel's Closing Submissions states that "Essentially, the Claimant contends that its responses are clearly at least as good as BBVS' responses in respect of some Appendix C Factors where the Claimant has been scored lower. It also contends that its responses are clearly better than BBVS' [responses] in respect of some Appendix C Factors where the Claimant and BBVS have been given the same score."

338. HS2 consented to the amendment but without prejudice to its position on limitation. This was a sensible position to adopt, as otherwise limitation would have been argued on an opposed amendment application. HS2 maintains that the legal challenge by Bechtel to its own score was not brought within the period required in the Regulations, and that Bechtel had sufficient information to do so from the standstill letter of 5 February 2019 and its associated 195 pages of feedback.

339. It is common ground that Regulation 107(2) requires proceedings to be brought within 30 days of the date when the economic operator, here Bechtel, first knew or ought to have known that the grounds for starting proceedings had arisen. For challenges in relation to the Bechtel score in the evaluation, therefore, this date would, prima facie, be that of the standstill letter (or receipt thereof if that were different). Given most communications are done electronically rather than by post, in the vast majority of cases the date of the standstill letter will be the date of communication to the economic operator. This is a short period and deliberately so; the rationale for it is that the potential for disruption to the workings of the economy are such that challenges to procurement decisions need to be brought speedily.

340. In ***SRCL Ltd v NHS Commissioning*** [2018] EWHC 1985 (TCC) I stated at [140] that where there were a number of different breaches or grounds of complaint, the date upon which limitation started to run would not necessarily be the same for all of them, as the date upon which the economic operator would have known that it had grounds for bringing a challenge could, in fact, be different in respect of different breaches. This is consistent with the dicta of Elias LJ in ***Sita UK v Greater Manchester Waste Disposal Authority*** [2011] EWCA Civ 156 and has been followed in other cases, such as ***Riverside Truck Rental v Lancashire County Council*** [2020] EWHC 1018 at [41], a decision of HHJ Eyre sitting as a Judge of the High Court. It also generally happens in procurement cases that, as the disclosure process unfolds and a claimant discovers it

may have other grounds (for example in relation to the details of the winning bid, information that is often not available to it simply from the standstill letter) it will issue a separate and new claim form to stop time running. Sometimes there may be two or even three separate sets of proceedings, all tried together, as a result of this.

341. Here – and this is not always the case – the full moderation rationale for both Bechtel and BBVS was included within the standstill letter. However, Annex 3 to the Amended Particulars of Claim contains allegations about Bechtel's own scores and also those of BBVS, but as a comparative exercise between the two. The former are said to be too low, and the latter too high, by relation one to another, given the content of the answers in each bid, and the scores are therefore said to be inconsistent; this is put as a breach of equal treatment. So far as the allegations about the Bechtel scores are concerned, however, HS2 contends there was sufficient information contained in the standstill letter about those scores, and the reasons for them, for Bechtel to have known that it had grounds to bring a claim on the three Technical Questions concerned. It did not do so in the original Particulars of Claim, and HS2 maintains that it ought to have done, and as a result, HS2 submits that these claims are time-barred.

342. So far as the relevant factors that led to the Bechtel scores were concerned, Bechtel knew about these from the standstill letter. For Question E004, Mr Watson confirmed that he knew from the standstill letter that Bechtel was considered by HS2 to have omitted key dates in its tender. For E007, Mr Watson accepted that he knew from the standstill letter that the reasons for the score of Moderate Confidence awarded for Question E007 was that Bechtel had not proposed any form of contract for some of the specific packages nor explained in sufficient detail the contracting approach. Finally, in respect of E009, although Mr Watson maintained that the score was wrong, he accepted that he was aware of the reason for the score of Good Confidence at the standstill stage. These were not concessions or answers in cross-examination that were at odds with the documents; it could readily be seen, from comparing the material sent to Bechtel by HS2 with the standstill letter, that this was the case for each of these three questions. However, that misses the substance of Bechtel's complaints in Annex 3. Its complaint is that its response to E007 (as an example) was better than the response by BBVS to the same question, and for that reason the score it was given is erroneous. Clearly, the tender response by BBVS is required in order to make that comparison.

343. The answer to HS2's limitation argument is that the BBVS tender was – as Bechtel put it - "an essential item of information to enable" these points to be pleaded; that is the term used in paragraph 205 of its Opening Submissions, and the point is repeated in its Closing Submissions. Although Mr Watson's evidence and answers about having the moderation for BBVS's score is not addressed in those submissions, I accept that absent the BBVS tender itself, the Annex 3 exercise (which concerns the comparison exercise) could not have been done. Essentially, the Annex 3 exercise maintains that there was an inconsistent approach taken by HS2 to the content of the Bechtel answers and those provided by BBVS. Given Bechtel did not have the content of the BBVS answers when it received the standstill letter, and did not obtain the BBVS tender until disclosure was given, it is difficult to see how Bechtel could have mounted its Annex 3 exercise in its original Particulars of Claim.

344. Accordingly, there can be no basis for any finding that these challenges, added by amendment to Bechtel's claim in June 2020 by reason of their inclusion in Annex 3, are time-barred. I find that they are not. The BBVS tender was not provided until

standard disclosure was given on 1 May 2020. HS2 consented to the amendment including Annex 3 on the basis that it would not "*advance a defence of time bar under regulation 107(2) of the Utilities Contracts Regulations 2016 in respect of any further amendments made to the Particulars of Claim by 26 June 2020 insofar as such amendments are based on facts first discovered by the Claimant in the Defendant's standard disclosure."* This was included in a consent order by the Court. Given my finding that the BBVS tender was required for the Annex 3 exercise, and that tender was included in standard disclosure, this means that the time bar does not apply and these complaints by Bechtel are not time-barred. I therefore consider them on their merits below.

I: The Result of the Competition

345. In this section, I deal with the outcome of the evaluation performed by the assessors, and the resulting determination of the most economically advantageous tender as a result. In doing so, I will identify the issues that concern Bechtel's claims that there were breaches of transparency and/or equal treatment and/or manifest errors in awarding the scores on different answers to the Technical Questions submitted by Bechtel and BBVS. Each of those challenges relate to some, but not all, of the factors within the ITT for each question. Appendix 1 to this judgment sets out all the Questions and Factors separately, as well as identifying the scores awarded, and the different score that Bechtel contends should have been awarded (either to itself, or to BBVS) in the evaluation. In dealing with the evidence of each witness in section E above, I have already dealt with the majority of challenges made to the alleged errors and breaches in the different areas of the evaluation, namely Questions E001 to E010 and I001. I have also dealt with limitation above in section H in respect of the time-bar defence raised by HS2 to some of the challenges to the evaluation. Bechtel maintains that had the scoring been performed without manifest error and the different breaches of obligation, it would have been the winner in the evaluation.

346. The findings I have made on Issues 18 and 19 above, concerning the qualifications in Bechtel's tender to clause 6.2, are fundamental to causation in these proceedings. Given the nature of those findings, they are fatal to any success or recovery by Bechtel in its challenge to the outcome of this procurement competition. I shall still provide reasons for the answers to the other issues agreed by the parties, in case my findings on Qualifications in Section G are wrong. Although it might be thought that the answers to the other issues are academic, in my judgment the parties are entitled to know the outcome of those other parts of the case. However, not as much detail is required as would be the case were they to be determinative. This judgment is, in any case, of considerable length, and endless recitation of the argument on hypothetical arguments is not proportionate. The over-riding objective in CPR Part 1.1 requires that the case be dealt with justly and proportionately, which includes allocating to it an appropriate share of the court's resources, while taking into account the need to allot resources to other cases.

Question E001 Organisation

347. Issues 2 and 3 concern Question E001 and the score of Concerns given to BBVS, which Bechtel alleges ought to have been a score of Major Concerns. Question E001 itself stated the following:

"Explain how you will structure your organisation to manage and deliver this Contract. Provide organisation charts of how you will manage and assure delivery of the Works from the starting date to completion date and provide a completed Management Resource Plan in the form of Appendix C3."

348. Additionally, the tenderers were asked to upload a zip file including certain documents, including the MRS to which reference has already been made. As can be seen from the factors listed under this Question (which are all set out in Appendix 1 to this judgment) the MRS was referred to in factors 4 and 5. Factor 5 stated the following:

[To give HS2 Ltd confidence a response should include and demonstrate:]

"a completed Management Resource Schedule in the form of the template at Appendix C3 detailing an efficient level of resource that the Tenderer demonstrates will effectively manage the Works over the duration of the Contract."

349. It was in respect of this factor that the two evaluators on this question, who were Mr Botelle and Mr Avery, awarded a score to BBVS, after moderation, of Concerns. Bechtel alleges this score should have been one of Major Concerns, and that the score of Concerns was in error. In their Closing Submissions, Bechtel drew attention to the fact that Mr Botelle was to be the Project Manager under the contract, with impartial and independent duties. Authority was cited for this proposition, namely Jackson J (as he then was) in ***Scheldebouw BV v St James Homes (Grosvenor Dock) Ltd*** [2006] EWHC 89 (TCC) at [34]-[35], which was cited and followed in ***Imperial Chemical Industries Ltd v Merit Merrell Technology Ltd*** [2017] EWHC 1763 (TCC) at [130]. However, although correct, in my judgment that proposition is not relevant to how Mr Botelle was to perform the evaluation, or how he did in fact perform it. No different set of duties or standards is to be applied in his case because he was the Project Manager. Evaluations must be done fairly and in accordance with the principles in the Regulations in any event, and by all the evaluators.

350. Mr Botelle only gave one bidder a score of Major Concerns, and this was BBVS for this question in his *draft* scores. However, I repeat what I have observed above about draft scores being reached in isolation from the other evaluator, and how movement from a draft score does not, of itself, constitute manifest error. It is correct that Table 6.8 of the ITT explained that one or more Major Concerns for different factors would justify a score of Major Concerns for the Question as a whole, but the substance of Bechtel's challenge on this Question amounts to reliance on the fact that Mr Botelle moved from his draft score. Bechtel's Closing Submissions state at paragraph 23:

"The Claimant maintains that this score amounted to a manifest error of assessment by the Defendant as the documents do not record, and the witnesses have failed to provide, any relevant or cogent reason for <u>why Mr Botelle moved away from his initial assessment</u> of Major Concerns in respect of Factor 5."

(emphasis added)

351. The other factor that is under consideration is the Alignment Factor, which is also for this Question called Factor 7. This was that the approach of the tenderer in answering this question "is aligned to its responses to the ITT Questions in this section E".

352. Simply moving from a draft score is not, in my judgment, of itself evidence of a manifest error. Nor, in my judgment, does the earlier award of a different score in draft shift the burden in some way on to HS2 to demonstrate why the latter final score was correct, or to justify movement from a draft score reached by an evaluator in isolation from the other evaluator. In my judgment, Bechtel retain the burden of proof in terms of having to show manifest error in the score that was awarded, although an earlier (and different) draft score might make that burden easier to satisfy in evidential terms. But there is a limit to how far Bechtel can rely upon a draft score. I have explained above how the draft scores were intended to be a basis for discussions between the two evaluators. Further, both Mr Botelle and Mr Avery in their oral evidence demonstrated to me that, exercising their professional judgment, there was no manifest error (by either or both of them) in arriving at the final score awarded to BBVS of Concerns. Bechtel challenged the approach of the evaluators on the basis of their witness evidence which suggested they were concerned only with the resources for Year 1 of the contract, and not for the whole life of the project. The latter was undoubtedly required by the Question, but I am satisfied that the evaluators did take resources for the whole life of the project into account. They had greater concerns over Year 1, due to the fact that the resources for subsequent years would be subject to agreement going forwards. Mr Botelle said in his cross-examination that Mr Pybus had explained this to him.

"It was also reconfirmed to me that the way the contract works, the whole life resource levels set out in the MRS were not going to be implemented as set out in the MRS beyond the Consolidation Point. I understand this is because at the end of year 1/the Consolidation Point, the Contract contemplated that resources would be agreed on an annual basis between HS2 and the winning bidder based on the project's evolving requirements, the completed design and the final scope of work. I can see that that is the case from the ITT Volume 0 at paragraph 3.7.3."

(emphasis added)

353. I accept that evidence, and I accept that the ITT paragraph in question was correctly referred to. It states:

"The GMMP for the first year will be derived from the Tenderer's Staff Rates provided at Tender within the Staff Rates Schedule in response to ITT Question [J001] and the resources included in the Management Resource Schedule Template provided in response to ITT Question [E001], as discussed and agreed prior to Contract award. Thereafter, the GMMP will be agreed annually utilising the resources included in the Management Resource Schedule Template as a basis for agreement, with the GMMP ultimately being determined by the Project Manager if not agreed."

(emphasis added)

354. None of the evidence, including that from the cross-examination by Mr Bowsher of the relevant HS2 witnesses, demonstrates that there was any manifest error in this evaluation. Criticism was made by Bechtel of the content of the moderation minutes, and it was submitted that these record the fact that the score was changed, but not the reason. It was also submitted by Bechtel that this was insufficient, in terms of available records, for the Court to be satisfied about what had occurred. It was said by Bechtel that "the Court lacks sufficient cogent evidence to reach any finding, on the balance of probabilities, as to the reasons" for Mr Botelle changing his draft score. I do not accept

those submissions. The reason for the score was the decision as to the level of confidence reached by the two evaluators jointly considering the content of the bid submission, and exercising their professional judgment. One part of the minute states that "Matthew and Rob agreed that there are concerns in relation to the Tenderer's proposed approach to delivery regarding the level of resource proposed and that this represented a significant risk to HS2 Ltd and to delivery of the station" and "It was therefore agreed that the level of confidence for this factor was Very Low, leading to a Concerns score…..". It was also recorded that Mr Avery had moved from his initial score of Minor Concerns, and Mr Botelle had moved from his initial score of Major Concerns. The fact that the level of resource proposed by BBVS was considered to represent a significant risk to HS2 is clearly recorded. The degree of confidence that each of them had was a result of their subjective view as to the level of risk presented by the BBVS MRS. This is what is sometimes called in modern terminology "a judgement call". There is a margin of discretion available in any event to HS2, but I find that there was no error in their reaching the conclusion that they did.

355. Turning to the Alignment Factor, no particular emphasis is put on this in the Closing Submissions by Bechtel for Issues 2 and 3. Regardless of that, I have considered this in any event, and there is nothing to suggest that the answers to Question E001 by BBVS were not aligned to its responses in respect of the other Questions in section E; there was no manifest error in that respect either. Even if there were, which I have found there was not, the score awarded was one that was within the margin of discretion available to HS2. I deal with the Alignment Factor as it impacts upon the other questions below.

356. Further, not only is there no error, manifest or otherwise in the score that was awarded, but nor is there any breach of the principle of transparency or equal treatment in the award of the score either. The moderation minutes are sufficient for the purpose for which they are intended, and there is no absence of proper record keeping in this respect.

