Neutral Citation Number: [2020] EWHC 164 (TCC)

Case No: HT-2019-000296

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

Heard remotely as if at the Rolls Building, 7 Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 25/06/2020

Before :

The Hon. Mr Justice Stuart-Smith

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Between :

MSI- DEFENCE SYSTEMS LIMITED	**Claimant**
- and -	
THE SECRETARY OF STATE FOR DEFENCE	**Defendant**

- -
- -

Simon Taylor (instructed by **Jenner & Block London LLP**) for the **Claimant**
Andrew Kinnier QC and Jonathan Lewis (instructed by **Government Legal Department**) for the **Defendant**

Hearing dates: 11 June 2020

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Approved Judgment

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

Covid-19 Protocol: This judgment was handed down by the Judge remotely by circulation to the parties' representatives by email and release to bailii. The date and time for hand-down is deemed to be 10:30am on Thursday 25th June 2020.

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Mr Justice Stuart-Smith:

Introduction

1. The Defendant is running a procurement exercise, to which the Defence and Security Public Contracts Regulations 2011 ("the Regulations") apply. It is for the provision of repair and support services for 30mm naval gun systems ("the Contract") for five years with an option for the Defendant to extend it for an additional five years. The estimated value of the Contract was said in the OJEU Notice posted by the Defendant to be in the order of £60-120 million. The Claimant is the incumbent contractor and is participating in the procurement. The other relevant bidding participant is Devonport Royal Dockyard Limited, which is commonly referred to as "Babcock". There was another bidder ("Leonardo") but they withdrew and no longer participate.

2. On any view, the procurement has not gone smoothly. This has led the Claimant to issue proceedings alleging various breaches of duty by the Defendant. Proceedings were issued on 21 August 2019. As often happens in procurement disputes, the Claimant says that it has been given inadequate disclosure and information on a piecemeal basis as a result of which its case is still developing. The current iteration of the Claimant's claim is set out in Amended Particulars of Claim dated 11 November 2019, which were settled in the light of disclosure given in October 2019. Since then there has been further disclosure as a result of which the Claimant now wishes to re-amend the Particulars of Claim. In doing so it maintains that it is still not in a position to finalise its claim as it has not yet received information relating to Babcock's bid. The court is told that negotiations are underway to establish a confidentiality ring that will enable that information to be provided to the Claimant as appropriate.

3. There are two applications before the court. The first to be issued is the Defendant's application of 4 May 2020 which seeks to strike out the Claimant's claim, or parts of it, pursuant to CPR 3.4(2)(a) on the basis that it discloses no reasonable ground for bringing the claim; alternatively, that the Claimant's claim, or parts of it, should be struck out pursuant to CPR 4.3(2)(b) in conjunction with CPR 3.1(2)(k) on the grounds that it would be disproportionate to allow the claim (or parts of it) to proceed to trial; alternatively that summary judgment should be awarded to the Defendant on the whole or parts of the claim pursuant to CPR 24.2 on the basis that the Claimant has no real prospect of succeeding on the claim (or parts of it) and there is no other compelling reason why the case should be disposed of at trial.

4. The second application is the Claimant's application to re-amend the Particulars of Claim. By the end of the hearing the Defendant's position was that, if and to the extent that the existing claim survived the strike out application, re-amendments relating to the surviving parts would not be opposed.

Principles to be applied

Strikeout and summary judgment

5. The principles that are applicable to an application for summary judgment under CPR 24.2(a) are similar to those that apply to an application to strike out under CPR 3.4(a). They are conveniently summarised by Lewison J (as he then was) in *Easyair Ltd v*

Opal Telecom Ltd [2009] EWHC 339 (Ch) at [15]. I bear them in mind throughout; but it is not necessary to set them out again here. For present purposes it is sufficient to note that "no real prospect of succeeding" means that the Court must consider whether the Claimant has a realistic as opposed to a fanciful prospect of success; however, in reaching that conclusion the Court must take into account not only the evidence actually placed before it on the application for summary judgment, but also the evidence that can reasonably be expected to be available at trial.

6. In addition, the Claimant relies upon the following principles, which are not in doubt:

   i) Where the pleadings show significant disputes of fact going to the existence and scope of the legal duties owed, the Court should only strike out a claim if it is certain that the claim is bound to fail: *Hughes v Colin Richards & Co* [2004] EWCA Civ 266 at [22];

   ii) For a strikeout application to succeed it has to be plain and obvious on the face of the Particulars of Claim that the claim is bound to fail, and the strikeout regime should be used sparingly: *Liconic AG v UK Biocentre Limited* [2014] 8 WLUK 116 at [4].

7. CPR 3.4(2)(b) taken in conjunction with CPR 3.1(2)(k) is engaged when a statement of case is "an abuse of the court's process or is likely to obstruct the just disposal of the proceedings." I accept the guidance of Jackson J (as he then was) in *Atos Consulting Ltd v Avis Europe PLC* [2005] EWHC 982 (TCC) at [18]-[19] that "a court will only strike out a statement of case pursuant to the second limb of rule 3.4.(2)(b) if the statement of case is such as to prevent the just disposal of the proceedings or, alternatively, such as to create a substantial obstruction to the just disposal of the proceedings." Jackson J continued by saying that, short of that, "it is not appropriate for the court to step down into the arena and to tell either party how to plead its case." This latter observation is to be taken in the context of the well-established and oft-repeated requirement that a statement of case must include "a concise statement of the facts on which the claimant relies": see CPR 16.4(1)(a). It should not need repeating that pleadings "need not and should not, contain the evidence by which they are to be proved or the opposing party's pleadings or admissions": see *Hague Plant Ltd v Hague* [2014] EWCA Civ 1609 at [76].

8. It is one of the recurring difficulties in procurement cases that claimants often have partial and inadequate information, a difficulty that is heightened by short and relatively inflexible periods within which to bring a claim in time. While recognising that difficulty, it does not relieve the pleader of the obligation to comply with normal principles of pleading: if anything it emphasises the need for skill and judgment to be exercised so as to achieve compliance. I would therefore add to Jackson J's observation that the court's case management powers when dealing with an inadequate pleading are not limited to striking all or part of it out: there may be circumstances where it is more appropriate to require the party to make good the deficiency rather than taking the draconian step of striking out. That said, I endorse without reservation that, ultimately, it is for the party to decide how it shall try to plead its case, provided it follows the well-known principles I have touched on above.

The Regulations

9. Pursuant to Regulations 51 and 5(2) a contracting authority such as the Defendant is under a duty to treat economic operators such as the Claimant and Babcock equally and in a non-discriminatory way and to act in a transparent way. The Claimant contends (but the Defendant does not admit) that in accordance with general principles of EU Law and/or Treaty Principles, the Defendant also owed it duties to act rationally, proportionately and in accordance with the principle of good administration. No submissions have been made about these non-admitted duties for the purposes of these applications and the Claimant has concentrated on the duties of equal treatment and transparency. For the purposes of the strikeout I assume that the existence of the other alleged duties is at least arguable.

The discretion to cancel or rewind a procurement

10. The Regulations recognise the existence of a discretion to abandon a procurement but do not give guidance on how that discretion should be exercised: see regulation 33(9). I summarised the broad principles that govern a contracting authority's discretion to cancel or rewind a procurement in *Amey Highways Ltd v West Sussex County Council* [2019] EWHC 1291 (TCC) at [12] and [59]. For present purposes it is sufficient to summarise them yet further: a contracting authority has a broad discretion in assessing the factors to be taken into account in deciding not to award a contract or to abandon or rewind a procurement. One circumstance in which it has been held to be lawful to abandon a procurement has been where the contracting authority discovers that the content of the Invitation to Tender ("ITT") makes it impossible for it to accept the most economically advantageous tender, provided that, when it adopts such a decision, it complies with the fundamental rules of Community law on public procurement such as the principle of equal treatment.

