Neutral Citation Number: [2020] EWHC 2958 (TCC)

Case No: HT-2020-000228

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

Rolls Building
Fetter Lane,
London, EC4Y 1NL

Date: 06/11/2020

Before :

MR JUSTICE KERR

- -

Between :

NEOLOGY UK LIMITED	**Claimant**
- and -	
(1) THE COUNCIL OF THE CITY OF NEWCASTLE UPON TYNE **(2) GATESHEAD METROPOLITAN BOROUGH COUNCIL** **(3) COUNCIL OF THE BOROUGH OF NORTH TYNESIDE**	**Defendants**

Mr Azeem Suterwalla (instructed by **Hewitsons LLP**) for the **Claimant**
Mr Joseph Barrett (instructed by **DAC Beachcroft LLP**) for the **Defendants**

Hearing dates: 21 and 22 October 2020

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Approved Judgment

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MR JUSTICE KERR

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 of hand-down is 10.30am on 6 November 2020

Mr Justice Kerr:

Introduction

1. This is my judgment on two applications arising out of a challenge to a procurement decision by the first defendant local authority (**Newcastle**) to award a contract to provide and maintain a system for automatic number plate recognition (**ANPR**) in the Tyneside area, including parts of the geographical area of the second and third defendants (**Gateshead** and **North Tyneside**). The ANPR system consists of cameras to photograph vehicle number plates and systems to enable the local authority concerned to check the status of vehicles.

2. The ANPR system in Tyneside is needed to enforce a forthcoming mandatory Clean Air Zone (**CAZ**) there. The CAZ is a defined area which older and more polluting vehicles may only enter if the person responsible pays a certain charge for the privilege. The ANPR system is to be used, in the usual way, to detect and enforce infringements or non-payment of charges. The registration number is photographed, read and reported electronically to local authority and central government systems used to trace the owner or keeper so they can be brought to book if the vehicle should not have been in the CAZ.

3. The procurement was undertaken by Newcastle. Mr Barrett represents all three defendants. Newcastle applies to lift an automatic stay on award of the contract consequent on the claimant unsuccessful bidder (**Neology**) bringing its claim. Neology seeks summary judgment against all three defendants. Gateshead and North Tyneside have put in defences denying any part in the procurement. Neology contends that all three defendants are responsible for the procurement and liable to Neology for Newcastle having conducted it wrongfully.

4. There were three tenders. The winner was Siemens Mobility Limited (**Siemens**). In second place was Systems Engineering Limited (**SEL**). Neology came third. It challenges the award of the contract to Siemens. The automatic stay, unless and until lifted, prevents Newcastle from entering into the contract with Siemens to provide the ANPR systems (**the contract**). SEL has taken no part in the proceedings. Siemens did not appear but provided a witness statement in support of Newcastle's position.

5. Neology applies for summary judgment on the ground that the defendants have no real prospect of success at trial. The defendants oppose that application and Newcastle, supported by Gateshead, North Tyneside and Siemens, applies to lift the automatic stay. Newcastle says the summary judgment application and the claim as a whole are weak and without merit; that damages would be an adequate remedy for Neology but not for the defendants; and that the balance of convenience and justice, including the public interest, favours lifting the stay.

Facts

Clean Air Zones

6. The CAZ concept is the government's chosen method of achieving reductions in levels of nitrogen dioxide in the outdoor air of major cities in this country, to comply with obligations under EU law (Directive 2008/50/EU (**the Air Quality Directive**))

limiting the permitted amounts of nitrogen dioxide in the air. Neology specialises in the installation, provision and maintenance of ANPR systems for uses including observation and enforcement of CAZs.

The Framework Agreement

7. To procure traffic enforcement cameras and associated systems needed for a CAZ, there is a certain Framework Agreement, called Crown Commercial Services Framework RM1089 Traffic Management Technology 2, Lot 2, Traffic Management and Traffic Enforcement Cameras (**the Framework Agreement**). Neology has a place within the Framework Agreement, entitling it to bid for contracts for ANPR in certain cities in England and Wales where a CAZ is being or is to be established.