357. Issue 2 poses the following question: Did the Defendant breach principles of transparency and/or equal treatment and/or commit a manifest error of assessment in awarding a score of Concerns (10%) to BBVS for Technical ITT Question E001 and ought the Defendant to have therefore awarded BBVS a score of "Major Concerns" for Technical ITT Question E001?

358. In my judgment the answer to each of the parts of this issue, as drafted, are both clearly No. Given my answer to Issue 2, Issue 3 does not arise. There was no basis in the ITT for excluding any tenderer if they were given a score of Concerns, which I have found was properly done, and without error.

359. Additionally, Bechtel sought, in overall terms, to achieve the equivalent of disqualification for the score awarded to BBVS on Question E001. The score of "Concerns" given to BBVS based on the potentially inadequate resources identified in the MRS demonstrated lack of confidence on the part of the assessors. That is entirely logical. But that did not merit the equivalent of disqualification for BBVS. It was not a pass/fail score. HS2 could have made it a pass/fail issue, had the ITT been designed in that way in the beginning. However, the way that the ITT was designed permitted a tenderer to score below "Moderate Confidence" in any of the Technical Questions, with this being translated into a lower percentage score, and not automatically into a score

of "fail". Any conclusion by the evaluators that they had low confidence, very low confidence, or no confidence, would result in scores of Minor Concerns, Concerns or Major Concerns respectively for the factors or Questions, rather than the result of total failure in the competition. The consequences of each of those scores were clearly explained in the ITT.

360. Additionally, when one considers the text of paragraph 6.8.15 of the ITT (quoted at [068] above), it can be seen that there were some express pass/fail criteria within the competition, but a single score of "Concerns" was specifically not one that would, on its own, give HS2 the right to reject a tender. Some other questions, not in the Technical Envelope, were given a pass/fail score. "Concerns" as a score in the Technical Envelope could lead to such a right on the part of HS2, but only in conjunction with another score of "Concerns", as paragraph 6.8.15(b)(ii) of the ITT required "two or more 'Concerns'". A single score of "Concerns" would not exactly be a ringing endorsement of a tenderer's answer to a Technical Question, given it would show "very low confidence" by the evaluators in that part of the response. However, it would neither justify, nor entitle, HS2 to reject a bid as a result. That must be borne in mind when addressing Bechtel's reliance upon the deficiencies in the MRS submitted by BBVS in its answer to Question E001.

Question E002 Resource Management

361. Question E002 was "Given the long term nature of this Contract, explain your resource strategy and how you will recruit, retain, develop and deploy the management team across the Contract lifecycle to successfully deliver the relevant station." The bidders had to upload a certain document, limited (as with so many of the documents required by the ITT) in length. Bechtel was given a score of Very Good, and BBVS a score of Good. Bechtel maintains that BBVS' score should have been lower than it was, and no higher than a score of Moderate.

362. The Alignment Factor is what is under scrutiny on this Question. This has an impact on other Questions too. Questions E002 (Resource Management), E004 (Contractor's Management Plan), E005 (Work Package Strategy), E006 (Early Works Plan), E007 (Procurement Plan), E008 (Design Management), E009 (Programme Management), E010 (Risk Schedule and Management) and I001 (Delivery within Incentive target) all identified the following as a Factor. It was also Factor 6 for Question E001.

363. It was "That the Tenderer's approach is aligned to its responses to the ITT Questions in [this] section E." Paragraph 5.5.7 of the ITT also stated the need for bidders to take what was called a "*holistic approach*" in responding to Technical ITT Questions E001 to E010 and I001:

> "Tenderers will note from Appendix C that HS2 Ltd expects ITT Questions [E001] to [E010] and [I001] to be answered in a manner that demonstrates a holistic approach to the Tenderer's technical delivery proposals and the Evaluation Guidance in Appendix C that accompanies ITT Questions [E001] to [E010] and [I001] indicates that a response will give HS2 Ltd confidence if it is aligned with the Tenderer's responses to the other ITT Questions in section E. However, responses to each ITT Question must be capable of being read on a stand-alone basis and Tenderers must not cross-refer between any ITT Questions to circumvent the stated maximum page limit for any ITT Question.

> HS2 Ltd will consider such cross-referenced material as 'extraneous' to the ITT Question and will not evaluate such cross-referenced material."

364. This was the subject of a clarification request from one of the other bidders and before the submission of final tenders, HS2 answered the query which was done via the Bravo Portal on 20 March 2018 stating the following:

> "HS2 Ltd will evaluate each ITT Question, including those in section E, as described in ITT Volume 0 Part 6.8, namely by reviewing the extent to which and how well the response answers the relevant ITT Question being evaluated. As described in Part 6.8, in evaluating a response to each ITT Question, HS2 Ltd will consider the extent to which and how well (a) the ITT Question has been answered; and (b) each factor in the accompanying Evaluation Guidance has been addressed and then HS2 Ltd will award a score based on the confidence level it has in the response as a whole taking into account the criteria and factors set out in the score descriptors in Table 6.8. In relation specifically to the last factor in the ITT Questions in section E concerning alignment, HS2 Ltd is keen to ensure that each response in section E is consistent to give HS2 Ltd confidence that the Tenderer has considered and proposed a holistic overall proposition. Accordingly, in addition to the two subject matter expert Assessors who will evaluate individual responses to ITT Questions, HS2 Ltd has also engaged a 'technical lead' whose role is to review all responses to section E to ensure responses align. To the extent a response to an ITT Question in section E is not consistent with the rest of the responses to the ITT Questions in section E, HS2 Ltd will in the first instance clarify any inconsistency or lack of alignment if appropriate in accordance with the provisions in ITT Volume 0 and the Utilities Contracts Regulations 2016. If a clarification is not appropriate or does not resolve any inconsistency or lack of alignment, then HS2 Ltd may reflect a material lack of inconsistency [sic] in its score for that ITT Question in accordance with the relevant score descriptors depending on the extent of the inconsistency (for example, does it represent a minor concern or does it just reduce confidence from 'Very good' to 'Good')."

365. The person referred to in this Bravo clarification as the technical lead was Mr Reading. Bechtel submits that this factor goes beyond a factual consistency check, and that is how it would have been understood by an RWIND tenderer. I find that an RWIND tenderer would have interpreted this factor to require consistency across responses. Inconsistencies, whether of factual content in an answer to a question, or methodology, or any other information provided by a tenderer in its tender, would be assessed by HS2 to ensure that the whole tender worked together to achieve the completion of the project. If HS2 decided, having performed the review required by the Alignment Factor, that one answer was inconsistent, or not aligned, with the other responses, then HS2 would first seek clarification or resolution of this with the tenderer. If that did not resolve it, then the material lack of consistency would be reflected in the score of the question that included the inconsistency, and the score awarded would reflect this. The score as awarded would depend upon the extent of the inconsistency. The score would reflect the level of confidence on the part of the evaluators assessed in accordance with the scoring matrix in the ITT.

366. Bechtel uses this Alignment Factor, and the conclusion HS2 reached on resources and the MRS, as a springboard to challenge evaluation on all the other questions in the

Technical Envelope. This is expressed in different ways, in different places, but the best summary is taken from its Closing Submissions in paragraph 142 where the following is stated:

"Given that the OOC Contract was for the provision of a management service (to be carried out by people), each and every one of BBVS' proposals in response to Questions E002, E004-E010 and I001 relied expressly or implicitly on adequate resources in order to be practically achievable."

367. In this way, Bechtel seeks to deploy the level of resources proposed by BBVS in the MRS to challenge the scores for other questions. It also relies upon what is something of an obvious point, namely that adequate resources are required to do a particular task by definition, therefore inadequate resources mean that there are insufficient resources available to do that task. Given the concerns expressed by the evaluators on E001, Bechtel alleges these doubts regarding the MRS shows that the Alignment Factor should, if properly evaluated, have led to a lower score for BBVS on this Question. As stated in paragraph 145 of Bechtel's Closing Submissions, "….because resourcing is a cross-cutting issue across the "E" Questions, it happens that low resourcing on Question E001 does affect the practical achievability of the proposals in most other Questions and ought properly to affect the scoring of those Questions."

(emphasis added)

368. Bechtel also makes complaint that Mr Reading did not assess whether the proposals made in other parts of the bids received would have been practically achievable given the level of resource submitted in the tendered Management Resource Schedules, even though he accepted that this would have been possible.

369. HS2 submitted that the use of the words "consistency" and "align" could not import the obligation to carry the merits or demerits of the answer to one question into all the other questions. I accept that submission.

370. I also consider that the way in which Bechtel approaches this subject is akin to having the entire scoring methodology changed, so that an inadequate answer on one question would have a disproportionate effect upon the scoring of all the other questions within the Technical Envelope. That is not how the ITT explained the evaluation and scoring would be done. Indeed, "practical achievability" is not an express factor in all of the questions the score for which is challenged by Bechtel.

371. There was no reason for Mr Reading, or for any other evaluator for that matter, to have assessed whether the proposals in other parts of the bid were practically achievable based upon the contents of the MRS. This is for one very simple reason: there was no specific Question in the ITT that required this. Had this been done in the evaluation, it would also have amounted to HS2 scoring the ITT by reference to hidden criteria. In my judgment, Bechtel are unable to change the scoring criteria by using the Alignment Factor in this way. I find that the Alignment Factor, interpreted by an RWIND tenderer in the way I have explained at [365] above, simply does not require HS2 to downgrade the scoring across all (or any) of the other questions in the Technical Envelope to reflect any lack of confidence or concerns under E001 about resources. I also find that there is no inconsistency in any event with the resources included in the MRS. However, even if the Alignment Factor did require scoring to be downgraded for the reasons argued by

Bechtel– and I find that that it does not – the guidance communicated by HS2 through Bravo on 20 March 2018 would require HS2 "in the first instance [to] clarify any inconsistency or lack of alignment" with BBVS.

372. I find that there is no reasonably arguable basis for the score awarded to BBVS for Question E002 to be downgraded to one of Moderate. There is no manifest error, breach of transparency or breach of equal treatment in awarding the score that was awarded, which was one of Good. I observe that across the 6 factors that were scored by Mr Avery and Mr Devlin, BBVS obtained the following scores: Excellent was given for Factor 2; Very Good for both of Factors 3 and 4; Good for Factors 5 and 6; and Moderate for Factor 1. It was a matter of professional judgment for the evaluators what score to award overall for this, and it cannot be said to be manifestly erroneous that this range of scores led to an overall conclusion of Good. Bechtel have simply not demonstrated that there was any error in any of these, or in awarding BBVS the overall score of Good, and the Alignment Factor does not assist Bechtel in any respect in its challenge to this score.

373. The Alignment Factor is the subject of Issues 7 and 8, and impacts upon Questions E004-E010 and I001 as well as the Questions which I have dealt with already.

Question E004 Contractor's Management Plan

374. This required the tenderers to "Provide an outline Contractor's Management Plan aligned to WI 120, describing how you propose to manage and deliver the Works in accordance with the Works Information." It also required the tenderers to upload a more substantial document as part of its response. Bechtel scored Moderate Confidence (which I will call simply Moderate, the word used by the parties in the trial) for this Question; BBVS scored Good. The Bechtel score of Moderate was driven by its answer to Factor 5. In these proceedings, Bechtel maintains it should have been given Good; it also argues that BBVS' score should have been lower, and no higher than Moderate. As with E002, the two evaluators were Mr Devlin and Mr Avery.

375. The three factors relevant to the challenge are Factors 1, 4 and 5, as well as the Alignment Factor. Bechtel alleges that there was interference with the evaluators' exercise in reaching the final score and that moderators and/or legal advisers were responsible for this. Part of what drove the attack on the scores for this Question so far as Bechtel' score was concerned, was that both of the draft scores were higher than the one given consensually. At first sight this looks puzzling, but when the correct status of draft scores is considered, considering a move of score (as did Mr Avery) from Good to Moderate is not such an issue. The scoring methodology for Moderate is:

"because one or more of the following applies:

- The response generally addresses the ITT Question and the factors in the Evaluation Guidance in a satisfactory manner, although parts of the response lack significant detail and/or evidence.

- The response gives greater confidence than 'Minor concerns' but is not sufficiently comprehensive to warrant 'Good confidence'."

376. This contrasts with the two bullet points for Good, which are:

- The response addresses well the ITT Question and the factors in the Evaluation Guidance, although parts of the response lack detail and/or evidence.

- The response gives greater confidence than 'Moderate confidence' but is not sufficiently comprehensive to warrant 'Very good confidence'."

377. Factor 1 was "an overview of the systems, strategies and plans approach the Tenderer considered necessary for successful delivery of the management service." Factor 4 was "how the Tenderer will work with the developer to optimise delivery and minimise impact to Old Oak Common Station" and Factor 5 was "a description of how the Tenderer proposes to manage the construction works including how Key Dates will be met for Old Oak Common Station and proposed mitigation measures for associated risk".

378. In my judgment, Bechtel was engaged in an entirely unjustified ex post facto re-scoring effort in terms of its challenge to these scores. This is clearly shown in paragraph 170 of its Closing Submissions where it submitted that "Had the Claimant instead been awarded the lowest of the Individual Assessor scores for these three Technical ITT Questions – in each case "Good" – it would have gained additional marks amounting to 2.2% of the total marks available, bringing its overall score to 75.96% to overtake BBVS as the first ranked bidder."

379. That is not relevant. It is correct, of course, that had Bechtel been awarded different scores it would have scored differently. The arithmetic in the submission is correct. Had Bechtel been awarded better scores, its overall score would have been better, and had it gained an extra 2.2% it would have won the evaluation (subject to the qualification/disqualification point which I have already dealt with above). But what is relevant is whether there was a manifest error, or manifest errors, in evaluation, or breaches of transparency or equal treatment in awarding Bechtel the final scores it was given. Bechtel was unable to demonstrate any such errors, in my judgment. Mr Avery had concluded, with his co-evaluator, that there was a lack of *significant* detail. The moderation minutes stated, inter alia, that they agreed that the third limb (ie, ' 'The response gives greater confidence than 'Minor concerns' but is not sufficiently comprehensive to warrant 'Good confidence') of Moderate Confidence reflected the assessment of the Tenderer's response accordingly. The assessors discussed and agreed that the lack of significant detail and the lack of detail in parts of the response reduced overall confidence to Moderate in the response as a whole. A lack of *significant* detail is within the scoring descriptor for Moderate. This conclusion was driven, essentially, by Factor 5, although Mr Avery stated in his oral evidence that this was a significant contributor, but not exclusively that factor. A debate about what is, on the one hand, a lack of significant detail; compared with what is more correctly categorised simply as a lack of detail, is exactly the type of re-scoring that will not usually be undertaken in proceedings such as these. Bechtel had not even included all the Key Dates in its answer, merely using only a selection of these. Not including a Key Date is, in my judgment, easily (and correctly) categorised as a lack of significant detail. There were only a total of 12 Key Dates, and Bechtel had omitted any reference to more than one – 7, to be precise, were simply not addressed by Bechtel. Only 5 of the Key Dates had been addressed, a point made clearly in Mr Avery's evidence on this, when the so-called "scoring inconsistency" was put to him:

"Q. In substance, the Bechtel answer is saying: here are the tools we will use and we will use those to meet the key dates. In substance, that is no real difference, is it, from the BBVS answer, which is to say: here is an approach we will take to meet the key dates?