11. Professor Arrowsmith suggests in her text, *The Law of Public and Utilities Procurement* at paragraph 7-321, that among the good reasons for deciding to begin again could be "where [the contracting authority] has made a mistake in the first procedure, such as omitting appropriate award criteria." I agree, for the simple reason that it would be absurd to require a contracting authority to struggle on to the bitter end in the full knowledge that any award it might make would be challengeable because it was made on a false and unjustifiable basis. However, this particular example, which the Defendant submits is directly relevant to the facts of the present case, must be applied with full regard to the principles of equal treatment and transparency.

12. The burden on a tenderer who wishes to challenge the exercise of the discretion to cancel or rewind is a high one. In *Ryhurst v Whittington Health NHS Trust* [2020] EWHC 448 (TCC) at [44] HHJ Stephen Davies held that:

> "The [contracting authority] has a margin of appreciation in such cases and, in accordance with the approach in *Amey* and *Croce Amica*, in the context of abandonment decisions [the tenderer] must … establish that the decision was manifestly erroneous or irrational or disproportionate or not objectively justified. I do not think it matters much, if at all, which label is attached."

I respectfully think it may matter which label is attached but, subject to that, I agree with this statement of principle.

13. Although the contracting authority has a broad discretion to cancel, I held in *Amey* that cancellation does not necessarily wipe the contracting authority's slate entirely clean: see [59]-[78]. Specifically, I held that cancelling (or, by implication, rewinding) a procurement does not deprive a tenderer of an accrued cause of action. That remains my view.

14. In the course of submissions in the present case, the Defendant referred to and relied upon *Apcoa Parking (UK) Ltd v City of Westminster* [2010] EWHC 943 (QB). For the reasons set out in *Amey* at [68]-[73], I do not think that *Apcoa* adds materially to the principles that I have outlined above.

The principles of equal treatment and transparency

15. In a recent judgment in the *2019 Rail Franchising Litigation* [2020] EWHC 1568 (TCC) at [26]-[37], I summarised the principles of equal treatment and transparency as follows:

> "*The principle of equal treatment*
>
> 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": see *Abbvie Ltd v The NHS Commissioning Board* [2019] EWHC 61 (TCC) at [53], [59]-[67].
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> 27. Two other aspects of the principle of equal treatment should be mentioned here. First, once a contracting authority has laid down the terms on which bidders are required to tender, it is obliged to require strict compliance, at least with "fundamental requirements" or "basic terms" of the tender. As the ECJ explained in *Commission v Denmark* (ECLI:EU:C:1993:257):
>
> > "37. ... observance of the principle of equal treatment of tenderers requires that all the tenders comply with the tender conditions so as to ensure an objective comparison of the tenders submitted by the various tenderers … .
> >
> > 39. With regard to the Danish Government's argument that Danish legislation governing the award of public contracts

> allows reservations to be accepted, it should be observed that when that legislation is applied, the principle of equal treatment of tenderers, which lies at the heart of the directive and which requires that tenders accord with the tender conditions, must be fully respected.
>
> 40. That requirement would not be satisfied if tenderers were allowed to depart from the basic terms of the tender conditions by means of reservations, except where those terms expressly allow them to do so."

Having explained that the tender in question failed to comply with a fundamental requirement of the tender conditions that specified the conditions governing the calculation of prices, the Court continued:

> "43. In those circumstances, and since the condition in question did not give tenderers the option of incorporating reservations into their tenders, the principle of equal treatment precluded Storebælt from taking into consideration the tender submitted by ESG."

28. Second, one of the consequences of the principle of equal treatment is that a contracting authority may not subsequently change one of the essential conditions for the award if it may have enabled tenderers to submit a substantially different tender:

> "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.
>
> 117. Consequently, in a situation such as that arising here, the contracting authority could not, once the contract had been awarded … amend a significant condition of the invitation to tender such as the condition relating to the arrangements governing payment for the products to be supplied." [Case C- 496/99P *Commission of the European Communities v CAS Succhi di Frutta SpA* [2004] ECR I-3801 at [116]-[117]]

The principle of transparency

29. Case C-19/19/00 *SIAC Construction Limited v County Council of the County of Mayo* [2001] WCR 1-772 provides a

convenient and succinct summary of the principle of transparency:

> "41. … [T]he principle of equal treatment implies an obligation of transparency in order to enable compliance with it to be verified … .
>
> 42. More specifically, this means that the award criteria must be formulated, in the contract documents or the contract notice, in such a way as to allow all reasonably well-informed and normally diligent tenderers to interpret them in the same way.
>
> 43. This obligation of transparency also means that the adjudicating authority must interpret the award criteria in the same way throughout the entire procedure …
>
> 44. Finally, when tenders are being assessed, the award criteria must be applied objectively and uniformly to all tenderers. Recourse by an adjudicating authority to the opinion of an expert for the evaluation of a factual matter that will be known precisely only in the future is in principle capable of guaranteeing compliance with that condition."

30. The principle, which has been restated in similar terms in many cases, applies not just to award criteria in the narrow procurement sense, but to all conditions and detailed rules of the award procedure, which could cover conditions about disqualification of bidders: see *Commission of the European Communities v The Netherlands* (Case C-368/10) [2013] All ER (EC) 804 at [109], *MLS (Overseas) Ltd v Secretary of State for Defence* [2017] EWHC 3389 (TCC) at [79]-[80]. A recent reiteration of the principle is provided by Case C-375/17 *Stanley International Betting* (ECLI:EU:C:2018:1026) (19 December 2018) where the Court said at [57]:

> "In that context, *the purpose underlying the principle of transparency*, which is a corollary of the principle of equality, *is essentially to ensure that any interested operator may take the decision to tender for contracts on the basis of all the relevant information and to preclude any risk of favouritism or arbitrariness* on the part of the licensing authority. It implies that all the conditions and detailed rules of the award procedure must be drawn up in a clear, precise and unequivocal manner to, first, make it possible for all reasonably informed tenderers exercising ordinary care to understand their exact significance and interpret them in the same way and, second, to circumscribe the contracting authority's discretion and enable it to ascertain effectively whether the tenders submitted satisfy the criteria applying to the relevant procedure … ." (Emphasis added)

This reiteration, which is an almost verbatim repetition of [111] of the *Succhi di Frutta* case, is useful in reminding the Court of the underlying purpose of the principle, which I have highlighted in the citation above and which provides a useful touchstone when assessing the limits of the principle.

31. In *Healthcare at Home v Common Services Agency* [2014] UKSC 49, the Supreme Court explained the implications of the "reasonably well informed and normally diligent" ("RWIND") tenderer. It held that the standard of the RWIND tenderer is an objective one and that "the rationale of the standard of the RWIND tenderer is thus to determine whether the invitation to tender is sufficiently clear to enable tenderers to interpret it in the same way, so ensuring equality of treatment". It follows that evidence about what tenderers themselves thought a tender document meant will generally be irrelevant - its meaning is to be assessed objectively: see *Healthcare at Home* at [12] and [26]-[27].