The Invitation to Tender

8. In or around February 2020, Newcastle issued an Invitation to Tender (**ITT**) for a mini-competition under the Framework Agreement (**the procurement**). The procurement was for the award of the contract, which was split into two parts, one for provision of the 35 cameras needed; and the other for provision of the associated software and services. The second part was for an initial period of five years, with potential annual extensions for up to a further five years.

9. The ITT stated that its purpose was "to appoint a Contractor to provide [ANPR] cameras and the associated local systems" for the CAZ. The procurement was therefore for both the "outstations" (the camera units on the streets) and "instations" (places where data is processed) and the related software required to operate the CAZ, to ensure it could talk to the central government computer system and Newcastle's computerised penalty charge notification system.

10. The ITT set out the nature of the competition and the rules by which it would be governed. Part 1 of the ITT, entitled "[i]ntroduction and organisation's guide to tender process" stated that the ITT contained, among other things, instructions for completion of the tender and details of the information a bidder should include in the tender response. It was there stated:

> "You should read the ITT carefully. It is important that you understand the Council's needs and requirements as:
>
> - you need to be able to demonstrate that you can meet those requirements in the information which you provide; …
>
> ….
>
> You must comply with all instructions and include the signed undertaking in your submission."

11. Under the heading "4. Tender evaluation and contract award", Part 1 of the ITT stated:

> "The ITT will state whether the tenders are going to be evaluated on the most economically advantageous tender or the tender which offers the lowest price.

In either case the Council will evaluate your tender using the following process:

- The Council's evaluation panel for this procurement exercise, will check the tenders to make sure tenderers have kept to the requirements.

- If compliant we will evaluate the information provided against the evaluation criteria as set out in the ITT.

- The Council will clarify your tender as needed."

12. The ITT further stated that the decision to award the contract would be communicated to bidders in April 2020; that the contract would be for a period of five years with the option for up to five twelve month extensions; and that tenders were to be evaluated, following an initial pass or fail stage, on the basis of a weighting of 20 per cent for price and 80 per cent for quality.

13. The quality evaluation, with its overall 80 per cent weighting, was made up of the following issues, each with a sub-weighting as follows:

"Q1: Installation, Mobilisation, Operation - Overall 50% weighting
Q2: Support and Resource - Overall 25% weighting
Q3: Management and Communication - Overall 15% weighting
Q4: Social Value and Climate Change - Overall 10% Weighting."

14. The scoring of the quality questions was to take place in accordance with a scoring table or matrix, with zero at the bottom of the scale, being awarded for "no response to the question or an inappropriate response in all areas", through to 100 at the top of the scale, for "an exceptional response in all areas".

15. The questions forming part of the quality assessment were included at Schedule 5b to the ITT. In Part 1 of the ITT, the following requirement was set out:

"5.1 Tender Information.

Please provide your proposals by responding to each of the questions in the Tender Response Forms (ITT Schedule 5 and 5b), giving consideration to the associated evaluation weightings and our expectations and objectives expressed throughout the specification document …. ."

16. The "specification document" was a lengthy contract specification set out in Schedule 1a to the ITT headed "Specification – Engineering and Construction". The author of the document (**the specification**) explained at the start that it:

"sets out the Tyneside Authorities' requirements in respect of the operation and maintenance of a network of ANPR cameras, associated infrastructure, and supporting ICT systems to deliver a functioning charging [CAZ] for Newcastle to capture non-compliant vehicles operating within the boundary of the [CAZ], and interface with external systems."

17. Paragraph 5.1 of the ITT continued:

"You must not exceed the prescribed word limit for each question, should you exceed the word limit the Evaluation Panel will not take into consideration any additional words."

18. Schedule 5b to the ITT repeated the scoring matrix, repeated the four aspects of the quality evaluation and then stated:

> "Diagrams/photographs and examples of the documentation can be included and do not form part of the word count. However, no appendices can be included or embedded in the document to support your answer."