A. I disagree. The Bechtel response is not saying that. The Bechtel response is saying: this is how we can meet five key dates. It is not how we can meet all of the key dates."

380. Bechtel accepts this in factual terms – it did, in fact, only deal with 5 of the total 12 Key Dates in its answer. However, Bechtel explained that these 5 dates had been dealt with by means of what it called "a more detailed risk analysis", the term used in its Closing Submissions. But this question in the ITT does not ask for "a more detailed risk analysis" of fewer than 50% of the Key Dates, with the others being omitted or ignored. Factor 5 expressly states "including how Key Dates will be met…." and the evaluators concluded that meant identifying them all. They cannot be said to have been in error in doing so, and I find that an RWIND tenderer would have interpreted the factor in the same way. "Key Dates" cannot sensibly be said to mean to an RWIND tenderer "only 5 of the 12 Key Dates".

381. However, as has been stated many times, Bechtel have to show *manifest* error, or breaches of the other obligations, by HS2. The degree of detail that is present, or missing, is a matter of judgment, which is within the professional sphere of the evaluators. The court will not lightly interfere with these. It cannot be said that the evaluators were wrong to conclude that there was a lack of significant detail in the response. When one adds the margin of discretion available to HS2, the conclusion that Bechtel fails in its challenge to this Question is reached somewhat readily. Bechtel scored a mix of Good and Very Good on the other factors, but the "Moderate" on Factor 5 led to an overall score of Moderate on this Question. That cannot be said to be manifestly erroneous.

382. Turning to the BBVS score, by contrast with Bechtel, BBVS scored only Very Good and Good across the factors, with no Moderate at all. The difference in the two tenderers' scores is therefore easily understood. The evaluators were not comparing answers to Questions between tenderers, but when this is done, it is easy to see how a tenderer who omitted significant detail (and hence scored Moderate) could achieve a lower score overall than one who considered all 12 Key Dates and scored only Good or Very Good on all the factors.

383. Similarly, the allegation that the moderation minutes are inadequate, or do not explain how either score, but particularly the Bechtel score, is reached, is not made out. Bechtel in its Closing Submissions referred to the minutes as containing a "puzzling and opaque" account. I reject that description, which is not accurate. The minutes explain, in summary form, what happened in terms of the evaluators reaching their conclusions. They do not recite, over pages and pages, who said what to whom, nor do they recite every part of the thought process. But they are sufficient for the purposes for which they were prepared, and for which they are required. Nor is there any evidence that there was any interference with the evaluators, nor downward pressure applied to their scoring intentions.

384. I have dealt with the Alignment Factor at [365] above. The same analysis applies in respect of this Question too. There were no material inconsistencies between BBVS' response to this Question and its answer to E001 generally, and its MRS in particular. BBVS' scores should not be reduced by reason of the Alignment Factor, and there was no manifest error in not doing so, nor were there breaches of transparency or equal treatment.

Question E005 Works Package Strategy

385. This was as follows: "Provide a Works Package Strategy (WPS) aligned to WI 120, describing your proposed approach to packaging and the requirements of delivery of the Works." The tenderer was told to assume land access as per the Contract Data, and was reminded to read ITT Volume 0 Parts 3.14 and 3.15 which set out important information regarding HS2's objectives. The tenderers were also required to upload a document of narrative, limited to a particular number of pages, in this case 10 pages of A4. Both Bechtel and BBVS scored Very Good. The evaluators were Mr Devlin and Mr Avery.

386. Bechtel does not challenge its own score, but maintains that BBVS' score should have been lower, and no higher than Good. The factor which was said to be relevant to this challenge was the Alignment Factor, as well as the part of the Question that directed the tenderers to read ITT Volume 0 Parts 3.14 and 3.15 which set out important information regarding HS2's objectives. Bechtel also relied upon Mr Watson's evidence.

387. The complaints, essentially, on this Question were that HS2 failed to apply the Alignment Factor when assessing the question; that HS2 failed to have regard to the alignment of the BBVS response with its other ITT questions; and that changes made from the draft scores in moderation could not be applied to the final scoring. HS2 maintains that it has no case to answer on this Question.

388. BBVS' answer to this Question including the following statement: "**3.1 Packaging approach to optimize supply chain layers** By blending the two approaches and considering the requirements of the geographical worksites and associated stakeholders and asset owners (i.e. OOC Lane, Western Structures, GWML Station, and HS2 Station), we have identified an optimised strategy comprising 15 service packages and 36 work packages. This solution delivers value for money and allows change and emerging scope to be managed." Bechtel maintains that this works package strategy would only be practically feasible if there were sufficient management and support resources in place to manage and deliver 51 works and service packages, and relies upon the concerns expressed in relation to the MRS to argue, therefore, that the BBVS answer to this Question should not have been scored as it was.

389. Mr Watson's second statement is a good example of Bechtel's approach to this part of its challenge. He stated "For example, the team interfacing with HS2 had to be sufficient to engage with HS2, the Station Design Services Contract Consultants, and other stakeholders. Further, the level of resource needed to manage the supply chain had to reflect the scale and complexity of each package, as well as their interfaces and timelines. The fact that Matthew Botelle identified BBVS' MRS as lacking resources overall, and in particular relating to construction management (among other areas), would have therefore constituted an area of misalignment according to Bechtel's

understanding of the ITT. However, nothing in the evidence I have seen shows that HS2 considered the alignment between a tenderer's works package strategy and resourcing levels in this way."

390. This essentially boils down to a complaint that Bechtel believe HS2 should have analysed, at a micro-level, whether a tenderer's proposed level of resources would be sufficient to staff all the functions that the winning bidder would have to perform over the life of the contract, and decide if these were sufficient. Bechtel alleges that this should have affected the score for this question, *in addition to* HS2 scoring BBVS' resources contained in its MRS in the separate question, E001, specifically designed to analyse and evaluate those resources. I find the ITT cannot be construed in this way, and would not have been construed that way by an RWIND tenderer. Bechtel's understanding of the ITT is not relevant for reasons I have already explained. Further, I repeat what I have found above; the scoring for the MRS was to form part of the mark awarded to each tenderer for E001. There was no mechanism built into the scoring methodology to allow for a low mark on E001 to be factored into, affect and reduce, all the scores on all the other Questions in the Technical Envelope for the same tenderer.

391. Further, BBVS' response to E001 stated that its resources were aligned to its Works Package Strategy. Lack of confidence in that statement in E001 should have been taken into account in the score for E001. Bechtel's approach is for that statement to have impacted upon BBVS' score from both ends, as it were, and feed into a lower score for E005 as well, in addition to that finding driving the E001 score too. This would not be scoring E005 separately as the E005 response deserved. I find that HS2 were not in error – and certainly not in manifest error – by not doing so.

392. In any case, I find that there were no material inconsistencies between the answer to this Question by BBVS and the other answers it provided in the Technical Envelope. I have dealt with the Alignment Factor at [365] above. The same analysis applies in respect of this Question too. BBVS' scores should not be reduced by reason of the Alignment Factor, and there was no manifest error in not doing so, nor were there breaches of transparency or equal treatment.

Question E006 Early Works Plan – Old Oak Common

393. This Question was as follows. "Provide an outline Early Works Plan (EWP) with a programme based on the proposed Work Package Strategy provided in ITT Question [E005] and aligned to the RIBA2 design provided in the Works Information (WI 3000). Tenderers are also required to provide their proposals to engage specialist foundation engineering contractors to deliver the detailed design and construction of the HS2 Box foundations, and associated utility diversions to meet the key dates and deliver the station into operation in accordance with ITT Volume 0, Part 3.13." Again, the tenderers were to assume land access, and all consents were Contractor Consents. A file had to be uploaded including various documents, including a .xer document with no more than 500 activities. This is a standard proprietary Primavera file type, which is a programme software application.

394. The two evaluators were Mr Avery and Mr Lalaurette. Bechtel does not take issue with its own score but seeks to have BBVS' score reduced, and maintains it should have been lower than it was, and no higher than Moderate. The Factor under scrutiny here is, again, the Alignment Factor. In draft, Mr Avery scored both Bechtel and BBVS

Good; Mr Lalaurette scored BBVS Very Good and Bechtel Excellent in draft. Both Bechtel and BBVS scored Good for this Question after moderation.

395. Again, the challenge to this concerned the Alignment Factor, and Bechtel relies upon emails relating to E006 to make its point under issue 10, which relates to the allegation of interference with the scores for each of E004, E007 and E008, such that it was said HS2 could not rely upon the final scores or changes made to the draft scores. In respect of that latter point, HS2 maintained that no separate challenge was made by Bechtel to E006 and therefore HS2 had no case to answer in this respect.

396. Bechtel rely on what is said to be unjustifiable interference with scoring and/or unequal treatment and/or lack of transparency in terms of the moderation process. Ms Sumner (who did appear as a witness) and Mr Cuthbert (who did not) were both involved in the Moderation Assurance process. The Moderation Assurance process involved Ms Sumner and Mr Cuthbert providing their feedback on the drafting of the Moderation Rationales and Moderation Minutes by e-mail. These emails were used in evidence, and a greater number are in the trial bundle. I have read all of those identified by either party. The comments in them typically identify some mis-match in language between the scores and the descriptors taken from Table 6.8 of the ITT. Some of Mr Cuthbert's regarding E006 go to Mr Wagstaff, something Ms Sumner could not fully explain, but there is no reason why she should have been able to, given Mr Cuthbert was standing in for her whilst she was on holiday.

397. However, although Bechtel have attempted to deploy the contents of these emails as demonstrating interference with the scoring – a point they sought to reinforce by pointing out that Mr Cuthbert now works for Balfour Beatty, one of the members of the BBVS consortium – in reality they do not demonstrate this. Certain examples are as follows:

"[In relation to the assessment of another tenderer, neither Bechtel nor BBVS]

Factor 6 (contracting strategy) — Good assessment seems marginal given the reference in moderation notes re ANL Bridge demolition being "without sufficient reference to foundation design/construction". Also — Minutes don't explain why Vincent withdrew his 1st criticism of page 11 which was that it didn't answer the question ("not asked in the ITT question").
Factor 7 — again the VGC looks marginal. The Minutes don't address why Vincent's comment that additional engagement evidence to add to market sounding would have resulted in VGC.
…
We find the overall moderated view of VGC rather unconvincing — and the Minutes are not strong enough to support it. Vincent's initial assessment seems stronger, the 5/3 split of VGC to G could change - see above and the comments overall seem to indicate areas where there was a lack of detail rather than the innovation/similar approach elsewhere/all factors being addressed very well indicators of VGC.

[In relation to the assessment of Bechtel's response]
Overall, the score is probably defensible by reference to the scoring indicators and minutes.
However, is the 'moderate' for supply chain engagement sufficiently significant overall to reduce the score from VGC to G? If a more holistic approach to BAM is being taken,

wouldn't a holistic approach here suggest VGC rather than G (given 4 VGCs and 1 E). It seems odd that BAM get VGC and Bechtel get G — given the similar spread of scores. Please look again and confirm during re-moderation.
Assessors (Vincent in particular) should look at the minutes to ensure that they capture fairly why he changed his view from Excellent (which admittedly is not sustainable given he scored various factors as VGC only) to Good.
Also, did the assessors consider whether some factors eg no 1 — are more important than other factors on this question eg no 7 (market engagement)?
Bechtel looked strong on no.s 1 to 3 for example. We don't have an objection to this provided it is justifiable in the circumstances."

(emphasis added)

"*One further point (having seen the stricter approach taken) to E006 EUS. We think the assessors on re-moderation should err on the side of being stricter with the scores eg re BAM and Bechtel*."

(emphasis added)

398. Mr Atkinson was the moderator and it appears that he may have been moderator for all the moderation sessions on E006, including those of 19 July and 3 August 2018 which follow the emails above. That may not have been how the moderation training suggested this would be done, because one entry in those slides states further moderators would be used if re-moderation was required, rather than the original moderator. It is not clear if that occurred or not. However, there is nothing in the evidence, in my judgment, to justify a finding that either the moderators or indeed the legal teams intervened or interfered with the professional judgment of the evaluators, or that any pressure was applied (either to BBVS' score moving upwards, or Bechtel's downwards) to influence the scoring, or distort the documentary record, or inappropriately rationalise scores (all of which are allegations made by Bechtel in its Closing Submissions). Bechtel maintains that "it may have been the scores…..that were wrong" but I reject that submission. The emails demonstrate questions are asked – such as whether they "capture fairly why [Vincent] changed his view" – but I do not consider these demonstrate either interference or impermissible intervention.

399. I do not find that these emails, when read fully and in context, demonstrate interference or downwards pressure in the way that Bechtel suggests. There are a tiny number of entries of text that could potentially be interpreted in that way, and I have identified some of them above, but only if they are taken out of context. One or two are unfortunately worded, for example the latter one, which states "being stricter with the scores" but generally they reflect attempts by those involved in the assurance process to ensure that the entries in the minutes reflect the thinking behind the scores. I interpret that as simply loose language. In any event, in the context of the vast amount of material available, including the moderation meeting minutes, such isolated entries are not persuasive. Bechtel made the most of what was available, and concentrated on such isolated entries or sentences to support their case. However, when looked at as a whole, there is very little, if anything, to support Bechtel's case in this respect.

400. Yet further, with the exception of Mr Cuthbert, I have had the vast majority of the personnel at HS2 involved in this – including Ms Sumner – give evidence in person before me on oath (or affirmation) and they have all been cross-examined by Bechtel. HS2 called 15 witnesses, and the oral evidence went on for many court days. Such a

process would, if there were such interference or pressure, be likely to emerge. I found no evidence of it. Although Mr Cuthbert was not cross-examined, if he had been exerting such pressure then this would have been upon evaluators I did see, such as Mr Avery, and he was extensively cross-examined. I am satisfied that there was no such interference or downwards pressure as suggested by Bechtel.

401. There is no evidence of manifest error, breaches of transparency or breaches of equal treatment in respect of E006 for BBVS' score, either based on the documents, or on the oral evidence of the HS2 witnesses including Mr Avery.

Question E007 Procurement Plan

402. The question itself asked that the tenderer "Provide an outline Procurement Plan that explains how the Tenderer will deliver the Work Package Strategy illustrated in ITT Question [E005], and how the Tenderer will manage the proposed supply chain for the relevant station." Tenderers were directed to read ITT Volume 0 Parts 3.14 and 3.15 before responding, and were also required to upload a document with a maximum of 10 slides.

403. The evaluators were Mr New and Mr Culver. Bechtel gained a score of Moderate, and BBVS a score of Very Good. Bechtel maintains that its own score should have been Good, and BBVS' score should have been lower than it was, and no higher than Good.