32. When considering whether the tender documents achieve the necessary standard of clarity and comprehensiveness for the RWIND tenderer, the CJEU has stated in *eVigilo* ECLI:EU:C:2015:166, after referring to [42] of SIAC that:

> "55. It … is for the referring court to assess whether the tenderer concerned was in fact unable to understand the award criteria at issue or whether he should have understood them by applying the standard of a reasonably informed tenderer exercising ordinary care.
>
> 56. In the context of that assessment, it is necessary to take into account the fact that the tenderer concerned and the other tenderers were capable of submitting tenders and that the tenderer concerned, before submitting its tender, did not request clarification from the contracting authority."

33. The principles of equal treatment and transparency also require an authority to disclose any matter which it intends to consider when evaluating bids. In Case C-331/04 *ATI EAC* [2005] ECR I-10109 the Court stated at [24]:

> "…in order to ensure respect for the principles of equal treatment and transparency, it is important that potential tenderers are aware of all the features to be taken into account by the contracting authority in identifying the economically most advantageous offer, and, if possible, their relative importance, when they prepare their tenders … ."

34. Applying these principles, in *Energysolutions EU Ltd v Nuclear Decommissioning Authority* [2016] EWHC 1988 (TCC) at [255] Fraser J said:

> "The principles of equal treatment, non-discrimination and transparency require a contracting authority that has adopted a decision-making procedure for assessing bids to comply with it once it has begun to do so. A different way of expressing the same principle is to state that a contracting authority that has set rules for that procedure must follow them, applying those rules in the same way to the different bidders. Changing the decision-making procedure during the process of assessment risks arbitrariness and favouritism, a risk that it is the purpose of such requirements to avoid. In C-226/09 Commission v Ireland [2010] ECR I-11807 the weighting was altered after tenders had been submitted and after an initial review of those tenders had been performed. This was held to be conduct that was not consistent with the principle of equal treatment and the obligation of transparency."

35. In *NHS Foundation Trust v Lancashire County Council* [2018] EWHC 1589 (TCC) at [10], I summarised the central features of the principle of transparency as follows:

> "…tender documents are to be construed on the basis of an objective standard, that is the standard of the reasonably well informed and normally diligent (RWIND) tenderer. It follows that the tender documents must state the process to be followed, including how marking of bids will be carried out, in terms that can be objectively assessed and understood by a RWIND tenderer; and, having done so, the contracting authority must stick to it."

36. In practice this means that there will be very limited circumstances in which it could be appropriate for a bidder to be permitted to amend their bid after the deadline for submissions; and it will seldom, if ever, be permissible for a contracting authority to vary the criteria that it has laid down or to permit non-compliance with them. Transparency and equal treatment require rigour in maintaining and enforcing the framework against which bidders have been asked to tender.

37. One gloss needs to be added. A contracting authority is generally not obliged to divulge its system of marking or its methodology of evaluation though, if it does so, it would be obliged to stick to that too: see Orange Business Belgium v Commission ECLI:EU:T:2016:385 at [138]-[139]. In carrying out its evaluation the contracting authority must be able to have some leeway in how it carries out its task provided that it does not change the award criteria that it has established: see *TNS Dimarso* ECLI:EU:C:2016:555 at [27]-[30], [36]-[37]."

16. This summary covers some matters that are not directly relevant for the present case, but it provides a suitable overview. What is of direct relevance is the standard of

clarity that is required of an ITT or Invitation to Negotiate ("ITN") both in relation to the award criteria and, where it is set out, its system of marking. The standard in each case is not perfection but sufficient clarity to enable potential tenderers to bid consistently.

Proof of reasons and the duty to give sufficient reasons

17. I summarised the principles relating to proof of reasons and the duty to give sufficient reasons in the *Rail Franchising* case at [66]-[76]. It is not necessary to repeat that summary in full here. It is sufficient, in relation to proof of reasons to repeat that:

> "75. …there is a duty to provide reasons for a decision such as the disqualification in the present case and that the obligation to state reasons is an essential procedural requirement. The level of detail which must be given in order to satisfy this duty will inevitably be context and fact specific. The guiding principle, as affirmed by the Supreme Court in *Healthcare at Home* at [17] is that:
>
> > "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."
>
> 76. Where the context permits, that reasoning can be in summary form as happened in Case T-183/00 *Strabag Benelux NV*. A different context requiring different levels and means of explanation is provided by the facts of *Lancashire Care NHS Foundation Trust & Anor v Lancashire County Council* [2018] EWHC 1589 (TCC), where I summarised the relevant principles and their underlying rationale at [49]-[55]. It remains my view that a procurement in which the contracting authority cannot explain the reasons for its decision fails the most basic standard of transparency. That said, there is no requirement that the reasons and reasoning must all be contained in one document (whether that be the document conveying the decision or otherwise), though the later the purported explanation, the greater the scrutiny that will be required to ensure that what is being provided is in fact the reasons or reasoning that prevailed at the relevant time and not merely an ex post facto justification."

18. Failure to give proper reasons may, in an appropriate case, justify setting aside a decision. In my view the Court should not be over-scrupulous and should not set out with a predisposition to look for errors or inconsistencies in the reasons given; but if material errors or failures in the giving of reasons are demonstrated it should not hesitate to intervene in an appropriate case.

Factual Background

19. The Defendant issued an ITN in July 2018. The Claimant considers that it was and is in a very strong position to succeed because it asserts that, as well as being the incumbent and sole provider of in-service support and therefore having the advantage of familiarity and continuity, it is the owner of intellectual property rights ("IPRs") relating to the existing systems which are not (or at least should not be) available to others, including Babcock. This strong sense of its advantageous position infuses the Claimant's approach to the present dispute: the Claimant clearly believes that no one else could match it in a fair and competitive procurement exercise. The Defendant does not accept that the Claimant has all the IPRs that it claims. These applications are not an occasion to test whether the Claimant's beliefs are well-founded; but its case on the advantages it has or should have as incumbent and as asserted owners of the claimed IPRs cannot be dismissed as fanciful.

20. The ITN provided for a five-stage evaluation of tenders, after which tenderers were to make presentations and there would be a period of negotiation. The anticipated contract award date was April 2019. The five stages of the evaluation were to include, as stage 2, evaluation of the quality of the tender in accordance with the weighting and scoring guidance stated in the ITN; as stage 3, assessment of the price; as stage 4, a score against "Real Value for Money"; and as stage 5, the Defendant might undertake negotiation and invite the submission of a final tender which would be assessed against the criteria in the ITN.

21. Section D of the ITN was headed "Tender Evaluation" and, as its name suggests, set out how the Defendant would evaluate tenders. Paragraph D10 identified the 5 stages of evaluation. In relation to Stage 2, evaluation of quality, it listed 24 Evaluation Criteria, of which the first two were to be assessed on a pass/fail basis and the other 22 had weightings attached which cumulatively added up to 100%. It then provided a grid for scoring guidance leading to scores from "High Confidence (100%)" through "Good Confidence (70%) and two more stages to "Unacceptable (0%)". Thus if a bidder was awarded "Good Confidence" in relation to a criterion with a weighing of 1.31%, that criterion would contribute 0.917% (1.31% x 70%) to the bidder's aggregate Tender Quality Score. For present purposes it is only necessary to set out the first box of the grid which was:

Score	**Guidance**
High Confidence (100%)	The tenderer's approach/justification/evidence to this subject matter and the delivery of the confidence characteristics results in the Authority judging that it is **highly likely** to achieve the objective sought in this area.