Neology's Bid

19. The requirements for each of the four questions were then set out, as follows. The first question was "on Installation, Mobilisation, Operation". I have added bold type to indicate the areas of controversy between the parties:

> "Question 1 - Installation, Mobilisation, Operation
>
> The Tyneside Authorities must ascertain how you intend to install mobilise and operate the ANPR Camera Network and Support Infrastructure. Please provide detail, denoting clear timelines using appropriate methodology and tools demonstrating a clear understanding of the specification and key requirements. It is permitted to attach documents to the response for this question. Your response should look to include but not be limited to:
>
> • An outline Design and Installation Plan for the entire project.
>
> • A draft Installation Programme in line with section 2.6.7 of ITT Schedule 1a Specification Engineering and Construction.
>
> • Suggestion of alternative placement of ANPR cameras. Please justify how your design meets the requirements and is the best fit solution (If you do not intend to suggest alternative placements please state and provide any feedback necessary, particularly if you deem that any intended ANPR locations are unsuitable)
>
> • A draft mobilisation plan in line with the section 2.6.6. of ITT Schedule 1a Specification Engineering and Construction
>
> • **An outline Commissioning Manual including documented processes and procedures for the installation and Testing of the Outstation Systems.**
>
> • A draft Data Volume Model including expected volume of data flow and available bandwidth.
>
> • **An outline Software Schedule detailing the software utilized for the delivery of the contract, key stages of the timeline and referencing all software development and testing.**"

20. The word limit was 6,000 words. Neology's answer was 5,899 words, within the limit. In addition, Neology produced eight appendices as "supporting evidence". Two aspects of Neology's answer to the first question were the subject of submissions before me: the commissioning of outstations (i.e. camera units); and the description of the software to be used.

21. As to the first area of controversy, Appendix C was a 68 page document called "Installation and Commission Guide P500 Series ANPR v1.4". Mr Suterwalla described it in his skeleton argument as a manual "setting out the process and procedures for the Installation and Testing of the Outstations, as well as the key stages for commissioning in order, with applicable details".

22. Neology's answer to question 1 also included the following narrative, which Newcastle submitted, through Mr Barrett, was "cursory and unsatisfactory":

> "Commissioning and Testing of Out-stations
>
> In order to minimise time on-site, decouple site activities from the critical path and ensure material supplied is validated, we will be conducting a comprehensive test regime before material arrives on-site. The camera out-stations will undergo a Factory Acceptance Test, the cameras will be updated to the latest firmware and be configured specifically before leaving the factory with a SIM card installed. As with all phases of testing, the client is welcome to visit our facility to be part of the quality assurance process. This is something which some clients, such as Transport for London, prefer to participate in whereas other clients are comfortable being in attendance for later phases of the project testing. Should further configurations be required for a specific camera be required [sic] then this can be completed remotely via a secure remote connection.
>
> A detailed commissioning manual is also supplied as supporting evidence."

23. The second part of the controversy over question 1 concerned Neology's description of the software to be used. The narrative was set out over two pages under the heading "System Integrator Role & Software Schedule". Mr Suterwalla described that answer in his skeleton as including "confirmation that the software solution was mostly an off the shelf solution and the details of that solution", with "a plan showing which software elements required further development and which were already developed/off the shelf solutions, and a further plan showing all stages of development/testing of software."

24. There were indeed diagrams included near the start of the narrative, with green colour coding denoting "pre-existing interfaces" and yellow colour coding for interfaces "under development/awaiting final testing". The narrative also made reference to a "Plan on a Page" timeline document "highlighting the Software Schedule for this contract … ." This was the single page Appendix D of the supporting evidence, entitled "Program Schedule".

25. Neology's narrative on the software schedule part of its answer to question 1 concluded:

> "The Detailed Planning stage shall provide the necessary detail of the Software components and their use to enable the Tyneside Authorities to understand the role and function of the software in this contract. The Software Schedule shall break down into appropriate detail, the works which are required to be undertaken by the different software teams, for example:
>
> - Build & Installation
>
> - Configuration

- Testing (see section below)
- Training
- Acceptance".