404. As well as the Alignment Factor (which for this Question was Factor 7) the four relevant factors were as follows. Factor 1, a procurement and contracting approach for each Works Package that aligns with the Works Package Strategy and is aligned to a management contracting strategy. Factor 2, the approach to securing and effectively managing key subcontractors and mitigation measures to manage associated risk. Factor 4, an approach to incentivising the supply chain, including how incentives will flow down from the Construction Partner contract. Finally, Factor 5, an approach to achieving best practice in supply chain engagement and open procurement to maximise supply chain growth.

405. This is one of the areas in which HS2 contended that Bechtel's challenge to its own score was time-barred. I have dealt with that in Section H, Limitation at [337] and following. Bechtel contended that HS2 failed to have regard to alignment, and also that HS2 was in breach of its obligations given how it scored the Bechtel bid. It complained that an inconsistent and irreconcilable approach had been adopted by HS2 between its bid, and that of BBVS. It also again alleged that the moderation process was conducted in breach of its obligations such that HS2 could not apply the final scores, and should have used the draft scores (which were higher for Bechtel than its final score).

406. Bechtel pointed out and relied upon that for Factor 1, Bechtel was awarded a score of "Moderate Confidence" and BBVS was awarded a score of "Very Good Confidence" for this Factor. Bechtel accepted that BBVS' response was better, but submitted (in paragraph 213 of its Closing Submissions) that "BBVS' response was only marginally more detailed than the Claimant's response." In other words, it was better, but not that much better. That is not a well-founded submission. BBVS' response indicated which type of contract it would use for *each* of its Works Packages. All Bechtel did was said it would consider NEC Options A, B or C. That, in reality, is not much of an answer at all. Bechtel accepted that BBVS had a "precise specification" but said that its own high

level suggestion was more realistic. The assessors plainly did not agree, and I find that they were not manifestly erroneous in scoring more highly the far more detailed response by BBVS for each of the Works Packages, than the vague sentence provided by Bechtel.

407. Bechtel maintain that either Bechtel should have been given Good Confidence, with BBVS at Very Good Confidence, or if Bechtel were to be given Moderate (as they were at the time) BBVS should only have been given Good Confidence. In other words, Bechtel do not quibble with a higher score being given to BBVS per se, but state it should not have been more than one score higher than Bechtel. I disagree that this is the correct approach to scoring - it is certainly not based upon anything in the ITT. The ITT explains that the score for each tender – and each factor in each question – is to be given on a stand-alone basis, and based on the degree of confidence and risk the evaluators conclude is present on that Question. The approach was not to look at different tenders and decide which is better, or which should be scored higher than another, or what the differential in score should be between them.

408. As long as the evaluators were justified in considering the contents of the bid and correctly arriving at the score for that tender, one simply cannot then look at the end result and decide that because one is marked too highly by comparison with another tender, there must be an error tucked away somewhere. That is the wrong approach, but it is implicit within Bechtel's challenge on this Question and this Factor in particular.

409. The evaluators were fully entitled to take the view that they did on Factor 1, given their margin of appreciation, and were entitled to give the scores that they did. There was no error in their doing so. Indeed, looked at with hindsight, they were fully justified in their subjective views, but even if they were not, Bechtel have to demonstrate manifest error and simply cannot do so. Nor is there any proper basis upon which to claim unequal treatment, other than simply that that the scores were different. That is not sufficient to justify a finding of unequal treatment. The scores that were given are in any case fully justified when looking at the different content of the two answers.

410. Turning to Factor 2, Bechtel maintain that the two responses (by Bechtel, and BBVS) "were of at least equal overall quality". Bechtel was given Moderate, and BBVS was given Good Confidence. The evaluators found Bechtel's response lacked significant detail. Mr New explained that BBVS explained steps it had actually already taken to secure sub-contractors, rather than merely listing steps in the future, and he rejected the points put to him for Bechtel that the two bids were broadly the same. I find that Bechtel did not demonstrate any lack of equal treatment. Mr New explained his view of the merits of the two bids; admittedly these could be described as subjective, but that is the whole point of Subject Matter Experts, or evaluators with specialist knowledge. Bechtel demonstrated in cross-examination that his views were not accepted, but they could not demonstrate either that he was in error, or that he had been guilty of unequal treatment.

411. Turning to the next factor, in the joint summary document I requested from the parties, dealing with factors relevant to challenges and evidential references, the entry for E007 states that factor 4 is in issue (at paragraph 7.4(d)). However, the Bechtel Closing Submissions refer at paragraph 220 to Factor 5. I have therefore considered both. On neither, however, have Bechtel come close either to demonstrating error, or unequal treatment, or interference with the scoring through moderation or otherwise. Nor does

consideration of the Alignment Factor assist Bechtel, for the reasons I have already explained in respect of the other Questions I have considered above.

412. There is no evidence of manifest error, breaches of transparency or breaches of equal treatment in respect of E007 for either Bechtel's score, BBVS' score, or the difference between those two scores.

Question E008 Design Management

413. For this question, the tenderers had to provide an outline Design Management Plan (or DMP) "aligned to WI300 describing your approach to design for the relevant station." That term "relevant station" for this tender obviously meant OOC; the same questions were used for Euston too, hence the use of the expression. Bechtel scored Moderate, and BBVS scored Good. It is not alleged that BBVS' score was wrong, but Bechtel alleges that its own score ought also to have been one of Good. The assessors were Mr Hooper and Mr Steward.

414. The relevant factor in issue in terms of the score is Factor 4, for which Bechtel was given a score of Moderate. Factor 4 was "how the Tenderer will manage Technical Assurance of construction, maintenance, testing and commissioning and handover activities." The evidence also dealt with Factor 1, and the Alignment Factor issue also concerned this Question.

415. As with other questions, Bechtel challenges the fact that the draft scores moved. Originally, Mr Steward gave Factor 4 a score of Good, whereas Mr Hooper gave it Moderate. The moderation minutes state in this respect:

> "Through consensus discussion and upon review of the response, David [Steward] agreed with Adrian [Hooper]'s view that there is in fact, a significant lack of detail in relation to the approach to maintenance testing and handover. On that basis, David's level of confidence for this factor was lowered from good to moderate and Adrian's confidence level remained at moderate. Both Assessors agreed that this factor was addressed satisfactorily."
>
> (emphasis added)

416. The conclusion part of the minutes stated:

> "Taking the response to the ITT Question as a whole, 4 of the factors were address (sic) well and 1 of the factors was addressed very well but the Assessors discussed and agreed that the significant lack of detail in parts of the response meant overall the response to this question provided a Moderate level of confidence."

417. The scoring descriptors for Moderate include as a feature "lack of significant detail". In order to advance or make good its challenge in this respect, therefore, Bechtel must show that the assessors were in manifest error in coming to this conclusion. Mr Steward gave evidence and, in my judgment, that evidence adequately explained the conclusion that was reached, and certainly does not demonstrate any error. The fundamental and central element of Bechtel's case amounts, in my judgment, to unwarranted reliance on draft scores. Further, in paragraph 187 of its Opening Submissions, Bechtel explained that HS2 was in breach of the principle of transparency by failing to provide a clear

explanation in the moderation minutes as to why the individual Assessors decided at moderation that their original assessment was wrong. However, even here, the draft score of Mr Hooper on Factor 4 was Moderate. Therefore, here, Bechtel seeks to elevate the status of Mr Steward's draft score above that of the draft score of his co-evaluator, Mr Hooper.

418. There are two points that can be made. Firstly, it is not correct for Bechtel to characterise the draft scores as correct or binding, such that they have to be "wrong" in order to be changed. I have explained above the process whereby evaluators were to consider scores separately, then come together to reach a consensus. The draft scores were their initial, separate, view. They do not have to be "wrong" in order to be changed. Secondly, even if Bechtel is correct to portray draft scores as having that status, the rhetorical question arises, why should Mr Steward's draft score for Factor 4 take primacy over that of Mr Hooper? Mr Steward explained in his evidence how the two of them discussed the matter, and he agreed with Mr Hooper's views. There is no sign of any error in him doing so, and certainly no manifest error.

419. Bechtel criticises what it describes as "downward moderation" of the score for E008, but again, that is to elevate draft scores to a status which they do not merit. In any event, the minutes clearly explain the areas in which the assessors concluded there was a lack of significant detail in Bechtel's bid. There is no error by HS2. Nor is there any breach of transparency. Mr Steward's evidence is criticised as containing "vague references" to the degree of discussion at the moderation meeting, but I find that criticism misplaced. Mr Steward explained in reasonable detail the method adopted by him and Mr Hooper, and what led to the conclusion that there was a lack of significant detail. Both that conclusion, and the score, are in my judgment matters of their specialist knowledge and judgment, reached without breach of obligation by HS2, and the court will not disturb either.

420. So far as the Alignment Factor is concerned, there is reference in E008 to WI300, the title of which is Design. The introduction at paragraph 1.1.1 states "This section of the Works Information describes the requirements of the Contractor in providing the engineering and architectural design components of the works. The Contractor reads this document in conjunction with the rest of the Works Information and the contract."

421. The minimum details of the DMP are set out in paragraph 5.2.3, where it states "the Contractor details in the DMP as a minimum" followed by 14 sub-paragraphs of required contents of the DMP. Two of them state the following:

> "(c) an organisation chart detailing roles, Staff and design and engineering accountabilities within the delivery organisation;
>
> (d) its process for identification, deployment and management of resources to meet the design programme."

422. Given Question E008 was about the Design Management Plan, and does not refer to the MRS, even if I am wrong about the way the scoring of the bids should have been done (with a low score for the MRS on E001 not being carried across into the scoring for other questions), there would be no conceivable justification for deficiencies in the MRS to impact upon the score for E008. The MRS is not relevant in any way to this question. Any failure to deal with organisation or process in respect of resources would

arise as a result of consideration of the contents of the DMP, which was assessed by the evaluators in any event.

423. Finally, this is a good example of the type of criticism made by Bechtel of the moderation minutes. The minutes for the assessment of E008 are criticised for not containing reasons, and are said "to be typical" in Bechtel's Closing Submissions. Yet the extract above at [415] above makes it clear that the assessors considered that there is "a significant lack of detail in relation to the approach to maintenance testing and handover." The reason is clearly identified, and by reference to that part of the answer that the assessors consider is found wanting, maintenance testing and handover. I consider that Bechtel's criticisms are unfounded.

424. All the challenges brought by Bechtel in respect of Question E008 therefore fail.

Question E009 Programme Management

425. For this Question, the bidders had to provide an outline programme for the delivery of the works within the Key Dates and by the Completion Date as detailed within the Contract Data. They were also instructed to "provide supporting narrative illustrating the programme management techniques that you will use to develop the programme, manage production on site deliver the relevant station." A file had to be uploaded with an outline programme, including a .xer file, and a narrative. Bechtel does not challenge its own score, which was one of Good, but makes complaint about the score given to BBVS, which was also Good. Bechtel alleges that the score for BBVS ought to have been Moderate. The two assessors were Mr Pang and Mr Lalaurette.

426. As well as the Alignment Factor, which arises in Issues 8 and 9, the other factors which were considered in respect of the challenge to the score for Question E009 arose under Issue 11 and were Factors 3 and 6. This is one of those questions where Bechtel alleges inconsistencies between the scoring for itself compared with that for BBVS. Bechtel explained this aspect of its challenge in its Closing Submissions in the following way:

"Essentially, the Claimant contends that its responses are clearly at least as good as BBVS' responses in respect of some Appendix C Factors where the Claimant has been scored lower. It also contends that its responses are clearly better than BBVS' in respect of some Appendix C Factors where the Claimant and BBVS have been given the same score."

427. In my judgment, this is a misconceived approach. The proper approach to scoring did not involve comparison with another tenderer's bid, assessing which was better, and scoring accordingly. This was made clear in the ITT itself:

5.5.7……However, responses to each ITT Question must be capable of being read on a stand-alone basis and Tenderers must not cross-refer between any ITT Questions to circumvent the stated maximum page limit for any ITT Question. HS2 Ltd will consider such cross-referenced material as 'extraneous' to the ITT Question and will not evaluate such cross-referenced material.

6.8.1 Assessors will award scores for the response to each ITT Question based wholly on the contents of the written responses to the ITT Questions, and any associated clarifications and responses from Tenderers made in accordance with the procedures

specified in this ITT, including but not limited to clarification and/or validation at clarification meetings and presentations in accordance with Part 6.18 (Post-Tender clarification meetings and presentations).”

428. Therefore, there is scope for tenders to be, on particular questions, slightly better on one Question in subjective qualitative terms than the answer by another tenderer, yet the two answers to be given the same score by the assessors, because both answers could potentially give the assessors the same degree of confidence. Different scores would not therefore be justified. This result could occur without constituting any sort of breach of the obligation for equal treatment.

429. But in any event, in order for Bechtel to succeed, I repeat that there must be manifest error in the evaluation or other breach of obligation. For this Question, Mr Lalaurette had given BBVS an overall score of Concerns, whereas Mr Pang had given BBVS an overall score of Excellent. Mr Pang explained, as I have referred to at [222] above, that he had a lot of experience as a planner, and Mr Lalaurette had a lot of experience on project management. Given planners use programmes very extensively, given this Question was entitled Programme Management, and given the nature of the material that the tenderers had to submit as part of their answers to Question E009, it might be seen as entirely understandable that the different backgrounds of the two assessors might lead to different draft scores from each of them, prior to the discussions and agreement required to reach a consensus score.

430. Bechtel failed, in my judgment, to demonstrate there was any manifest error in the conclusion reached by Mr Pang and Mr Lalaurette, that conclusion being that there was a lack of detail, but not a lack of significant detail, in the BBVS answer. The latter was required for a score of Moderate, the score Bechtel contends BBVS ought to have been given. When the narrative is looked at in detail, the conclusion that there was some detail missing, but not significant detail missing, can be seen to be wholly understandable. Still more, when one considers the margin of discretion available to the assessors, manifest error simply cannot be found.

431. I reject that application of the Alignment Factor ought to have resulted in a lower score for BBVS, and I also reject that there were any breaches of obligation on the part of HS2 in the moderation process such that the final consensus score should not be used. However, even if I am wrong on that last point, the draft score of Mr Pang for BBVS was better than the final score of Good – he had awarded BBVS a draft score of Excellent - and there is no reason to grant primacy to Mr Lalaurette’s draft score, compared to that of Mr Pang.

432. All the challenges brought by Bechtel to the BBVS score for E009 fail.

Question E010 Risk Schedule and Management

433. For this, the tenderers were to provide an outline Risk Management Plan “that explains your approach and proposals for identification and the proactive management of risk across the delivery of the Works. Identify the risks that you consider will impact on the specific station and demonstrate how this will be incorporated into your risk management approach.” This was to be uploaded as a pdf document. Both Bechtel and BBVS were given a score of Very Good.