22. The Evaluation Criteria were described in greater detail in Annex B following a common format. The description of each Criterion relevantly included:

    i) A section entitled "Aim": for example, Criterion 4 ("Stakeholder Relationship") had as its stated aim "to contract with a Tenderer who will work proactively with the Authority to develop a collaborative working relationship";

    ii) A section entitled "Background": for example, the background for Criterion 4 included that "the Authority wishes to develop a strong working relationship with a Tenderer that recognises and proactively seeks to work collaboratively";

iii) A section entitled "Evidence Required", which does not require further description; and

iv) A section entitled "Confidence Characteristics", which set out the confidence characteristics to which the scoring guidance as set out above referred: for example, the Confidence Characteristics for Criterion 4 included that:

> "The Authority is confident that the Tenderer has demonstrated: 1. Suppliers acting with integrity and seeking solutions that work for all stakeholders; … 4. A collaborative approach to managing contract changes required to address unforeseen changes in circumstances; 5. A culture that encourages people to find solutions and improvements collaboratively; … ."

23. In relation to Stage 3, evaluation of price, there was a sub-paragraph which said:

> "**Efficiencies and Innovation** – Tenderers are to clearly identify within their Tender submission any efficiencies and innovation which may lead to increased Value For Money or performance benefits. This is in addition to the winning Tenderer's contractual requirement to provide an efficiency paper to support the take up of any or all of the Option Years."

24. In January 2019 the Claimant received an Agenda for Negotiation from the Defendant which indicated that, following stages 1-4 of the Evaluation, the Claimant was ranked first. It also stated that the Defendant had now declared the funding line (i.e. budget) to tenderers as being just short of £72 million exclusive of VAT. The Claimant duly made its presentation and started negotiations with the Defendant. I assume for present purposes that an equivalent Agenda would have been sent to Babcock which would have disclosed to them that they were currently ranked second and gave an indication of funding limits.

25. On 30 January 2019 the Defendant issued an Invitation to submit its final offer. A similar invitation was evidently issued to Babcock. The Claimant submitted its Best and Final Offer ("BAFO") on 13 February 2019. By now the proposed date for the contract award had slipped to May 2019. On 13 June 2019 it slipped further when the Defendant asked the Claimant to extend the validity of its tender to 30 September 2019, which the Clamant agreed to do.

26. On 13 July 2019 the Defendant sent a letter to the Claimant ("the Rewind Decision Letter") which stated that:

> "Following the internal evaluation exercise it has become clear that the published evaluation and marking criteria were not sufficiently clear to provide the necessary confidence that tenders could be marked consistently.
>
> In accordance with its obligations under [the Regulations], the Authority needs to ensure that the procurement process is transparent and therefore it will be amending the ITN to deal

> with the concerns and it is planned to re-issue the amended ITN to tenderers by the end of Sept 19 with tender returns planned for Nov 2019.
>
> The Authority sincerely apologise for the inconvenience this may cause. Tenderers will be invited to submit a new bid having received the revised evaluation and scoring guidance. The process will be clearly laid out in the revised DEFFORM 47. However, for your information, following receipt of initial tenders, it will also include a repeat of the stages for negotiation and BAFO. It is therefore estimated that the Contract award will now be Mid 2020."

27. It will immediately be noted that the Rewind Decision Letter gives one reason only for the decision to rewind, namely that "the published evaluation and marking criteria were not sufficiently clear to provide the necessary confidence that tenders could be marked consistently." On direct questioning from the Court, Leading Counsel for the Defendant confirmed that the reason given in the Rewind Decision Letter was *the* reason for the decision to Rewind. As will be seen, that answer is not consistent with the Defendant's present pleaded case: see [44] below.

28. The Claimant requested further details of the reason for the decision and for disclosure of contemporaneous documents. On 19 August 2019 the Defendant wrote to the Claimant's solicitors:

> "Towards the end of the tender evaluation process it became apparent that the linkage between the evidence required, confidence characteristics and scoring guidance was unclear and therefore could have been inconsistently applied and misconstrued by the evaluators. Given this, the Authority considers there was potentially insufficient transparency for both tenderers and evaluators and is therefore taking steps to address this concern. For the avoidance of doubt, the confidence characteristics and weightings will not be amended. Nor will the use of the lowest RvFM cost rating as the means to identify the winning tenderer. The scoring guidance descriptors will be changed along with minor changes to the evidence required to address the potential lack of linkage to the confidence characteristics and to provide better clarity and transparency for tenderers and evaluators. Any amendments are considered proportionate to the issue."

29. Once again, it is to be noted that the Defendant's letter gave one reason, which was similar to the reason that had been set out in the Rewind Decision Letter, though it was rather differently formulated.

30. On 21 August 2019 the Claimant issued these proceedings, evidently because of the 30 day time limit under the Regulations. Correspondence continued as the Claimant pressed for further information.

31. On 24 September 2019 the Defendant provided the amended version of the ITN ("the Rewind ITN"). In broad outline, it did not substantially change the content of the Evaluation Criteria themselves, though changes were made to the evidence required for some criteria. Most of the Evaluation Criteria now include a box under the heading "Scoring Guidance" which says "Standard Scoring Guidance applies" and refers to the Scoring Guidance for Stage 2, as to which see below. What has proved to be most contentious is that the Rewind ITN substantially changed the Scoring Guidance in relation to Stage 2. For example, the first box on the grid now reads:

Score	**Guidance**
High Confidence 100%	The Tenderer's response demonstrates an **excellent** understanding of the evaluation criteria with **comprehensive** evidence, using **high** quality, relevant and real-life examples, resulting in the Authority judging that it is **highly likely** the confidence characteristics will be achieved. The tenderer also proposes **excellent** opportunities for innovation, efficiencies and/or continuous improvement with well-reasoned rationale and supporting evidence.

This pattern of including a sentence about proposing opportunities for innovation, efficiencies and/or continuous improvement with well-reasoned rationale and supporting evidence is repeated with minor modifications in the lesser boxes. Also, the sub-paragraph that had originally been placed under Stage 3 (about tenderers identifying any efficiencies and innovation which may lead to increased value for money or performance benefits) has now been moved to Section C, which gives instructions on preparing tenders that are of general application.

32. As well as changing the Scoring Guidance grid as just described, the Rewind ITN substantially altered the text accompanying the grid, including a page of new "general principles" that will apply to scoring responses to each criterion. The first paragraph gives a flavour of the new material:

> "Evaluators will allocate a score in respect of each applicable criterion based on the Tenderer's ability to fulfil the requirements of the Scoring Guidance narrative. Evaluators will not seek to attribute a percentage score to a criterion but rather determine which narrative best describes the quality of the Tenderer's response. It follows that the quality of a Tenderer's response does not have to be perfect (100%) in order to fall into the "High Confidence" bracket. A percentage figure is only attributed so as to enable the Authority to carry out certain calculations set out elsewhere in this document. For the avoidance of doubt, there is no scope for any percentage score other than those listed in the table above to be awarded for any criterion."

33. The Rewind ITN invited tenders to be submitted by 12 November 2019, with negotiations in January 2020, BAFO submission in February 2020 and contract award in July 2020.

34. On 22 October 2019 the Defendant, by a letter from the Government Legal Department, informed the Claimant that it had been ranked second in the evaluation after BAFO before the interruption of the process. It confirmed that no tenderer had

made representations suggesting that there was any lack of clarity in the evaluation criteria. It is now clear that no evaluator had raised concerns either.

35. The letter of 22 October 2019 provided disclosure to the Claimant which included:

    i) A letter dated 9 July 2019 from the Defendant's Head of Commercial, Weapons Operating Centre, to the Director of Weapons ("the 9 July Letter");

    ii) What is described as version 4 of a document dated 18 September 2019 which explains the changes to the ITN "with rationale and justification" ("the Rationale Paper");

    iii) A document dated 28 June 2019 that describes itself as an "Evaluation Process Review" for the competition ("the Process Review"), which was enclosed as Annex B to the Rationale Paper.