26. Mr Barrett criticised this section of Neology's answer to question 1 as "lacking in detail". He submitted that Neology's answer failed to distinguish between actual software and the "interface" between different types of software. These points risked going beyond the court's knowledge and expertise. They were said to be supported by a witness statement from Newcastle's solicitor, Mr Timothy Dennis, who offered some technical comments on Neology's answers.

27. Mr Dennis explained in his statement that these matters would be the subject of evidence at trial from the tender evaluators. Clearly, the latter would be better qualified than a lawyer to provide such evidence. At this stage, the admissible evidence of Newcastle's dissatisfaction with this part of Neology's response comprises the feedback comments made in Newcastle's later award letter to Neology, to which I am coming.

28. The second question, with a weighting of 25 per cent, was headed "Support and Resource". The area of dispute between the parties is the manner in which Neology answered the part of the question relating to an "outline Employment and Skills Plan", as indicated below in bold type.

29. The requirements of question 2 were set out as follows:

> "The Authorities need to understand how you intend to support and provide relevant resources to this project. Please address the following points and include any other aspects you deem suitable to illustrate your competence when delivering the project in this area.
>
> • Describe how you will ensure robust maintenance support teams, consisting of both a back-office support team for software issues and a front-office responsive team for hardware/maintenance.
>
> • Include your resource proposal for the entire project and how this will ensure an efficient and effective operation. Identify appropriate teams, disciplines and/or subcontractors.
>
> **• Provide an outline Employment and Skills plan that sets out the positive impact that this contract will have on the local economy through supply chain opportunities for local businesses and employment/skills.**
>
> • Provide details of our current quality management and asset management systems.
>
> • Provide an overview of proposed project reporting in line with the examples stated in the specifications. Note any additional reporting that can be offered based on experience of projects of similar size and nature.

> • Provide recent examples of the following; Technical Construction File, Disaster Recovery Plan, Risk Register and an Exit Plan encompassing a Hand back plan and Decommissioning."

30. Neology's answer was just within the word limit of 3,000 words. There were five "supporting evidence" documents. Under the heading "Employment and Skills (E&S)", there was a page and a half of narrative followed by a table. I adopt Mr Suterwalla's description of this part of Neology's answer, from his skeleton argument:

> "Neology would adopt a strategy of "*think, buy, support local"* in order to support employment opportunities for residents based in Tyneside (thereby explaining the positive impact the Contract would have through supply chain opportunities for local business and, separately, on employment and skills).
>
> b. The arrangements between Neology and its sub-contractors are such that there is an expectation that persons based in Tyneside would be employed on the project (local opportunities for employment skills as per this requirement in Q2).
>
> c. Candidates from the local area would have an advantage in the employment process by virtue of their local knowledge (as above).
>
> d. Neology would work with its partners to ensure that their apprentices are given a chance to work on the Clean Air Zone (as above).
>
> e. Neology would provide work experience at all levels and career stages (as above).
>
> f. Data would be kept and provided to Newcastle setting out the jobs created by the scheme in the local area (as above).
>
> g. Neology produced a table showing how it intended to generate £180,000 of value to the local area across the term of the contract. That value would manifest itself in matters such as:
>
> i. Offering jobs to the long term unemployed (as above).
>
> ii. Apprenticeships and work experience (as above).
>
> iii. Identifying, where possible, the use of local suppliers and businesses. Neology gave the example of its use of locally based engineering teams from SSE (in accordance with the requirement to address supply chain opportunities)."

31. The third question, with a weighting of 15 per cent, was shorter. It was headed "Management and Communication". The requirements were set out as follows.

> "The Authorities need to have a good level of confidence that this project can be managed in a focused and considered way in order to deliver the timescales required. Please respond to the points below and include any other relevant detail to support your response in this area.
>
> • Please provide an overview of how you propose to interface with Newcastle City Council Highways, Streetlighting, Urban Traffic Management and Back Office as detailed in the specifications.