434. Issue 8 includes reference to this Question in the first part of the issue, namely the application of the Alignment Factor, by posing the question "was the Alignment Factor applied in the evaluation of BBVS' response to Technical Questions E002, E004-E010 and I001 rationally and/or in accordance with how it would have been understood by an RWIND bidder?". However, the second part of that issue does not ask whether any failure to apply the Alignment Factor resulted in the award of too high a score to BBVS in respect of E010. The only questions where this is alleged in Issue 8 to have occurred are E002, E004, E005, E006, E007, E009 and I001. Further, Issue 9 is framed to include all of E004 to E009 and I001, thus expressly excluding consideration of E010.

435. HS2 therefore submits that it has no case to answer on this question. Bechtel, on the other hand, in paragraph 232(c) of its Closing Submissions, maintains that "the Claimant's and BBVS' scores for Questions E001-E002, E004-E010 and I001 would have been adjusted to avoid the breaches described in Sections II, VI, VIII and IX above." Section II is a manifest error of assessment relating to Question E001 and cannot involve E010. Section VI is a failure to consider or assess the Alignment Factor. Section VIII relates to breaches of transparency and equal treatment by downwards adjustment of draft scores at moderation. Section IX is an inconsistent approach to scoring answers specifically by reference to E004, E007 and E009.

436. HS2 points out that paragraphs 45g and 45h of the Particulars of Claim do not include any pleaded allegation by reference to Question E010. That is correct. On its own Closing Submissions, the only breaches upon which Bechtel can rely concerning this question are those in respect of the Alignment Factor and downwards adjustment of scores at moderation. Given for this Question there was no downwards adjustment, as Bechtel (and BBVS for that matter) were given two draft scores of Very Good and an overall score also of Very Good, that alleged breach falls away.

437. The only area left therefore is the Alignment Factor. I accept HS2's pleading point, which is more than a mere technicality. Bechtel maintained that HS2 had misapplied the Alignment Factor generally (as a matter of principle), and paragraph 151(a) of its Closing Submissions referred to the this "impact[ing] the practical achievability of the proposals in Question E002, E004-E007, E009 and I001" – that is, no separate complaint is made in respect of E010. However, in case I am wrong about that (and given paragraph 151 of the Bechtel Closing might to conflict with paragraph 232(c) of the same document), I will briefly explain why it makes no difference.

438. Ms Olsen and Mr Pang were the evaluators. The title of the Question is Risk Schedule and Management. The Risk Management Plan could not sensibly be affected by the contents of the MRS. It was put to Ms Olsen that BBVS' risk management proposals relied on stakeholder management, and that Mr Botelle had concerns that BBVS' stakeholder and consent management teams were under-resourced, but it was not put to Ms Olson that the resources proposed by BBVS in its MRS for stakeholder management were insufficient to deliver its risk management proposals. Even if I am wrong about the way that the Alignment Factor was intended to operate (and would have been understood by an RWIND tenderer to operate) I am unable to conclude on the evidence that any aspect of the MRS submitted by BBVS would have had any impact upon the risk management proposals.

439. There is no breach of obligation by HS2 in evaluating E010 and there is no manifest error.

Question I001 Delivery within Incentive Target and Programme Target

440. This stated the following: "Delivery within the Incentive Target and Programme Target is a key objective of HS2 Ltd. Provide your proposal to meeting this objective including describing the approach that you will apply and demonstrate how this will enable you to design and deliver within the Incentive Target and Programme Target as detailed within WI 800. Identify the steps that you will take and issues that you would address to enable the station to be designed and delivered within the Incentive Target and Programme Target."

441. This is a particularly ironic Question, in a sense, given the subject matter of the Bechtel qualification. That qualification could be interpreted as a very clear indication that Bechtel did not intend to meet this key objective, given the proposed change to clause 6.2 and the options that would arise at the Consolidation Point if Bechtel refused to agree that either the Incentive and/or Programme Target could not be met. However, this Question was evaluated by the assessors in isolation from that qualification and Bechtel was awarded Very Good. BBVS was given Good. The two assessors were Ms Olson and Mr Culver. Bechtel maintains BBVS ought to have been given a score of Moderate as a result of proper application of the Alignment Factor.

442. HS2 again takes a pleading point and maintains that paragraphs 45g and 45h – which deals with moderation of responses - contain no complaints about I001. I accept that submission, as I accepted it for E010. Further, Ms Olson gave BBVS a draft score of Good in any event, so although her co-assessor moved from Moderate to Good for BBVS, there would be no reason to grant Mr Culver's draft score some sort of precedence over the draft score of Ms Olson.

443. I therefore consider this from the point of view of an alleged failure by HS2 properly to apply the Alignment Factor to other elements of BBVS' bid. The argument by Bechtel is that (as put in paragraph 142 of its Closing Submissions) "given that the OOC Contract was for the provision of a management service (to be carried out by people), each and every one of BBVS' proposals in response to Questions E002, E004-E010 and I001 relied expressly or implicitly on adequate resources in order to be practically achievable."

444. However, even if I am wrong about the way that the Alignment Factor was intended to work in terms of scoring, there is no manifest error or breach of obligation in HS2 failing to apply its conclusions regarding resources and the MRS to the score for the answer to I001. This is because this Question expressly refers the tenderer to WI800 by using the phrase "as detailed within WI800". That document, part of the Works Information and headed Commercial Management, expressly within it deals both with the Cost Plan, the Cost Plan Strategy, the Management Resource Plan and the MRS.

445. Paragraphs 5.1.1 and 5.1.2 of WI800 state as follows: "5.1.1. The Contractor provides a Cost Plan to manage and control the costs throughout the life of the contract and provide assurance to the Project Manager that the works can be delivered within the Incentive Target" and "5.1.2 The Contractor develops and submits to the Project Manager for acceptance a Cost Plan within eight weeks of the issue of the Contractor's final verification report on the SDSC estimated target cost for the works."

446. Given the Cost Plan is submitted to the Project Manager for acceptance, and given the MRS and Management Resource Plan are expressly stated to be part of the Cost Plan, Bechtel is wrong to state, as it does in its submissions, that deficiencies in the MRS would impact upon tendered resources being adequate in order to be practically achievable. Further, the MRS is described in paragraph 6.2.1 of the ITT in the following terms "An initial Management Resource Schedule is contained within the Contract Data Part 2 and represents the GMMP for the first year and is a forecast of all of the management Staff it anticipates to utilise during that year. The Management Resource Schedule details the numbers of anticipated Staff by discipline, role, supplier, pay band and grade and the all-in tendered rate per day, start and demobilisation dates and the proportion of time to be spent on this contract".

447. In my judgment, this demonstrates two things. Firstly, the MRS is only an initial document and is a forecast for the first year. An RWIND tenderer would interpret it in that way. In my judgment, no RWIND tenderer would interpret paragraph 6.2.1 as meaning that the MRS fixed the level of resources for the life of the contract. Secondly, any deficiencies in that MRS would not have any impact on the evaluation of this Question, dealing with the tenderer's intentions to meet the Incentive and Programme Targets. The answer has to "identify the steps that you will take and issues that you would address….." Answering this does not, in my judgment, concern the MRS. I accept HS2's submission that the Question did not ask about management resources or require tenderers to explain their alignment with the proposed MRS at all.

448. I find that there is no breach of obligation on the part of HS2 in the evaluation of Question I001 and Bechtel's challenges to this fail.

Alignment Factor and other consistency issues

449. There are a number of ways that Bechtel puts alignment issues. The Alignment Factor is an express element of each of the questions in the Technical Envelope, and was considered by Mr Reading. Additionally, there are other specific alignment features that were required in specific questions. For example, Question E009, Factor 2 required alignment with the Works Package Strategy in Question E005 and the Early Works Plan in Questions E006.

450. Another instance is where Questions required alignment with one of the Works Information documents, for example Question E005 required the Works Package Strategy to be aligned with WI 120, and Question E007 required the tenderer to do the following:

> "Provide an outline Procurement Plan that explains how the Tenderer will deliver the Work Package Strategy illustrated in ITT Question [E005], and how the Tenderer will manage the proposed supply chain for the relevant station."

451. These plainly are instances where Questions refer to another element of the Technical Envelope, in this case Question E005, which itself required alignment to the Works Information. These are all instances where a tenderer's bid had to be consistent across the other elements within it. The phrase "cross-cutting" was also used in the proceedings. There are a number of different issues that refer to all of these principles, for instance Issues 7, 8 and 9.

452. I have already explained that the lack of confidence which HS2 found in the MRS as part of the answer provided by BBVS to Question E001 – and which was reflected in the score of Concerns awarded to BBVS for that Question – was not intended, and would not have been understood to have been intended by an RWIND tenderer, to flow across into the scores for each of the other Questions in the Technical Envelope or I001, as alleged by Bechtel. The other type of alignment issues, such as the references to other E Questions or the Works Information, were expressly intended to be considered when evaluating the questions that required this, but the evidence demonstrates that they were.

453. However, in respect of each of them, the general allegation made by Bechtel has to be substantiated with specific findings on the evidence that demonstrate manifest errors in evaluation, or other breaches of obligation on the part of HS2. Bechtel has simply failed to demonstrate these evidentially.

454. I return to the correct approach of the court in matters of procurement challenge.

Summary

455. The evidence regarding the evaluations and assessments for each of the Questions, for both Bechtel's bid and that of BBVS, is such that Bechtel has failed to demonstrate any breaches of transparency, or equal treatment, or any errors of assessment (still less, any manifest errors) in any of the evaluations. This section of the judgment therefore demonstrates that, even if I am wrong about my conclusions on the effect of the qualification to clause 6.2 in Section G above, and HS2's ability to reject Bechtel's tender as a result, that conclusion makes no difference to the outcome of these proceedings.

J: Abnormally Low Tender

456. I turn to deal with the issue of an abnormally low tender. This arises in the context of a number of different issues. Bechtel alleges that BBVS' answer regarding resourcing (included as part of its answer to E001) and the resources included in the MRS were insufficient. Bechtel also alleges an abnormally low tender in respect of BBVS' price, in particular the Lump Sum Fee. Issues 1, 4 and 5 are as follows:

Issue 1. Did the Defendant owe the Claimant a duty (i) of good administration and/or (ii) to identify whether other bids received in the competition appeared to be abnormally low and/or (iii) to investigate such bids as did appear to be abnormally low and/or (iv) to decide whether to reject the tender in light of explanations provided and/or (v) to conduct the evaluation of tenders and take decisions on its abnormally low tender investigation on a rational basis and/or free of manifest error?

(a) What is the correct meaning of 'abnormally low tender' and can a tender be 'abnormally low' based on resource levels?

Issue 4: Did the Defendant breach its duties under Regulation 84 UCR by not identifying BBVS's tender as apparently abnormally low on the basis of:

(b) its proposed level of resourcing; and/or

(c) its price, in particular the Lump Sum Fee?

Issue 5: If the answer to Issue 4 is in the affirmative, did the Defendant breach its duties under Regulation 84 UCR by not excluding BBVS's tender on the basis that it was abnormally low?

457. I shall consider the subject matter of these issues together. I have dealt with the alleged duty of good administration at [283] above and following.

458. Regulation 84 UCR 2016 provides the following in respect of abnormally low tenders:

"(1) Utilities shall require economic operators to explain the price or costs proposed in the tender where tenders appear to be abnormally low in relation to the works, supplies or services.

(2) The explanations given in accordance with paragraph (1) may in particular relate to—

(a) the economics of the manufacturing process, of the services provided or of the construction method;

(b) the technical solutions chosen or any exceptionally favourable conditions available to the tenderer for the supply of the products or services or for the execution of the work;

(c) the originality of the work, supplies or services proposed by the tenderer;

(d) compliance with the applicable obligations referred to in regulation 76(6);

(e) compliance with obligations referred to in regulation 87;

(f) the possibility of the tenderer obtaining State aid.

(3) The utility shall assess the information provided by consulting the tenderer.

(4) The utility may only reject the tender where the evidence supplied does not satisfactorily account for the low level of price or costs proposed, taking into account the elements referred to in paragraph (2)..."

(emphasis added)

The remainder of the Regulation is set out at [103] above but is not directly relevant to these issues, dealing as it does with other matters.

459. The regulation therefore entitles the utility to require an explanation of "prices or costs" if they appear to be "abnormally low". Regulation 84(2)(a) to (f) identifies the matters to which that explanation may relate.

460. Here, Bechtel criticises HS2 for assessing the issue of "abnormally low" only by reference to Staff Rates and Lump Sum Fee, and for failing to do so in circumstances where the MRS submitted by BBVS had resources within it which Bechtel says were too low.

461. To support its arguments on this subject, Bechtel relies on dicta of the General Court of the EU stating that "an offer that appears abnormally low gives reason to suspect that the tenderer will not be able to perform the contract according to the conditions offered, in particular because the asking price seems to be too low or because the envisaged technical solutions seem to exceed the tenderer's capacities" (emphasis added) from Case T-90/14 ***Secolux v Commission*** EU:T:2015:772 at [61]; Case T-700/14. This judgment is only available in French and German, but counsel for Bechtel provided a translation, this passage being translated from the French which states "une offre qui paraît anormalement basse permet de soupçonner que le soumissionnaire ne sera pas en mesure d'exécuter le marché selon les conditions offertes, et ce, notamment, parce que le prix demandé paraît trop faible ou parce que les solutions techniques envisagées paraissent dépasser les capacités du soumissionnaire".

462. The MRS, the resources schedule provided by BBVS as part of the answer to Question E001, was given a score of "Concerns" by the evaluators because of some aspects of it which the assessors felt did not give them the necessary confidence. The assessors were Mr Botelle and Mr Avery. Although in this part of the case Bechtel relies upon the MRS on the issue of an abnormally low tender by BBVS, Bechtel also challenges the outcome of the procurement in terms of the evaluation of E001 (which I have dealt with above).

463. In ***SRCL Ltd v NHS Commissioning*** [2018] EWHC 1985 (TCC) I considered the issue of abnormally low tenders. I held that the following principles applied, in that case under the Public Contracts Regulations 2015. I find that the same principles apply here to the different Utilities Regulations. My findings at [193] to [205] in that case can be summarised as follows:

(a) There is no basis for imposing a general duty on authorities (here, HS2) to investigate whether a tender is abnormally low [193];

(b) If the authority considers that a particular tender is abnormally low *and* considers that it should reject the tender for that reason, there is a duty on the authority to require the tenderer to explain its prices [193];

(c) Absent a satisfactory explanation, the authority "shall reject the tender" in the circumstances expressly set out in Regulation 69 PCR 2015 and Regulation 56 (2) namely non-compliance with specified fields of environmental and social legislation [193]. UCR 2016 is different, and Regulation 76(6) states that the "Utility may decide not to award a contract to the tenderer" if it does not comply with specified fields of environmental, social and labour law legislation. This is rather different wording than used in Regulation 56(2) PCR 2015;

(d) Otherwise, the authority is entitled to reject the tender if the evidence does not satisfactorily account for the low level of price, but it is not required to do so [193].

(e) The court's function is not to substitute its own view for that of the contracting authority on whether a tender has the appearance of being abnormally low. The correct approach is only to interfere in cases where the contracting authority has been manifestly erroneous [197].