36. Each of these three documents served to heighten the Claimant's concerns, as has further disclosure given in May 2020 which includes a briefing note apparently drawn up in March 2019 ("the Briefing Note") as problems began to emerge. I provide a brief and non-exhaustive summary of points emerging from these documents below.

37. The Briefing Note from March 2019 records that Leonardo withdrew "based on the limited [Technical Data Pack] available". This fuels the Claimant's belief that, because of its unique position as the owner of its IPRs, no other bidder could compete with it on the basis of the technical information that was legitimately made available during the tender process. Second, it describes Babcock's bid submitted in November 2018 as "compliant – unaffordable" and its own bid as "affordable", which implies that Babcock's bid was more expensive than that of the Claimant. This fuels the Claimant's submission that declaring the funding line in January 2019 gave Babcock an (unfair) indication that its bid was too expensive and would have to be reduced to within budget, whereas it gave no such assistance to the Claimant, which was already within budget and did not know what impact the indication of the funding line would have on Babcock's approach going forward.

38. The 9 July Letter was subject to some redactions for privilege. It recommended a re-run of the ITN for four reasons, two of which are redacted. Of the two that remain, one referred to the Claimant's "known record of engagement with litigators" (a reference to other disputes between the Claimant and Defendant), and the last was that "the ITN evidence requirements, confidence characteristics and scoring are inconsistent across the evaluation criteria." Elsewhere it listed eight separate "known weaknesses" with the tendering process which appear to include the inappropriate distribution of information to bidders who should not have received it, inconsistencies or lack of clarity in how evaluators approached their task, and a reference to "the subjective nature of the application of the confidence criteria" (with what follows redacted). There are apparently no notes of consensus meetings and no records of how the panel concluded a final score where there were differences between individual evaluators. The letter stated that "the independent review concluded that it was disproportionate effort to re-run the ITN however" (and the rest of the paragraph was redacted).

39. The Rationale Paper listed seven "concerns" that would be addressed in the Rewind ITN, including that "the linkage between the scoring, confidence characteristics and scoring is inconsistent." As will immediately be noted, this formulation is not the same as that adopted in the Rewind Decision Letter, but is closer to the formulation in the 19 August 2019 letter. The absence of documentation is another "concern" as are concerns about how evaluators went about their task.

40. The Process Review provided a reasonably sanguine view of the process, including that:

> "The Evaluation Panel has adopted a common approach to evaluating tenders albeit what was being looked for, in terms of evidence characteristics, was unwritten and documented in the ITN. For example, looking for evidence of understanding the requirement, completeness of the response, evidence of method, relevant case studies and/or presence of innovation."

The Process Review concluded that a re-run of the whole procurement would be "inappropriate and disproportionate".

41. In addition to disclosing the four reasons for recommending the re-run and the eight "known weaknesses" in the 9 July Letter and the seven "issues" listed in the Rationale Paper, the letter of 22 October 2020 from the GLD answered the Claimant's question about the reason that had originally been given for the decision by stating that "after the evaluation of tenders and before the formal notification of the award decision, the SSD had a number of concerns with the Procurement process, which included the following: …". There followed seven "Issues" which were evidently based upon the seven "concerns" listed in the Rationale Paper, of which the last four "issues" were not in identical terms to the matching "concerns". It would not be unreasonable to interpret the Rationale Paper and the letter of 22 October 2019, taken at face value, as meaning that the seven issues/concerns contributed to the decision to rewind the process and to issue the Rewind ITN. Whether or not that interpretation would be correct is well beyond the scope of the present hearing. By a later letter, dated 4 November 2019, the GLD informed the Claimant that not all of the known weaknesses identified in the 9 July Letter informed the decision to rewind the procurement; it explained that "these were issues … which, when viewed collectively, were perceived as creating a greater likelihood that the procurement would, rightly or wrongly, be subject to challenge."

42. Other disclosure has been given, including notes from Mr Haffenden, who I understand to be a senior official within the Defendant. His notes are critical of aspects of the Debrief Report that record the basis for the decision to award the contract to Babcock. His comments cast doubt on the reasons given for marking down the Claimant on particular points. This would be obvious grist to the mill for a scoring challenge by the Claimant if there were to be a sound basis in law for bringing one. As previously indicated, the Claimant has not yet seen any confidential materials relating to the Babcock bid.

43. The Rewind tender process continues. The Claimant has submitted a revised bid in accordance with that process, as has Babcock. Contract award is now anticipated to be in July 2020.

44. It is convenient to mention here that the Defence, at paragraph 51 pleads that:

> "The Rewind Decision was taken for the following two primary reasons:
>
> 51.1 There was an inadequate audit trail of how the consensus scores were reached.
>
> 51.2 There was a lack of clarity as to the confidence characteristics and how they had been interpreted by the evaluators. There was therefore concern that it would be unclear to the tenderers what was expected of them to meet those characteristics."

45. The following points will be noted:

i) The pleading lists two reasons, not one; and they are described as the "primary" reasons, which suggests that there were more reasons that contributed to the decision and which are not identified;

ii) The reason in paragraph 51.1 did not feature in the Rewind Decision Letter;

iii) The reason in paragraph 51.2 differs from the reason given in the Rewind Decision Letter. The reason given in the Rewind Decision Letter suggested that the lack of confidence was because the published evaluation and marking criteria were unclear. The reason pleaded in paragraph 51.2 includes that there was a lack of clarity about how they had been interpreted in fact by the evaluators, which is different.

The Claimant's Claim

46. The Claimant's claim at present is set out in the Amended Particulars of Claim. I bear in mind that, in the light of more recent disclosure, the Claimant wishes to amend its claim; and that it submits that it does not yet have the necessary information to enable it to form a concluded or final view on how best to advance its claim, not least because it has seen no confidential information relating to Babcock's tender and its scoring by the Defendant.

47. After a narrative introduction which could without doubt be pruned but which does not, in my judgment, obstruct the just disposal of the action, the substance of the pleading starts at paragraph 30, with a conventional pleading of the Defendant's obligations under the Regulations, Treaty principles or general principles of EU and UK public law. As indicated above, not all of the duties are admitted by the Defendant, but they cannot be dismissed at this stage as fanciful.

48. Section D lists the alleged breach of the Defendant's obligations.

49. Under the heading "Failure to provide reasons or information", the Claimant alleges that the Defendant has failed to provide any or any adequate reasons for its decision to abandon the prescribed tender procedure and/or to rewind the Procurement: paragraph 31. Paragraphs 31(1)-(6) were in the original Particulars of Claim and narrate the Claimant's requests for, and the Defendant's alleged failure to disclose,

documentation. Paragraph 32 was introduced by amendment after the provision of the disclosure on 22 October 2019 to which I refer at [35] above. It alleges a continuing failure to provide contemporaneous documents showing the Defendant's decision-making process between the 9 July Letter and the decision to rewind the ITN, the Claimant's scores and rank in the evaluation carried out of the Claimant's original ITN and BAFO responses, and evaluator comments on those responses. And, in the light of the disclosure that has been given, it asserts a request for three further categories of documentation relating to Babcock's bid and its evaluation. It is obvious to anyone familiar with procurement challenges, that this information is intended to be relevant to a possible scoring challenge as well as possible challenges on other grounds. After a reserving of rights to plead further when more disclosure is given, paragraph 33 (which was in the original Particulars of Claim) avers that:

> "On the basis of the limited information available so far to the Claimant, it is averred that the Defendant has acted in breach of its duties to the Claimant under the Regulations and general EU Treaty principles, including the principles of equal treatment, transparency, non-discrimination, proportionality and/or good administration, made manifest errors, and/or acted irrationally and/or otherwise in breach of its public law duties as follows."