> • Provide details of how you will provide the required Training and Guidance, including examples of the required documentation."

32. The word limit was 2,000 (not including diagrams etc) which Neology comfortably observed in its answer, comprising about six pages of narrative interspersed with some tables and diagrams. Neology did not attach any appendices to its answer.

33. Again, I gratefully adopt Mr Suterwalla's summary of Neology's answer:

> "Neology provided a table setting out the project governance structure. That table set out who from Neology and other stakeholders would be involved in each stage of the project governance process. Neology was not, however, able to make this section more specific to the Tyneside Authorities, as Newcastle did not provide bidders with the details of the senior team who would be involved in the governance of the project."

34. The fourth question, with a weighting of 10 per cent, was divided into two parts, each with a weighting of 5 per cent. The question was headed "Social Value and Climate Change." The word limit was expressed as 1,000 words (excluding diagrams, etc) for the whole of question 4. That was a very short word limit for a very long question in two parts, albeit with a total weighting of only 10 per cent of the overall 80 per cent weighting for quality.

35. Neology appears to have treated the word limit as 1,000 words for each part. It kept within that interpretation of the word limit, recording that its response to the first part was 795 words and, to the second part, 879 words. Newcastle did not take issue and neither party took any point either in the tender evaluation process or in these subsequent proceedings about the word limit for question 4 and whether it was exceeded.

36. In respect of social value, the question was phrased as follows (with the bold type in the original, and omitting the narrative under each heading):

> "Social Value means getting the best outcomes of the people of Newcastle and the North East from the money we spend, this includes economic and environmental considerations. We require the successful Contractor to work towards developing ways to improve the economic and environmental well-being of Newcastle upon Tyne at every stage of its operations.
>
> The City Council is looking to develop several Community benefit outcomes, the key benefits have been listed below in section 2.1 As part of this long-term Contract please outline what Community benefits you could deliver to the city of Newcastle Upon Tyne based on the examples below.
>
> Contractors can propose additional Community benefits outcomes to those listed.
>
> **Community Benefit Outcomes and Description of Requirements**
>
> **Job for Long Term Unemployed (12 months +)**
> …
> **Modern Apprenticeship**
> …
> **Supply Chain Development (SME)**
> …

Jobs for Unemployed
…
Work Experience Placement [*five days structured placement*]
…
Accredited Training to Employees
…
Equipment/Product Donations
…
Industry Awareness Day (Full Day)
…
Sponsorship
…
Work experience placement [*one day of structured work experience*]
…
Charitable donations
…
Communal area refurbishment
…
Industry Awareness
…
Day (Half Day) Volunteering
…
Toolbox Talks
…"

37. The second part of question 4, dealing with climate change, described the requirements as follows:

> "On 3 April 2019, Newcastle City Council declared a Climate Emergency and the intent [is] to make Newcastle carbon neutral by 2030.
>
> We have an ambitious programme of interventions of what we as a council can influence through our policies, programmes, projects and services, but this fundamentally requires a whole city approach, with businesses, universities, the private sector, residents and communities going on this journey with us.
>
> Please provide details of how, from design and maintenance thought to handover and potential decommission, your organisation intends to limit the negative aspects of climate change within this project by identifying potential opportunities, constraints and risks to ensure a positive impact on air quality and the wider environment.
>
> Please detail how you intend to provide support and guidance to the local you [sic] SME's you engage with throughout this contract and how they can limit the negative impacts of Climate Change."

38. Neology's answer to question 4 was, as required, set out in two parts. The first part referred to such matters as corporate social responsibility, the need to provide economic opportunities, support community cohesion and "meaningful engagement with Social Value opportunities".