(f) There is no definition of the words 'abnormally low'. However, the expression must encompass a bid which is low (almost invariably lower than the other tenders) and the bid must be beyond and below the range of anything which might legitimately be considered to be normal in the context of the particular procurement [204].

(g) A contracting authority has a discretion as to what test it uses for identifying what may be an abnormally low tender and an 'anomaly threshold' is a perfectly permissible approach as a matter of EU law [205].

464. The different wording between Regulation 56(2) PCR 2015 and Regulation 76(6) UCR 2016 could potentially mean that in the former the authority has a duty to reject, whereas in the latter the utility has the power, but not the obligation, to reject. However, regardless of the proper construction of the former (which in ***SRCL*** I found was a power but not a duty to reject), in the latter instance the different Regulation under UCR 2016 plainly states the "Utility *may*". In my judgment, the use of the word "may" means that HS2 had a discretion to reject an abnormally low tender. It would require a different word if the authority was positively under a duty to reject, such as "must". Therefore it is clear that under the regulations that govern this procurement, 2016 UCR 2016, HS2 had the power to reject an abnormally low tender, but was not obliged to do so.

465. I do not consider that the dicta in the ***Secolux*** case quoted above means that the court is required to adopt a general review of whether any successful tenderer will be able to perform the contract, merely because a losing bidder alleges that the winning tender is abnormally low. The passage in the case continues on to specify that, in particular, it is the price or the technical solutions adopted that will be considered in this respect. Every case will be different, because it is by reference to the contract that is to be awarded that the concept of abnormally low tender will be defined.

466. In ***Joined Cases C-285/99 and C-286/99 Impresa Lombardini SpA*** [2001] ECR I-9233 at [67] and ***Advocate General Ruiz-Jarabo Opinion*** at [32] and [35], the Advocate General notes that: "*The concept of an abnormally low tender is not an abstract concept; on the contrary, it is defined by reference to the contract to be awarded and to the work involved… the concept of an abnormally low tender is very precise and must be determined for each contract according to the specific purpose it is intended to fulfil"*.

(emphasis added)

467. I accept that statement, and I find that the concept of an abnormally low tender has to be considered by reference to the particular contract to be awarded, the work involved, the way the project is designed and the way the costs and prices are calculated. I also accept the submission made by Bechtel that a tender can be considered "abnormally low" on the basis of matters other than the quoted price, authority for which Bechtel cites Case T-495/04 ***Belfass*** ECLI:EU:T:2008:160 at [98] to [100]. This states:

"[98] It follows that Article 139(1) of the Implementing Rules [equivalent to regulation 84 UCR16] enshrines a fundamental requirement in the field of public procurement, which obliges a contracting authority to verify, after due hearing of the parties and having regard to its constituent elements, every tender appearing to be abnormally low before rejecting it.

[99] Next, the Court notes that Article 97(2) of the Financial Regulation provides that contracts may be awarded by the automatic award procedure or by the best-value-for-money procedure and that, as regards the latter form of procedure, Article 138(2) of the Implementing Rules states that the tender to be accepted is the one with the best price-quality ratio, taking into account criteria justified by the subject of the contract such as the price quoted, technical merit, aesthetic and functional characteristics, environmental characteristics, running costs, profitability, completion or delivery times, after-sales service and technical assistance.

[100] The Court is accordingly of the view that, where the contract is awarded to the tender offering best value for money, the fundamental requirement referred to in paragraph 98 above applies not only to the price criterion under the tender evaluated but also to the other criteria referred to in Article 138(2) of the Implementing Rules, since those criteria allow an anomaly threshold to be determined beneath which a tender submitted in the tender procedure in question is suspected to be abnormally low, within the meaning of Article 139(1) of the Implementing Rules."

(emphasis added)

468. The concept of abnormally low, therefore, has to be determined on the basis of the actual contract being tendered in this specific case. That much is made clear from the above, particularly the phrase "having regard to its constituent elements". One constituent element of the tender in this case was resources. However, Bechtel faces substantial obstacles in this area of its case. This obstacle is three-fold. The first obstacle is that the MRS did not feed into either the price or costs proposed in the tender. This point was made increasingly clear as the detailed mechanism of the scoring was examined during the trial. The MRS was a separate factor in Question E001. It had no effect on the Staff Rates; indeed, the template for the rates under Question J001 was specifically designed so that level or amount of resources would *not* feed into the Commercial Envelope. It was these rates that were considered by HS2 when evaluating J001. This was entirely understandable, given the services were to be management contract services, and also given the GMMP was to be agreed on an annual basis going forwards. The winning tenderer would be paid on the basis of rates, and also be paid through the mechanism of the percentage Lump Sum Fee. It is also understandable given the Staff Rates had to be considered between tenderers on a like-for-like basis. This is made clear in the ITT, in particular at 6.11.6 which stated:

"6.11.6 Once populated, the [Staff Rates Schedule] template will automatically multiply the 'Day Rate' entered for each role and grade rate by the 'Average Forecast Days' for each role, as identified in Appendix C2 to calculate a modelled cost for evaluation purposes only (the 'Rate Card Price'). The 'Average Forecast Days' is an average annual indicative assessment of the utilisation, in days, of a particular role and grade to perform the Construction Partner role for the Contract duration and is for evaluation purposes only to ensure that all Tenderers can be evaluated on the same basis. The template will sum all the modelled costs for each role and grade to determine a modelled Rate Card Price to be evaluated".

469. Staff Rates, as with Lump Sum Fee, were scored by reference to who was the lowest bidder. This was made clear in the next paragraph of the ITT:

"6.11.7 The lowest Rate Card Price will receive full marks (100) for the quantitative evaluation of this element of the Commercial Submission with higher Rate Card Prices having 1 point deducted for every 1% variance from the lowest Rate Card Price. The score will then be applied to the sub-criteria weighting (10%) to identify the weighted score for the Staff Rates element of the Commercial Evaluation."

470. Nor did the amount, or level, of resources have an effect on the Lump Sum Fee, which was evaluated and assessed wholly independently of level of resource, and upon the percentages ascribed by each tenderer to the different line items in the template that had to be completed to answer that Question, J002. Bechtel in its evidence tried to demonstrate that level of resources would affect the Lump Sum Fee, because Mr Roberts explained (for example) certain elements in the Bechtel bid would have been different, within the Bechtel template, had the level of resources been different. However, there were six such elements, and three of them had been priced by Bechtel at zero. The others were at very small percentages. But in any event, this evidence does not assist Bechtel. Firstly, it could not demonstrate that the Lump Sum Fee it had tendered would have been different. On all the evidence, I find that it would not. Secondly, on the terms of the ITT, an RWIND tenderer would not have concluded that the level of resources in the MRS under Question E001 would impact upon the level of fee for J002. It was entirely a matter for a bidder how it constructed the level of its own Lump Sum Fee. Mr Roberts' evidence amounted to a subjective exercise that, had Bechtel known resources would be treated as HS2 treated them, Bechtel *could* have submitted a different level of fee. Yet the ways in which HS2 approached resources in the MRS, and J001 and J002, and the ways these questions would be evaluated, were all clearly set out in the ITT and an RWIND tenderer would have understood that.

471. Further, there was no cogent evidence that *level* of resources in the MRS impacted upon the BBVS percentages in the Lump Sum Fee submitted. I find that they did not. However, even if they did, this was a function of how each of Bechtel and BBVS chose to compile the information they provided in their respective fee templates. Further, the Lump Sum Fee was assessed under Question J002 and no aspect of the Template provided, allowed or stated, that any input by the tenderer was to be resource-dependent, or included the MRS as an element. Rather to the contrary, they were all to be inputted as percentages, or parts of percentages.

472. I find that both J001 and J002 were designed so that the evaluation of price and costs would exclude any consequential factors dependent upon resource level, specifically so that HS2 could compare like with like between tenderers, regardless of resource levels in the MRS. This is how those terms of the ITT (paragraphs 6.8, 6.9.1, and 6.11.1 to 6.11.18) would be understood by an RWIND tenderer.

473. The second obstacle that Bechtel faces is that HS2 had set a Fee Collar, or lower limit, *above which* each tenderer had to bid its Lump Sum Fee. This was dealt with at paragraphs 6.11.19 to 6.11.23 of the ITT. The level of the Fee Collar was not an arbitrary percentage; it was set after consideration of the evidence available to HS2 for all the procurements it had conducted on other contracts, and then adjusted. Given the European cases in [464] state that an abnormally low tender "must be determined for each contract", this was done by HS2 in the ITT itself.

474. That was the purpose of the Fee Collar, and I find it accomplished its purpose. It must also be understood that, to be abnormally low, both those words must be considered,

namely "abnormally" *and* "low". Here, the BBVS bid was "low" only in the sense that the fee it tendered was lower than Bechtel's fee. But it was not "abnormally" so. The term means a bid that "must be beyond and below the range of anything which might legitimately be considered to be normal in the context of the particular procurement", to use the wording from [204] of the ***SRCL*** case. Indeed, when one considers Confidential Appendix II, the single biggest difference between the Fee submitted by BBVS and that of Bechtel was determined by the different level of profit. Bechtel wanted a higher profit. If that difference is removed, then the two fees are much closer to one another. I find that the difference between them is sufficiently close that the BBVS bid could not be described as "abnormal"; it is entirely of the same order, and in the same range, as that of Bechtel. This conclusion is reinforced by the fact that another bidder, Omega, bid a Lump Sum Fee excluding profit only 0.47% higher than that of BBVS. Given BBVS and Omega were so close together on Lump Sum Fee, and there were only five bidders, it is difficult to see how BBVS' fee could properly be described as "abnormal".

475. The third obstacle is that the type of contract to which this procurement related, which is essentially a management contract in all but name, would lead to HS2 paying the Construction Partner through the fee, and payment for resources provided by application of the rates in J001 applied to the level of resource deployed by the winning bidder. Physical works were not to be performed by the Construction Partner, but by the Works Contractors. When one considers the level of fee tendered, even absent the Fee Collar, there would be no "reason to suspect that the tenderer will not be able to perform the contract according to the conditions offered", to use the expression from the European authorities in [460] above. "Perform the contract" must mean for *this* contract, namely the Construction Partner contract, in respect of which no actual costs of the physical works (the Works Packages) were to be included by way of payment to the winning tenderer. There is nothing in the rates, or the Lump Sum Fee percentages submitted by BBVS, that could have led to HS2 concluding – or even suspecting - that BBVS would not be able to perform the Construction Partner contract.

476. Bechtel submits that "a utility which identifies that there are reasons to suspect that a tenderer does not have the technical capacity to perform the contract on the terms of the tender should conclude that the tender is to be treated as an abnormally low tender, or should conclude that it appears to be abnormally low." Whether this is a correct legal submission or not, this is not such a case. There are no reasons on the evidence in this case for HS2 to have had such suspicions of any lack of technical capacity of BBVS to perform the contract. Further, this is not a case where, for example, there is "a technical solution" (the term used in the ***Secolux*** case) that has to be considered when assessing the notion of an abnormally low tender. The MRS does not represent the "technical capacity" of BBVS to perform the contract, to adopt the phrase in Bechtel's submissions. The MRS represented one element that would be used to calculate the Year 1 GMMP. This is clearly set out in paragraph 3.7.3(b) of the ITT which stated :

"The GMMP for the first year will be derived from the Tenderer's Staff Rates provided at Tender within the Staff Rates Schedule in response to ITT Question [J001] and the resources included in the Management Resource Schedule Template provided in response to ITT Question [E001], as discussed and agreed prior to Contract award."

The MRS was an organisational proposal, as made clear later on in the ITT at paragraph 3.14.2 which stated "As part of their Tender response, Tenderers are required to confirm

how they propose to organise their contract management team (ITT Questions [E001] and [E002])….." The contents of the MRS did not represent the entirety of BBVS's ability to perform the contract.

477. It was also expressly recognised that this organisational structure in the MRS would change, as set out in paragraph 3.20.2 of the ITT:

"HS2 Ltd recognises that the requirements of the Contract will change over the life of the Contract and similarly that the Construction Partner's organisational structure and its management team will also need to change to reflect those changing requirements as the Contract and Works progress. Accordingly, the Tender response requirements and the Contract are designed to recognise that the organisation and management team will be amended and agreed on an annual basis and to allow the Construction Partner to focus on providing the right organisation and level of resources to successfully deliver the Contract." (emphasis added).

There is no basis for elevating the MRS to some type of technical solution for the contract, in the way contended for by Bechtel. It represented, and was intended to represent, the organisational structure advanced by each bidder.

478. Turning to the proposed level of resourcing shown in the MRS submitted by BBVS, the evidence does not support any conclusion that this showed levels of resource outside the range of anything that could legitimately be considered normal in the context of the procurement. It appeared low in some isolated respects, as Mr Botelle and Mr Avery explained and was, as a result, not sufficient to give HS2 the confidence for it to be scored well. This was reflected in the score it obtained, namely that of "Concerns", which showed that it represented a degree of risk to HS2. But that is not the same as being outside a legitimate or normal range, or of being abnormal. There is no evidential basis for such a conclusion. I have already found that the score of Concerns was not manifestly erroneous.

479. I find it doubtful that "level of resourcing" could be seen as falling within the terms of the regulation governing abnormally low tenders, so far as this specific contract is concerned. This is because those resources in this procurement do not have any impact upon price or costs submitted by the tenderers. However, even if I am wrong about that and it does, here the BBVS tendered resources cannot be considered abnormally low. Here, the evidence shows that these resources were low in some respects, which led to the score of Concerns. They were, however, when looked at as a whole, not outside the range of what could be considered normal or acceptable. Further, the price, in particular the BBVS Lump Sum Fee (but also the Staff Rates), is not only unaffected by the level of resource, but is plainly not abnormally low either. The Lump Sum Fee bears very close comparison with that tendered by Bechtel, in particular when one takes account of the higher level of profit tendered by Bechtel. As [4] of Confidential Appendix II shows, there is a difference in the two fees of only 1.42%, if the different percentage for profit is removed (which accounts for the majority of the difference). It is very difficult to envisage a scenario where a fee of x% would be abnormally low, yet a fee of (x + 1.42)% is not. Yet that is the finding for which Bechtel contends, if the different level of profit is removed. Not only that, but another tenderer (with the codename Omega) bid a figure excluding profit of only 0.47% higher than BBVS. This is very close, in my judgment, to the winning bid level. It cannot be said BBVS' bid for Lump Sum Fee, excluding profit, was out of the range of the other tenderers. Profitability is

not to be entirely ignored, because it is expressly referred to at [100] of ***Belfass***. However, where profit alone accounts for so much of the difference between the two levels of Lump Sum Fee, I find it verging on contradictory that Bechtel could rely upon the fact that its profit was so much higher than that sought by BBVS in demonstrating that BBVS' bid, so far as fee was concerned, was abnormally low. In this case, on these facts, it plainly was not. The evidence was that the rates were broadly comparable across the tenderers, and BBVS was not by any means the lowest across all of them. There is no evidence to suggest that the rates tendered by BBVS were abnormally low either.