50. It is therefore evident that, at present, the Claimant justifies any lack of further particularisation by relying upon the alleged failure of the Defendant to provide it with sufficient documentation.

51. The next heading is "Failure to award Contract to the Most Economically Advantageous Tenderer". The primary allegation, which is set out at paragraph 34, is that the Defendant breached its obligations under the Regulations and acted: (a) contrary to the principles of equal treatment and transparency, (b) irrationally and in manifest error and in breach of the principles of proportionality and good administration and without any or any proper justification, in that it: (i) failed to apply the published award criteria, applied undisclosed criteria and made manifest errors in the assessment and scoring of bids, (ii) failed to keep proper records of evaluation and consensus, (iii) wrongly ranked Babcock first and (iv) wrongly decided to rewind the procurement rather than awarding the Contract to the Claimant.

52. It is possible to regret the apparently scatter-gun bombardment of principles that are alleged to have been breached; but, although inelegant, the listing of all possible principles of EU or UK public law is tempting for a Claimant which considers that it does not yet have all relevant information and does not want to lose any possible avenues that might present themselves more clearly with the benefit of further disclosure. As it stands at present, the pleading provides a comprehensible basis for the claim that is being made. It is implicit in this case that, contrary to the Defendant's concerns, the original ITN was a sound basis for the procurement and, specifically, for the assessment of the competing bids. On that basis, it is alleged that the Claimant should and would have been awarded the contract and that any failure to award it the contract was due to breaches of duty in the evaluation of its bid. This clearly encompasses both a scoring challenge and a claim that the decision to rewind was unjustified. I shall return later to the Defendant's contention that this section of the Claimant's case is irrelevant because the scoring of which the Claimant complains was not relied upon and is therefore "of no consequence".

53. The end of paragraph 34 indicates that further particularisation is to follow.

54. The first subheading of this particularisation is "Scoring Errors" and is pleaded at paragraphs 34(1)-(5)E. The central allegation that amounts to the Claimant's case is readily understandable and is provided by paragraph 34(5)E. It is that:

> "In summary, it is inferred from the ranking prior to BAFO, the various weaknesses identified by the Defendant in the assessment of bids, the inherent weakness in Babcock's tender and inherent strength of the Claimant's tender as described above, that the Defendant made manifest errors in the scoring of both bids and was manifestly wrong to have ranked the Claimant second following BAFO and that the Claimant's bid should have been ranked first."

55. The understandable difficulty for the Claimant is that, when pleading this section, it had not seen any documents showing how either its tender or that of Babcock was marked and consensus evaluation reached. To compensate for this difficulty, the Claimant rehearses at considerable length the reasons why it believes that it *should* have won if the ITN had been operated properly. Chief amongst those reasons are: (a) its advantageous access to the IPRs, (b) Babcock's corresponding disadvantages, with the alleged consequence that Babcock *could not* have answered various parts of the tender satisfactorily because it *could not* have performed key functions of the Design Authority, and (c) there is a suggestion in the disclosed documentation that was available to the Claimant that evaluators had applied undisclosed criteria including looking for innovation which the Claimant did not need to demonstrate in order to (continue to) provide all aspects of the contractual requirements.

56. While I understand the temptation to add in such material, it is a temptation that should have been resisted. At its highest, and apart from some of paragraph 34(5)E, the material is not an articulation of the Claimant's case or even a concise statement of the facts upon which the Claimant relies to sustain that case. At best it is a submission that the Claimant *should have* won because of its natural advantages and Babcock's corresponding disadvantages. Some of the material might amount to evidence in due course: but that should not be pleaded. Accordingly, in my judgment, much of this section is inappropriately included in the Amended Particulars of Claim though I acknowledge that, once the Claimant understands what its real case may be, some of this material might be relevant for inclusion in a pleading. That said, on a fair reading of this section, it does not substantially obstruct the just disposal of the proceedings so as to justify the Court adopting the most draconian course and striking it out at this stage.

57. The next section is headed "Lack of Transparency". At paragraphs 34(5)F-G, the Claimant pleads:

> "(5)F The Defendant acknowledges its failure to provide records which could justify scores at Issues 6 and 7 of the Rationale Paper …:
>
> *"6. Consensus meetings were not documented with an audit trail of the decisions.*

> *7. De-brief material could not easily be produced raising concerns on the audit trail of decision making and quality of evaluator notes."*
>
> (5)G It is averred that the Defendant's admitted failure to document adequately its assessment and consensus decisions further renders the BAFO scores and ranking unreliable."

58. These paragraphs are pleaded as particulars of the failure to award the contract to the Claimant. Sub-paragraph (5)F is an unconventional way to plead an admission, if that is what is intended. The paragraphs are admitted and averred by the Defendant. Accordingly, if the Defendant's assertion that weaknesses in the scoring of the original bids are of no consequence is rejected, the relevance of these paragraphs is plain.

59. The next section is headed "Rewind decision" and lasts from paragraph 34(5)H to paragraph 34(5)S. Its intended purpose appears to be to provide further particulars of the Claimant's case that the Defendant acted unlawfully (for that is what the Claimant would be required to prove) in deciding to rewind the procurement and to call for bids against the Rewind ITN. It is to be read in the context of the complaint in paragraph 31 that the Defendant has not given proper disclosure of its decision making processes. The Claimant makes this plain in paragraph 34(5)H where it pleads that "[pending] further disclosure, the reasons for the Defendant's decision remain unclear …". But it then alleges that, on the basis of the information then available to it, "the Rewind decision was irrational and contrary to the principles of equal treatment, proportionality and good administration" and that "such reasons as have been provided by the Defendant are either groundless or form no proper or rational basis or justification for the option chosen" and that what the Defendant should have done was to re-run the evaluation avoiding the failures that are said to have affected the original evaluation and led to the decision to rewind.

60. So far, the Claimant's pleading is adequate to identify the nature of the case it intends to run. However, the pleading then proceeds to list each of the "known weaknesses" in the 9 July Letter and to set out a detailed explanation of the reasons why the Claimant does not accept that they would be good reasons for a Rewind rather than a properly controlled re-run of the evaluation on existing terms. In my judgment this section of the pleading is inappropriate and unhelpful. For the purposes of a pleading it would, in my judgment have been sufficient to say compendiously that *if* the known weaknesses were the reason or reasons for the rewind decision they provided no rational or lawful basis for the decision to rewind; and, which I understand to be the Claimant's case, that the proper decision should have been a re-run of the scoring exercise, if necessary with a new team of evaluators. The way would then be open for the Defendant either to admit or deny whether the known weaknesses formed part of the basis for its decision. If and to the extent that it denied that they were reasons that informed or influenced its decision, and wished to put forward a positive case about what its reasons were, it could and should do so.

61. This section of the pleading concludes with paragraph 34(5)S:

> "In the circumstances described above and as explained further below, the Rewind decision not only wrongly deprived the

> Claimant as the rightful winner of the original tenderer [sic] from being awarded the Contract, but also gives rise to a substantial risk of breach of equal treatment in that it enables Babcock to submit a revised bid against award criteria which are more favourable to it than the original criteria."