39. The answer to the first part of the question included the "social value community benefit tracker" referred to in its answer to question 2, ascribing a financial value of £180,000 that would, it was said, accrue to the three authorities. It also included an illustration from a site in Mexico with a slogan broadly in support of inclusivity; and a

statement of Neology's commitment to helping persons from BAME communities and those with disabilities.

40. The second part of Neology's answer, dealing with climate change, spoke of a commitment to reducing Neology's carbon footprint. There was an illustration in the form of a photograph of an office in California, presumably of its parent company; mention of avoiding domestic flights and using trains instead in this country; of flexible and remote working; and other matters of detail such as removing single use plastic cups from the business.

Evaluation of tenders

41. The bids were evaluated by a panel of five evaluators, each of whom had particular experience or expertise relevant to the procurement and Newcastle's requirements. The meetings of the evaluators were chaired by Ms Amanda Surrey, a lead specialist in resources working for Newcastle, responsible for various kinds of procurement including those involving information and communications technology.

42. Four evaluation meetings took place. Three of the meetings were devoted to discussing the response of each bidder in turn. The fourth comprised a discussion of outstanding issues arising from all three bids. The panel discussed the content of each tender and agreed what scores should be awarded to each bid for each of the answers provided. Newcastle's evidence is that this was done with reference to the award criteria and the scoring matrix.

The contract award decision

43. In the ITT, it had been envisaged that the award decision would be issued in April 2020. There was some delay because of the public health emergency that was then, and still is, ongoing. Consequently, the award letters were not issued until 24 June 2020. The award letter provided to Neology is before the court; the other two award letters are not.

44. The overall result was that Siemens' score was 58.49 per cent of the available 100 per cent of marks; while Neology's score was 52 per cent of the available 100 per cent of marks. The award letter did not cite the scores achieved by SEL, which came second. The feedback in the award letter addressed to Neology was as follows.

45. In relation to question 1 (installation, mobilisation and operation), Neology's score was 30 out of a possible 100, lower than Siemens' score (which was expressed as a percentage). In the scoring matrix, Neology's score denotes an "[a]cceptable response with some minor shortcomings, or poor response with some acceptable elements". The feedback was expressed thus:

> "The response had both acceptable and poor elements. The panel acknowledged the proactive approach to camera placement and that a clear and proactive pre assessment had been carried out. However, the response to the request for an outline Commissioning Manual the panel thought was brief, without any reference to the actual testing that should take place and that a summary of the key stages of commissioning would have been advantageous. The response to the request for an outline Software Schedule was deemed poor. The panel would have expected the

> response to state specific software used, off the shelf and/or bespoke systems and reference any development if necessary."

46. For question 2 (support and resource), Neology scored 50 out of 100, the same score as Siemens. In the scoring matrix, that score denotes "[g]ood response with some minor shortcomings, or acceptable response with good elements". The feedback was as follows:

> "The panel appreciated the fact that the considerable experience of the team was listed. Including a resource profile and [sic] would have been advantageous, as noted in the API interface. The response to the request for an outline Employment and Skills plan was more of an outline of the Social Value the bidder would bring to the contract and therefore the question was deemed not answered."

47. For question 3 (management and communication), Neology again scored 50 out of 100, a higher score than Siemens achieved. The feedback was in the following terms:

> "The panel felt that the response was good but generic in parts and not tailored specifically to Newcastle City Council."

48. For question 4 (social value and climate change), Neology's score was again 50 out of 100, which was the same as Siemens' score. The composite feedback in respect of the two parts of question 4 stated briefly:

> "A good and comprehensive response offering wide range of Social Value with some innovative ideas, although the panel notes some financial assumptions have been made. Also, some consideration given to the environmental impact of this project."

Neology's challenge to the award decision

49. On 26 June 2020, two days after the date of the award letter, Neology issued its claim. It later filed particulars of claim, on 3 July 2020, triggering with effect from that date the automatic statutory suspension of Newcastle's power to enter into the contract with Siemens pursuant to its award decision.