480. Further, there is nothing either in the way that BBVS constructed its bid, or in the evidence before the court, to substantiate any suggestion that HS2 acted either irrationally, or manifestly erroneously, in approaching the issue of an abnormally low tender in the way that they did. The decisions HS2 made on this subject were entirely rational and free from manifest error. HS2 designed the ITT including the Fee Collar, and then, additionally, performed an ex post facto exercise of review on rates afterwards. Bechtel accepts in paragraph 134 of its Opening Submissions that HS2 has a margin of appreciation in this respect. I find that there is no discernible error by HS2 in its consideration of whether any tender was abnormally low, or its conclusion that BBVS' tender was not abnormally low.

481. I find that there is no basis for any finding that the BBVS tender was abnormally low. What HS2 should have done thereafter does not arise, and would be entirely hypothetical. It is not therefore necessary to address it. Issue 1 is answered "No" in respect of the duty of good administration, as I have found there is no such duty; HS2's obligations in respect of an abnormally low tender are set out [463] above. In this tender, the level of resources had no impact on price or costs. Each of Issues 4(a) and 4(b) are both answered "No", and Issue 5 does not arise.

K: Different Contract and Abandonment

482. Bechtel alleges that there were sufficient material changes to the contract as entered into between HS2 and BBVS, due to the Revised Contract Data and/or the Further Revised Contract Data, such that these involved the introduction of "conditions which, had they been part of the initial award procedure, would have allowed for the admission of tenderers other than those initially admitted or would have allowed for the acceptance of a tender other than the one initially accepted". Bechtel argue therefore that the Revised Contract Data amounted to a substantial modification and/or material change to the Contract as tendered as contemplated by Regulation 88(7)(b)(ii) UCR 2016 and the case of ***pressetext***. Bechtel allege that the failure to commence a fresh procurement process is a breach of the obligation of transparency, by analogy with Regulation 88(8) UCR 2016.

483. The case relied upon by Bechtel is Case C-454/06 ***pressetext Nachrichtenagentur GmbH*** ECLI:EU:C:2008:351 at [34]-[37]. However, as might be seen readily from the dates, this case pre-dates the Regulations. It may be, as Bechtel submits, that Regulation 88 "codifies pre-existing case law of the CJEU", but whether it does or not, I find that the correct place to start is not in the ratio of this earlier case before the regulations were passed, but the terms of the regulations themselves. Regulation 88 applies to contracts modified during their term. Here, the modification – if modification it was – occurred prior to the contract being entered into. The regulation does not therefore prima facie

apply. But even if it does, Regulation 88(1)(a) permits modifications which have been provided for in the initial procurement documents in any event.

484. It is important, as a starting point, to identify the terms of the relevant regulations that govern the procurement competition, as well as the changes that were in fact made to the Contract Data.

485. The first point to note is that this procurement was being conducted under the negotiated procedure allowed for under Regulation 47 of UCR 2016. That regulation, which applies specifically to utilities, states:

"(1) In negotiated procedures with prior call for competition, any economic operator may submit a request to participate in response to a call for competition by providing the information for qualitative selection that is requested by the utility."

486. To use the language of the regulation itself, the procurement competition under scrutiny in these proceedings was that of qualitative selection. HS2 draws attention to the fact that this regulation provides very few "rules" for, or constraints upon, the negotiated procedure, and this is in contrast to the detailed requirements of the competitive procedure for negotiation under Regulation 29 of the Public Contracts Regulations 2015. Utilities, therefore, have a wide discretion in structuring and carrying out the negotiated procedure, subject to principles of transparency, equal treatment, non-discrimination and proportionality. HS2 submits that there is considerable flexibility under this procedure for utilities to negotiate, clarify and finalise the terms of the contract or the project itself with the preferred bidder, once that bidder is selected.

487. HS2 also relies upon the view of one of the leading academics in this field, Professor Arrowsmith in *The Law of Public and Utilities Procurement*, Vol.2 (2018 3rd Ed.) Sweet & Maxell at paragraphs 17.22 to 17.23:

> *"It can be seen that these six procedures now largely correspond to the procedures available under the 2014 Public Procurement Directive. However, a number of important differences exist between the regime of the latter and the utilities regime as regards the award procedures, with the procedures under the utilities rules generally being more flexible. The European Commission when introducing the original Utilities Directive 90/538 suggested that this greater flexibility was justified by the different nature of the entities and contracts involved."*
>
> *"In practice, the negotiated procedure with prior call for competition will often be a sensible choice (and is frequently used in the UK). A flexible approach is often preferred by commercial organisations as a means of obtaining value for money and may similarly often be used by regulated entities in the utilities sectors for this reason, even for relatively simple procurements. This procedure may be chosen even if the entity decides to use a procedure that is based on a single tendering phase with limited provisions for discussions: a formal tendering stage can be incorporated into the negotiated procedure, but the choice of the negotiated procedure offers the utility more flexibility than the restricted or open procedures in setting the rules of the tendering process. A significant advantage of using a negotiated procedure rather than a restricted procedure is also that this avoids any potential problems arising from the uncertainty over precisely*

what is permitted in a restricted procedure—for example, in terms of scope for allowing economic operators to alter their tenders after submission."
(emphasis added)

488. Professor Arrowsmith also provides further commentary on this subject when she considers the London Underground case (*Commission Decision 264/2002,* ***London Underground Public Private Partnership*** [2002] OJ C309/1515), stating the following under the heading ""*How complete and final must offers be when the contracting authority selects a preferred bidder*?":

> *"The better view is that under the 2004 Public Sector Directive/Public Contracts Regulations 2006 it is not necessary for offers at the final stage to be complete before the contracting authority designates the preferred bidder in a negotiated procedure with a notice. Support for this interpretation is provided by the analogy of the procedure involving the use of design contests under the directive. .... That matters may be left open in final offers is also supported by the Commission's Decision in Case N-264/2002, London Underground Public Private Partnership on state aid relating to the public-private partnerships (PPP) for the London Underground. This PPP involved a competition by London Underground, a public utility, to select three consortia to maintain and upgrade the London Underground infrastructure over 30 years. As part of the analysis the Commission considered whether London Underground had complied with the negotiated procedure under the Utilities Directive. One of the main issues was whether changes to the project and project terms could be made after selecting the preferred bidders. The Commission accepted that after submission of offers "further negotiations would continue" with the preferred bidder. These covered some important issues such as risk allocation, the timing and sequencing of the infrastructure work and the performance regime (concerning the award of bonuses or deduction of payments for failing to meet certain targets). These negotiations were undertaken for various reasons, including to improve affordability and to allow the results of experimental operation of parts of the project (through "shadow companies") to be fed into the process. It seems that negotiations could potentially involve all aspects of the project, whether or not already subject to agreement in principle, including the terms offered by the bidder and the scope and nature of the project itself."*
>
> (emphasis added)

489. Bechtel points out that the decision upon which Professor Arrowsmith relies in the above passage has no legal standing in the UK. Bechtel even goes so far as to submit that it is of "no legal value as a source of law". It is a decision of the Commission made as the regulator of state aid, communicating to the UK what its intended course of action is to be. I accept the case, in any event, plainly concerned the issue of state aid.

490. However, although HS2 relies upon the support of Professor Arrowsmith, its submission is actually founded on the wording within UCR 2016, compared to the wording of PCR 2015. The former is far wider and gives utilities a greater flexibility in terms of negotiation.

491. I accept that general submission by HS2 on the wording of the regulation. The use of the word "negotiated" in the regulation would suggest that such a point is somewhat

compelling; utilities are given very wide scope in terms of negotiation. The wording of the regulation is demonstrably wider than that of its counterpart in the Public Contracts Regulation, namely Regulation 29, which is competitive procedure with negotiation. In my judgment, this is to reflect the different type of projects undertaken by utilities, compared to other contracting authorities, who would use the Public Contracts Regulations rather than UCR 2016. Utilities need a wider degree of flexibility because of the different subject matter of the contracts.

492. The conclusion of Professor Arrowsmith is (partly) based on the view of the Commission in the ***London Underground*** case that the utility could, *after* selecting the preferred bidder, negotiate with the winner, including on important issues. This was based on the wording of the regulations, a point accepted by the Commission. Those issues were stated as including "important issues such as risk allocation, the timing and sequencing of the infrastructure work and the performance regime". The Commission's decision is of no legal status under the doctrine of *stare decisis*, but the common sense driving that conclusion is inescapable. I reach the same conclusion based on the wording of the regulations themselves, and not because I am applying a conclusion of the Commission as though it either bound or persuaded me. Given the nature of utilities projects, such as HS2 (the scale of which is obvious) or the London Underground one (in that case it was a 30 year project) it would be far from sensible if, having selected the winning bidder, the utility was not permitted to negotiate, agree, discuss or make changes with that economic operator. As long as the process that leads to the winning bidder being identified is fair, transparent, treats the bidders equally and complies with the regulatory requirements, then once that winner is chosen, the utility is not bound strictly to contract only on the specific details contained in the tender. The opposite conclusion would make utilities projects unmanageable. Consider, as an example, start dates. Delays are caused by any number of factors. If the start date of a project is moved back by, say, 6 months, I do not interpret the regulations as requiring a further procurement competition to be undertaken reflecting that change. There is no distortion to the competitive process by permitting such negotiation, and I find that the regulations permit this. If this were not permitted, a change of dates would require a new competition. Such a conclusion would be somewhat lacking in any common sense or logic.

493. This approach to the flexibility required by a utility, which I find is permitted by the regulations, was in any case expressly included within the detailed terms of the ITT itself. I return therefore to my reasoning in [483] above. The initial procurement documents made it clear that this type of change would be permitted. The terms of the ITT included detailed provisions allowing for both negotiation and clarification. Paragraphs 2.5.3, 3.21.1, 6.15.9 and 6.18.1 of the ITT all expressly dealt with this and permitted HS2 to do the following:

1. In paragraph 2.5.3, to discuss issues with the top ranked tenderer provided its evolved requirements would not have impacted on evaluation;

2. In paragraph 3.21.1, to make changes to the scope of services and works during the course of the procurement process;

3. In paragraph 6.15.9, to conduct final negotiations with the top ranked tenderer, provided it did not do so in a way which distorts competition or would have affected the outcome of the evaluation;

4. In paragraph 6.18.1, to hold post tender clarification meetings for the purposes of clarifying Technical submissions and conducting negotiations.

494. These tender rules were not challenged by Bechtel when it received the ITT, and it is far too late for Bechtel to do so in these proceedings. Further, the fact of holding a meeting with one of the bidders (BBVS, in September 2018) was, as has been seen from the emails from Mr McMonagle in August 2018, known about by Bechtel about 6 months before it received the standstill letter informing it of the result of the competition. It is therefore far too late for Bechtel to bring any cause of action based either upon the terms of the ITT, or the holding of the meeting of 5 September 2018, now. It was far too late for Bechtel to do so even in February 2019. Yet further, the changes upon which Bechtel rely to justify its challenge in this respect, namely changes to the Contract Data, did not distort competition and did not affect the outcome of the evaluation.

495. The first bullet point of Clause Z32.1 in the proposed contract terms in the tender documents stated that the GMMP and the Management Resource Schedule for the first GMMP Period (which was to be 12 months from the starting date) would be set out in the Contract Data Part 2. Contract Data Part 2 expressly stated that the GMMP and the MRS were "to be agreed prior to contract award". Although paragraph 5.8.2 of the ITT stated that the winning bidder's MRS was "then intended (subject to any refinement during post-tender negotiations) to be the first accepted Management Resource Schedule and the first Accepted Programme as defined and to be used in the Contract" the part in parentheses is highly important. It means that HS2 expressly envisaged, and notified all the bidders, that the MRS would or could potentially be "subject to…refinement" and that this would take place during "post-tender negotiations".

496. A utility such as HS2 is in any case permitted to include within the tender documents, the ITT, the ability to do this. Changes to an essential condition of the tender rules after selection of a preferred bidder or contract award may offend general Treaty principles of equal treatment and transparency if such possibility is *not* expressly provided for in the tender rules and such changes would have made it possible for tenderers to submit a substantially different tender. In Case C-496/99 P ***CAS Succhi di Frutta SpA*** at [116], [118] the following was stated:

> [116] *Although, therefore, any tender which does not comply with the specified conditions must, obviously, be rejected, the contracting authority nevertheless may not alter the general scheme of the invitation to tender by subsequently proceeding unilaterally to amend one of the essential conditions for the award, in particular if it is a condition which, had it been included in the notice of invitation to tender, would have made it possible for tenderers to submit a substantially different tender.*
>
> [118] *Should the contracting authority wish, for specific reasons, to be able to amend some conditions of the invitation to tender, after the successful tenderer has been selected, it is required expressly to provide for that possibility, as well as for the relevant detailed rules, in the notice of invitation to tender which has been drawn up by the authority itself and defines the framework within which the procedure must be carried out, so that all the undertakings interested in taking part in the procurement procedure are aware of that possibility from the outset and are therefore on an equal footing when formulating their respective tenders."*

(emphasis added)

497. Bechtel seeks to rely upon Regulation 88 UCR 2016 to justify its assertion that a new procurement competition should have been conducted by HS2. That Regulation states as follows (this extract is taken from Bechtel's Opening Submissions):

> "(1) Contracts and framework agreements may be modified without a new procurement procedure in accordance with these Regulations in any of the following cases—
>
> … (e) where the modifications, irrespective of their value, are not substantial within the meaning of paragraph (7)…
> …
> (7) A modification of a contract or a framework agreement during its term shall be considered to be substantial within the meaning of paragraph (1)(e) where one or more of the following conditions is met—
>
> (a) the modification renders the contract or the framework agreement materially different in character from the one initially concluded;
>
> (b) the modification introduces conditions which, had they been part of the initial procurement procedure, would have—
>
> (i) allowed for the admission of other candidates than those initially selected;
>
> (ii) allowed for the acceptance of a tender other than that originally accepted; or
>
> (iii) attracted additional participants in the procurement procedure;
>
> (c) the modification changes the economic balance of the contract or the framework agreement in favour of the contractor in a manner which was not provided for in the initial contract or framework agreement;
>
> (d) the modification extends the scope of the contract or framework agreement considerably;
>
> (e) a new contractor replaces the one to which the utility had initially awarded the contract in cases other than those provided for in paragraph (1)(d).
>
> (8) A new procurement procedure in accordance with these Regulations shall be required for modifications of the provisions of a contract or a framework agreement during its term other than those provided for in this regulation."
>
> (emphasis present in Bechtel's Opening Submissions)

498. However, it can be seen that the extract is selective; it omits reference to Regulation 88(1)(a) which states modifications are permitted "where the modifications, irrespective of their monetary value, have been provided for in the initial procurement documents in clear, precise and unequivocal review clauses, which may include price revision clauses, or options."

499. It is therefore necessary to consider the nature of the changes to assess whether they are of the nature and type that are permitted.