62. This paragraph looks forward to the final section, which is entitled "Unfair treatment in revising the tender rules". Its primary allegation appears to be that the Defendant has acted in breach of the principles of equal treatment and transparency and has shown preferential treatment and/or bias toward Babcock in its approach to the Rewind ITN. Specific complaints are that the Defendant amended the Scoring Guidance non-transparently after the submission and evaluation of the original BAFOs and invited re-tenders on terms that unfairly favoured Babcock. The main complaint appears to be that the new scoring indicators are alleged to favour Babcock by introducing "opportunities for innovation, efficiencies and/or continuous improvements" as a feature to be satisfied in order for a tender to achieve High Confidence for any Evaluation Criterion: see [31] above. It is also alleged that the new Scoring Guidance is likely to cause confusion and to lead to perverse results because it is not clear whether innovation in achieving the initial contract objectives justifies a finding of High Confidence or whether the references to opportunities for innovation is a reference to innovation during the contract period. The Claimant has two main complaints about this. First it is said to favour Babcock because Babcock would need to show innovation just to get to the starting gate, whereas the Claimant as incumbent and owner of the IPRs would not need to do so. Second, it is said to be unfair because it is an additional requirement to those included in the original ITN.

63. Other complaints are less conventional and less easy to follow. For example, paragraph 35(3)B complains that other changes made to the ITN are unnecessary or statements of matters that should be obvious to any RWIND tenderer or competent evaluator. The pleading lists them and explains in what amounts to a submission rather than a conventional pleading why each item is inappropriate. I do not at present understand what proper purpose is served by these passages.

64. The section concludes with the allegation at paragraph 35(4) (which survives from the original Particulars of Claim):

> "In the circumstances, applying undisclosed or altered criteria and/or tender rules to the Procurement after the opening of tenders in a manner which would or could subvert or distort the proper outcome of the Procurement and confer an unfair competitive advantage on Babcock."

This is at least conceptually understandable as an allegation that may appropriately be made in the context of a procurement challenge.

65. Under the main heading "RELIEF", the Claimant first alleges that, as a result of the Defendant's breaches, it has been deprived of the contract and/or lost the opportunity to win the contract in a fair and transparent procedure in accordance with the prescribed tender rules and Regulation. It also alleges that it has suffered its lost profits on the contract and/or its wasted tender costs and/or losses caused by the delays to and/or abandonment or rewinding of the procurement. The relief it seeks is:

i) An order that the Defendant's rewind decision be set aside and/or an order requiring the Defendant to re-score the tenders against the original award criteria and using a new team of evaluators;

ii) Declaratory relief;

iii) Damages.

66. In response to a long and detailed Defence, the Claimant attempted to provide a degree of additional clarity by its Reply. I paraphrase its summary of its case as follows:

i) It avers that the original scoring guidance and award criteria were transparent and clear and were capable of being applied consistently and fairly;

ii) It agrees that the evaluation process as it was followed was flawed and entailed manifest errors including the application of undisclosed criteria;

iii) It claims that the Defendant failed to apply the scoring guidance and other criteria properly not because of any lack of transparency in the criteria but because of failings of the evaluators;

iv) It avers that if the original ITN scoring guidance and award criteria had been applied properly it would have been awarded the contract and that its cause of action accrued when it was not awarded the contract as and when it should have been;

v) It claims that the decision to rewind was "unreasonable, irrational, non-transparent and in breach of the principles of equal treatment, proportionality and good administration." In light of the errors made in the evaluation, what was required was a rerun that did not repeat those errors: had that been done, the Claimant would have been awarded the contract;

vi) It claims that the changes to the ITN are discriminatory because they favour Babcock over the Claimant.

vii) As a result it claims that it has been caused to suffer loss and damage.

67. This provides welcome clarification of a case which, as I have identified above, can be found in the Amended Particulars of Claim despite the criticisms that may be made of its having inappropriate and unhelpful material added.

The Defendant's Application

68. The Defendant's submissions in support of its application generally follow the pattern of the Amended Particulars of Claim, which I have summarised above. Throughout the section of this judgment which follows, I bear in mind the principles that I have summarised above; and I remind myself that an application for a strikeout or summary judgment is not an occasion for a mini-trial.

Failure to provide information

69. The Defendant submits that, even if it initially provided inadequate information in the Rewind Decision Letter, it has now given additional information which renders this complaint academic.

70. Applying the principles relating to proof of reasons that I have summarised at [17] above, the question is whether the information provided by the Defendant disclosed its reasons in a clear and unequivocal fashion so as, on the one hand, to make the Claimant aware of the reasons for the decision and thereby enable it to defend its rights and, on the other, to enable the court to exercise its supervisory jurisdiction.

71. The Rewind Decision Letter identified one reason for the decision to rewind, which appeared to be limited to an objective lack of clarity in the published evaluation and marking criteria. However, as outlined above, the subsequent explanations and disclosure, culminating in the case pleaded in the Defence have presented what is arguably a shifting and inconsistent body of information and assertions about the reasons for the decision. It is at least arguable that the position pleaded in the Defence is not consistent with the information provided; and that the information provided does not show clearly what considerations did and did not inform the decision to rewind. Experience shows that investigation of reasons for a decision may be highly fact-sensitive with subtleties of evidence having a determining effect. These are matters for trial.

72. Accordingly, while I accept that neither the Regulations nor the ITN nor general principles of EU or UK public law require any particular form or precision in the giving and proof of reasons, it is not open to this court at this stage in the proceedings to hold that the Claimant's complaints about the reasons and information that have been given so far disclose no reasonable grounds for bringing the claim or have no reasonable or realistic prospects of success.

Failure to award the contract to the Claimant

73. It is not possible to form even a preliminary view about the merits of the Claimant's assertion that they, not Babcock, should have been the preferred bidder since no information has yet been provided or information disclosed about Babcock's bid and how it was marked. Equally, however, it is impossible for the court on this application to discount the material that the Claimant asserts should have put it in pole position, namely what it asserts are its natural advantages as incumbent provider with exclusive access to the IPRs that it claims. It is evident from the materials before the court that the Claimant's assertions about the IPRs will be challenged; but that is a matter for trial, not strikeout.

74. Furthermore, some of the weaknesses that the Defendant has acknowledged in its disclosed information provide support for the Claimant's belief and contention that there has been a failure to mark consistently and in accordance with the evaluation criteria and marking system as set out in the original ITN. Those weaknesses may have informed and justified the decision to rewind, but the Claimant's case here is different and is essentially on all fours with the claim being advanced in *Amey*. The Claimant asserts that the original ITN was inherently sound and that it should have been awarded the contract if it had been implemented properly. Critically, the

Claimant says that it should have been awarded the contract in April (or May at the latest) 2019, before the decision to rewind. On that basis it maintains that it had an accrued cause of action which pre-dated and was not cancelled by the rewind decision, for reasons identical to those set out in *Amey*. It is of course possible that the Defendant's view will prevail and that the original ITN was so flawed that it could not properly have formed the basis for an award to the Claimant and justified the decision to rewind. This is one of many factual permutations that may ultimately emerge. Another possible permutation is that, whether or not the procedural errors justified the decision to rewind, they do not (either alone or in combination with other evidence) demonstrate that the Claimant should have been awarded the contract. As things stand, the court cannot form a view on the merits of this limb of the Claimant's claim, still less can it rule that it has no reasonable prospects of success.

75. It is no answer to submit that the Claimant can challenge any decision that might be made under the Rewind ITN to award the contract to Babcock. The submission does not address the basic fact of the alleged existence of an accrued cause of action. The Claimant might in due course contend that a decision under the Rewind ITN to award the contract to Babcock gave it a further, different and additional cause of action; but that is not the same as saying that a subsequent cause of action cancels the one that is alleged to exist now.

76. Nor is it an answer to say that the Defendant did not rely upon the scoring of the original bids. At a trial of the Claimant's claim that it should have been awarded the contract and had an accrued cause of action by the time of the rewind decision, it will be a matter of prime consequence to investigate how the bids were in fact scored and whether that process (taking into account any flaws in the process that may be demonstrated) would or should have resulted in the scores that were in fact awarded.