500. On 5 February 2019, the day on which the Standstill Letter was sent to the other bidders, HS2 sent BBVS a Letter of Contract Conformation ("the confirmation letter"). This attached a revised Contract Data Part 1 document showing amended dates for the programme, including dates for Sectional Completion ("SCs"), Key Dates ("KDs"), as well as amended ADs and PMs. Many of these were delayed relative to the equivalent dates set out in the previous version of the Contract Data Part 1 provided to bidders on 6 August 2018. The confirmation letter required BBVS to complete a new MRS based on the new contract data provided, which BBVS did via the Bravo Portal on 10 February 2019.

501. The accompanying message stated that "...As the period up to the consolidation point has reduced significantly from tender, we have reflected a major increase in resource during this period to compensate". BBVS then submitted a further version of the MRS on 12 February 2019 following a meeting with HS2. Following the issue of proceedings and the imposition of the automatic suspension up to it being lifted in August 2019, this data was further revised and those further revisions comprised the version of Contract Data Part One that formed the basis of the Contract that was signed by HS2 and BBVS on 16 September 2019. The final version of BBVS' MRS was incorporated into OOC Contract Data Part 2. In the heading to paragraph 128 of Bechtel's Closing Submissions, these changes are described as "impermissible material changes". I reject that categorisation of the changes.

502. Although there are differences in the MRS that were incorporated into the contract compared to the one submitted by BBVS in its tender submission, the following points are important, and need to be borne in mind:

1. The changes were required as a result of the programme changing. They did not alter either the technical or commercial character of the procurement competition.

2. HS2 was expressly permitted to make such changes by the terms of the ITT. Regulation 88(1)(a) permits them too.

3. The revised dates reduced the period from that stated in the tender leading to the Consolidation Point. An increase in resources by the CP would obviously be required as demonstrated by the BBVS message that was sent in February 2019. That increase had to be reflected in the MRS, which was to form part of Contract Data Part 2. The ITT did not bind the parties only to use the precise MRS submitted in the bid which was evaluated.

4. I find that these are precisely the type of changes that were meant by "refinement" within paragraph 5.8.2 of the ITT, and any RWIND tenderer would have understood this.

5. None of what occurred either breached the Regulations, the express terms of the ITT or distorted competition.

6. None of the changes changed the economic balance of the contract.

503. There are also the following important points arising out of Bechtel's reliance on Regulation 88. Firstly, where modifications are not substantial, they are expressly permitted. I find that the modifications made by HS2 and agreed by BBVS are not substantial, and are not contrary to Regulation 88. Even if they are substantial, they are permitted by Regulation 88(1)(a). Further, the changes, had they been part of the original ITT, would *not* have allowed for the acceptance of a tender other than that accepted, namely that of BBVS, such that they would in any event fall under sub-paragraph (7) of Regulation 88. BBVS would have been the winning bidder if these dates had been included originally, on the terms of the ITT as drafted and the tenders as evaluated. Secondly, the regulation requires consideration of whether the modifications made would change the economic balance of the contract. I find that they would not. However – and this is somewhat ironic – had HS2 accepted the new proposed clause 6.2 put forward by Bechtel in its qualification, that is precisely the sort of modification that *would* have changed the economic balance of the contract. That is, in the context of this procurement, the sort of change that would *not* have been permitted without a new competition.

504. Had that occurred, HS2 would, in my judgment, have been required to conduct a new procurement competition, not by reason of the later changes to the Contract Data (of the type agreed between HS2 and BBVS, which are minor changes to details such as dates) but by reason of any agreement by HS2 to accept Bechtel's qualification to clause 6.2. That is precisely the sort of change which would have distorted competition, as had it been accepted by HS2, one bidder (Bechtel) would have been bidding against a markedly different contractual undertaking than the other bidders (including BBVS). The changes made by HS2 in the instant case to the Contract Data, including the changed dates, and the consequent changes to the MRS, did not. They are changes to details that simply refine matters, and for the most part, simply arise as a result of the passage of time. It took longer to award and conclude the contract than anticipated when the ITT was drafted, and so changes to the Contract Data were necessary. The changes to the MRS were similarly permitted both as a consequence of the contract dates changing, and also by the terms of the ITT. I find that there was no obligation upon HS2 to re-conduct the procurement.

505. Regulation 88 does not assist Bechtel. The changes of which complaint is made were expressly permitted in the ITT. They are not substantial, nor are they material. The changes required to the dates were, partly, necessary because of the imposition of the automatic suspension imposed by Bechtel issuing proceedings. The Bechtel witnesses, in particular Mr Roberts, said the Bechtel tender would have been different if they had known about these changes, but that is far from sufficient for Bechtel to succeed on this issue. Firstly, I find that the Bechtel tender would not have been materially different in any relevant respect. Secondly, even such a notionally different tender would not (and sensibly could not) have affected the two main central elements of the Bechtel bid, which means the outcome of the competition would have been the same, and BBVS would still have won. The first of these is the Lump Sum Fee, in particular the higher percentage for profit sought by Bechtel, and the fact that BBVS was the lowest bidder on J002 and hence awarded 10% in the evaluation for that question in the Commercial

Envelope, with Bechtel awarded only 5.76%. The second is the Bechtel qualification to clause 6.2. There is no evidence at all that the changes that were made post-tender would have had an impact upon this decision at Bechtel both to include, and to decline to remove, the qualification. Accordingly, Bechtel would still have faced disqualification.

506. Abandonment decisions can, in any event, only be made in accordance with the principles of equal treatment, and the utility has a margin of appreciation in making such decisions. This is shown in a number of cases, such as ***Ryhurst Ltd v Whittingham NHS Trust*** [2020] EWHC 448 (TCC) where HHJ Stephen Davies, sitting as a High Court Judge, said:

"[44] It follows, in my view, that Ms Hannaford is not correct in her submission that her complaint of unequal treatment is made out in this case purely and simply by reference to the fact that on her case the sole or principal reason for the decision to abandon the procurement as against Ryhurst, namely the Grenfell connection, would not have been applied to any other tenderer in the same position, so that unless the decision can be shown by the Trust to have been objectively justified it would be in breach of the equal treatment principle. Instead it seems to me that the Trust has a margin of appreciation in such cases and, in accordance with the approach in Amey and Croce Arnica, in the context of abandonment decisions Ryhurst must go further and establish that the decision was manifestly erroneous or irrational or disproportionate or not objectively justified. I do not think that it matters much, if at all, which label is attached. It is sufficient to say that the onus of proof lies upon Ryhurst to establish that the decision was outside the range of reasonable decisions which the Trust, as a public authority having to balance a wide range of relevant factors and interests, could properly have arrived at in compliance with its fundamental EU procurement obligations."

(emphasis added)

507. I agree with that statement and I find that there would be a margin of appreciation available to HS2 in this respect too. Bechtel have not, in my judgment, come close to demonstrating either that there were sufficiently material changes in any event that were not permitted, or if there were, that HS2 should have decided to abandon the procurement, or that a failure to abandon the competition puts HS2 in breach of the regulations. Further, Bechtel has not demonstrated that a failure to abandon the procurement was even arguably manifestly erroneous, irrational, disproportionate, or not justified. The HS2 project is a highly complex one and the contracts for Old Oak Common and Euston are important ones in terms of the overall programme of the HS2 project. To have abandoned the OOC procurement – Lot 2 – and re-conducted it would have caused exceptional delay and disruption to the programme of that major station, and also to the entire project. That part of the works at the southern end of Phase One would have become extraordinarily out of step with the rest of the project, including the station at Euston. In my judgment, there can be no valid criticism made of HS2 for any failure to decide to abandon the procurement.

508. Finally on this issue, if Bechtel were right in its construction of the Regulations, this would give any bidder with sufficiently deep pockets, who was sufficiently motivated, an extraordinarily powerful weapon in its arsenal where procurement competitions for complex contracts are involved. By issuing proceedings, the automatic suspension could potentially cause delay to a contract award. By reason of that delay, changes to

dates such as possessions and contract commencement would inevitably be caused. Yet delay to such dates could (if Bechtel were right), even if anticipated and expressly provided for in the ITT, still lead to a conclusion that the competition had to be rerun. If Bechtel were right, changes of the nature such as those to the Contract Data in this case could potentially be further relied upon by a losing bidder to argue that the procurement competition it had already lost, should be abandoned and re-run in any event. Even without delay caused by the automatic suspension, infrastructure projects often suffer delay. Any delays suffered prior to contract award could potentially undo the entire result of any major procurement, if Bechtel's interpretations of the Regulations are correct. I do not consider UCR 2016 imposes such restrictions upon utilities, such that the changes to the contract data that occurred in this case must, or ought to, lead to the conclusion that another procurement competition must be conducted. I find that the changes to the contract data that occurred in this case are permitted both within the terms of the ITT itself, and by reason of the negotiated procedure under Regulation 47 being used by HS2.

L: Conclusions

509. I have not specifically recited or identified every piece of evidence in this case, nor have I specifically referred to each of the authorities cited to me, of which there were, by the close of trial, a total of 70, including extracts from text books. I have considered all this material, but only refer in this judgment to the evidence and legal principles sufficient to demonstrate how I have arrived at my conclusions on the different issues.

510. In reality, this case could have been decided merely on the disqualification point alone. I do not criticise the parties for not applying to have that subject dealt with as such, and if there is any blame to be attached to that, it ought equally to apply in the direction of the court in any event. Judges of the Technology and Construction Court take great interest in pro-active case management, and there was no suggestion from me at the early case-management hearings in this case that disqualification ought to be heard as a preliminary issue. This point was thrown into stark relief as the evidence unfolded during the trial. Preliminary issues can, in any event, sometimes not be the attractive short cuts they first appear. In any event, I have considered all the other issues so that the parties can see that, regardless of my finding on the disqualification issue, this makes no difference to the outcome. BBVS would still have been the winning bidder, and Bechtel's claims in these proceedings all fail.

511. Bechtel's performance on the technical side of the bid, in the Technical Envelope, was better than that of BBVS, but by reason of BBVS' tender for the Lump Sum Fee (for details of which the Confidential Appendix II should be consulted), and the fact that the winning bidder on J002 was awarded 10%, the extra marks that BBVS obtained for this single question (compared to the far lower score for Bechtel on J002 for its higher Lump Sum Fee) made BBVS the winner overall. This fee by BBVS was above the Fee Collar, and there is no question of the BBVS tender being an abnormally low tender. It was well within the range to be expected, based on HS2's knowledge of rates and fees bid on other procurements.

512. This shows, in my judgment, a procurement competition working fairly and as it is designed and intended to operate, and in the result giving HS2 the most economically advantageous tender. In this case that tender was submitted by BBVS, and these proceedings do not change the outcome of that competition. There were no errors in the

evaluation of the BBVS or Bechtel tenders, manifest or otherwise, nor were there any other breaches of obligation on the part of HS2.

513. I will now provide answers to the specific issues in the order they were agreed by the parties and set out at [40] above in Section C. I do so for convenience but in an attempt to avoid repetition, will not descend to any great level of detail.

514. Issue 1: HS2 did not owe Bechtel a duty of good administration. In any event, even if it did, this would be broadly equivalent to duties that were owed, namely those of equal treatment and transparency. HS2 did owe the duty set out in the regulations in respect of potentially abnormally low tenders. Whether a tender is abnormally low has to be considered by reference to the particular competition and subject matter of the contract in question. Here, for this competition, a tender could not be abnormally low based on resource levels due to the way the competition was designed and the proposed contract terms; but even if it could, BBVS resources were not abnormally low, nor were its fee or rates.

515. Issue 2: No. The score of Concerns awarded to BBVS for Question E001 was reached without either manifest error or breaches of transparency or equal treatment.

516. Issue 3: This does not arise.

517. Issues 4 and 5: There was no breach of obligation by HS2 in not identifying BBVS' tender as abnormally low. By reason of the way the Fee Collar was set in the ITT, HS2 had set a minimum threshold for fee percentages to be bid by the tenderers for their Lump Sum Fees for Question J002, that threshold being 7%. That figure was not arbitrarily chosen but was based on sound evidence available to HS2 that was directly obtained from, and related to, earlier competitions. The Lump Sum Fee in BBVS' tender exceeded the Fee Collar and was not abnormally low in any event. The rates submitted by tenderers for Question J001 were also considered, and BBVS' rates were not abnormally low. No part of BBVS' resources schedule contained in the MRS fed into either the rates or the Lump Sum Fee in any event. BBVS' proposed level of resources was not abnormally low in any event. Issue 5 does not therefore arise.

518. Issue 6: No.

519. Issue 7: An RWIND tenderer would have interpreted the Alignment Factor to require consistency across responses. Inconsistencies, whether of factual content in an answer to a question, or methodology, or any other information provided by a tenderer in its tender, would be assessed by HS2 to ensure that the whole tender worked together to achieve the intention of the project. If clarification were sought by HS2 of inconsistencies and not provided, then the material lack of consistency would be reflected in the score of the question that was inconsistent. The score that would be then awarded would be one which reflected the level of confidence on the part of the evaluators assessed in accordance with the scoring matrix in the ITT. This is explained further at [365] above.

520. Issue 8: Yes, the Alignment Factor was applied rationally and in accordance with the understanding of an RWIND tenderer. No, the scores awarded to BBVS for the Questions identified were not "too high".

521. Issue 9: No, there was no such failure by HS2. No, the scores awarded to BBVS for the Questions identified were not "too high".

522. Issue 10: No, there was no such interference and there were no breaches on the part of HS2 as alleged.

523. Issue 11: No.

524. Issue 12: (a) No; (b) No; (c) the minutes kept of the 5 September 2018 were inadequate, and further details are provided at [260] and following. There is no obligation of good administration upon HS2 and hence no breach of this duty as a result. However, although the failure to keep proper records is a breach of the obligation of transparency, the records available were sufficient for the court to exercise its supervisory jurisdiction. Further, the contents of the meeting were limited to permissible clarifications by BBVS and did not affect the outcome of the competition.

525. Issue 13: (a) The reassurances as to resource levels given by BBVS at the meeting of 5 September 2018 were permissible post-tender clarifications permitted by the ITT and did not contravene the principle of equal treatment. HS2 was neither in manifest error, nor breach of its duties, by seeking such clarifications, nor by accepting them. (b) The revisions to the MRS in response to the revisions of the Contract Data were permitted by the ITT and consistent with the steps HS2 was entitled to take. They were neither impermissible changes, nor promises to make impermissible changes. (c) This does not arise. In any event, BBVS had been identified as the most economically advantageous tender as a result of a properly conducted evaluation and the changes to the MRS that were required did not affect this outcome.

526. Issue 14: No.

527. Issue 15: No.

528. Issue 16: No.

529. Issue 17: No.

530. Issue 18: Yes.

531. Issue 19: (a) Yes. (b) Bechtel would have maintained its qualification to clause 6.2.

532. Issue 20: There are no identified breaches. Strictly speaking therefore, this does not arise. However, and in any event, the answer to (a) is No and the answer to (b) is also No.

533. Issues 21 to 23: these do not arise.