The rewind decision

77. The Defendant points to the broad discretion to cancel or rewind a procurement. That is not in doubt: see [10] above. However, I do not consider it appropriate to strike out the Claimant's claim under this head, for three main reasons. First, because of the history and inconsistencies to which I have referred above, the true reasons for the rewind decision are not yet established and the court can form no reliable view about the outcome of that enquiry. It is therefore premature to decide that the reasons were good, bad or indifferent. Second, if the Claimant is right and there was nothing inherently wrong with the original ITN that should have prevented the proper awarding of the contract, it is not obvious what good or sufficient reason there could have been to justify the rewind decision. Put another way, Professor Arrowsmith's example, cited at [11] above, may cease to be applicable or relevant to the present case. Third, despite the breadth of the discretion, this is an area of law which is developing and, despite what was said in *Ryhurst*, I am not convinced that either the standard to be achieved by the Claimant in challenging the decision or the relationship between the discretion to rewind and the Defendant's pre-existing obligations of equal treatment and transparency have been fully worked out or could be fully worked out for the purposes of this case without a fuller understanding of the case and fuller submissions on the law than this application has generated.

78. For these reasons I am not satisfied that there is no reasonable ground for bringing this limb of the claim or that it has no reasonable prospects of success.

Unfair treatment in revising the tender rules

79. I have summarised what I understand to be the essence of the Claimant's case at [62] above. If the decision to rewind was lawful, the Defendant would have had a broad discretion about the terms on which the rewind should be carried out; but the discretion is not unlimited. One limitation is that, when adopting and implementing that decision, it complied with the fundamental rules of Community law on public procurement such as the principle of equal treatment: see [10] above. The principle of equal treatment does not mean that all tenderers must find it equally easy to meet all criteria; but they must be treated equally and criteria that disadvantage one tenderer in a manner that is either arbitrary or excessive are forbidden: see [15] above and the citation from [26] and [27] of the *Rail Franchising* case. It does not seem fanciful to me to suggest that the new Scoring Guidance, with its reference to "excellent opportunities for innovation, efficiencies and/or continuous improvement" may be discriminatory against the Claimant because it does not need to be innovative in the same way as Babcock does in order to satisfy the contractual requirements: see [62] above.

80. The Defendant has another point, namely that no relief is claimed for the alleged breach of duty in revising the tender rules. I reject this submission. Since the rewind tender process has not yet concluded, the Claimant cannot identify actual loss and damage sounding in damages. However, it alleges at paragraph 39 of the Amended Particulars of Claim that it "has suffered, and/or may suffer, loss and damage, namely its lost profits on the anticipated Contract and/or its wasted tender costs and/or losses caused by the delays to and/or abandonment or rewinding of the Procurement"; and it promises full particulars "in due course". In the Prayer it claims declaratory relief and damages. Though not yet particularised, this pleading is apt at present to cover the claim that it would wish to pursue in due course. The claim must be further particularised "in due course", which means quite soon.

No loss or risk of loss

81. As a further and more generalised submission, the Defendant submits that, if the Claimant wins the contract after the rewind process, it will not have suffered any recoverable loss. It also relies upon the provisions of the ITN to the effect that tenderers would bear all costs associated with preparing and submitting their tender and would not be reimbursed if the tender process was terminated or amended by the Defendant. Elsewhere, the ITN provided that any expenditure, work or effort undertaken prior to any offer and subsequent acceptance of contract was a matter for tenderer's commercial judgment. No authority has been put forward to support a submission that such clauses would preclude recovery even on proof that losses were sustained by reason of the Defendant's breach of duty and, in the absence of such authority, I would not regard this as a trump point justifying strikeout or summary judgment.

Summary conclusion on CPR 3.4(2)(a) and CPR 24.2

82. The Defendant has failed to show that there is no reasonable prospect of success or that there are no reasonable grounds for bringing the claim.

Strikeout on the basis of proportionality

83. The Defendant submits that it would be appropriate to strike out the claim on the grounds of proportionality under CPR 3.1(2)(k) and CPR 3.4(2)(b). The former provision states that amongst the case management powers of the court is the power to "exclude an issue from consideration". The latter provision states that the court may strike out a statement of case "if it appears to the court that the statement of case is an abuse of the court's process or is otherwise likely to obstruct the just disposal of the proceedings."

84. The Defendant supports this application by identifying six features that are said to justify taking this course. They are that:

    i) The claim is not properly pleaded;

    ii) The Claimant could have sought an interim remedy if it considered that the ongoing procurement was skewed to benefit Babcock;

    iii) The Claimant will not suffer any recoverable losses caused by the breaches pleaded in the claim;

    iv) The Claimant might win the contract, in which case these proceedings will have been a waste of time;

    v) There is no benefit in proving breaches of the Regulations in circumstances where those breaches have been admitted; and

    vi) The prolix and confused pleading will consume considerable court resources.

85. The first and last of these features are essentially the same. As appears from this judgment, the pleading at present is prolix but not to the extent that it obstructs the just disposal of the proceedings in the sense described by Jackson J in *Atos*. With a fair reading, it is possible to identify the substance of the Claimant's case, despite it being encrusted with inappropriate and unhelpful facts and matters. Even if the Claimant wins the contract, there is scope for a substantial (as opposed to nominal) award of damages, though the quantum of any such award would be reduced. As I have attempted to explain above, the fact that some breaches are admitted by the Defendant does not determine the outcome of the litigation. And the failure to seek injunctive relief is not a good ground for striking out the claim, particularly when there is a continuing dispute about the adequacy of the Defendant's disclosure and, even now, the outcome of an application for interim relief would be doubtful.

86. I therefore decline to strike out the claim on proportionality grounds.

87. The Defendant's application therefore fails. In those circumstances the application to re-amend the Particulars of Claim is not opposed.

The Way Forward

88. There are two events in the offing. The first is the agreement of a confidentiality ring and disclosure of confidential documentation. The second is the first CMC in this action, to be held in July. It is necessary to take steps to clarify and limit the real

issues in the case, which is best done once disclosure has been given. Accordingly, within 7 days of the Defendant giving disclosure of confidential material into the ring, the Claimant shall either (a) indicate that it is now satisfied with the disclosure that the Defendant has given or (b) issue an application for the disclosure that it considers that the Defendant should have given but has not. If the Defendant has given disclosure into the ring by the time that this judgment is handed down, time will run from handing down. In the event of (a), then within 14 days of the Defendant giving disclosure into the ring (or the date of hand-down) the Claimant shall serve on the Defendant the final form of the Re-Amended Particulars of Claim upon which it proposes to rely (subject to unforeseen changes and further order of the court) in pursuing its claim. That final form shall comply with the proper principles of pleading statements of case. If the Claimant is unable to amend the Particulars of Claim so as to put it into a form that is compliant with the proper principles of pleading statements of case, it shall serve at the same time, a document which sets out the Claimant's case in a form that is compliant and which identifies clearly the nature of the case that the Defendant has to meet. Those documents shall be reviewed by the Court at the CMC. If the finalisation of the confidentiality ring (or handing down this judgment) does not occur until a date that precludes these steps being taken before the CMC, the CMC shall be adjourned to a date to be fixed. In advance of the CMC, the parties shall co-operate to produce (a) a list of issues to be decided at trial and (b) proposals for the swift and effective resolution of this litigation.

89. Nothing in this judgment fetters the case management powers of the court on the CMC or subsequent hearings.