50. I mention for completeness that Neology's claim includes a "reasons" based challenge, in addition to its other grounds of challenge. I do not think I need in this judgment address further the challenge founded on provisions of allegedly inadequate reasons because that aspect of Neology's challenge is not relied on in support of its application for summary judgment; nor do I think it impacts materially on Newcastle's application to lift the stay, made on 24 August 2020.

The outcome report

51. Two days later, on 26 August 2020, Newcastle produced its formal report of the outcome of the procurement (**the outcome report**), citing regulation 84 of the Public Contracts Regulations 2015 (although that regulation does not require such a report in all cases where a contract is awarded pursuant to a framework agreement).

52. The outcome report recited that Newcastle was the contracting authority. It provided basic information about the tendering exercise, including the scoring method and the weightings attributed to price and quality and, in relation to the latter, the four questions and their respective sub-weightings.

53. It included the scores for all three bidders. This revealed SEL's scores as well as those of Siemens and Neology. SEL's total score was 54.57 per cent, between Siemens' 58.49 per cent and Neology's 52 per cent.

54. The outcome report provided new (to Neology) information in the form of commentary on the answers given by Siemens and SEL. It also repeated and slightly amplified the feedback given to Neology in the award letter. Neither side relied heavily on the amplified feedback as set out in the outcome report. I do not find it necessary to set it out here.

55. On 28 August 2020, Neology issued its application for summary judgment, which I consider next.

The claimant's summary judgment application

56. There was no dispute about the principles normally applicable in an application for summary judgment. I was treated in both skeletons to citation of CPR rule 24.2 and the usual series of propositions from the case law. I was reminded not to conduct a mini-trial; that complex factual evaluations are not suitable for summary judgment; and so forth. However, no case was cited in which summary judgment had been granted in a claim under the Public Contracts Regulations 2015 (**the Regulations**).

57. The parties disagreed about how those principles are applied to the statutory cause of action and available remedies under the Regulations. For Newcastle, Mr Barrett submitted, as I understood his argument, that a claimant could only obtain summary judgment in such a claim if it could show it would inexorably have won the contract; it was not enough to show a plain and indefensible case that the tendering exercise was flawed and should be set aside.

58. Mr Barrett pointed out that under regulation 91(1) a breach of any of the duties owed to economic operators is "actionable by any economic operator which, in consequence, suffers, or risks suffering, loss or damage". Therefore, it was not enough for a bidder to show a plain and indefensible breach of duty by the contracting authority. Unless it could show that the breach prevented it from winning the contract, it could not establish the necessary element of loss or damage, an essential ingredient of the statutory tort created by regulation 91(1).

59. For Neology, Mr Suterwalla submitted that it was sufficient to show that the defendant had no real prospect of resisting the claim to have the award decision set aside, a remedy available under regulation 97(2)(a) in addition to, or instead of, damages awarded under regulation 97(2)(c) where loss and damage is suffered as a consequence of the breach of duty.

60. He submitted that the economic operator's cause of action is complete if it "risks suffering, loss or damage" (regulation 91(1)), not just where loss or damage is actually suffered. Thus, Moore-Bick LJ in *Lettings International Ltd v. London Borough of Newham* [2007] EWCA Civ 1522, at [19]-[20] had rejected a similar argument, in the context of deciding whether there was a serious issue to be tried: it was "at least arguable that the loss of a significant chance of obtaining the contract is enough to found a claim".

61. Both parties also reminded me of the body of law defining the content of the contracting authority's duty. Mr Suterwalla emphasised the principles of equal treatment, transparency and proportionality, embodied in regulation 18(1) of the Regulations. The first two principles had recently been helpfully restated by Stuart-Smith J, as he then was, in the 2019 *Rail Franchising Litigation* [2020] EWHC 1568 (TCC), referring to the relevant domestic and European case law at [26]-[35]. Mr Suterwalla said this was a case where those principles had plainly been breached and the court could safely say so even without a trial.

62. In relation to what the tender criteria required, he drew my attention to the concept of the "RWIND" or reasonably well informed and normally diligent tenderer, a recent addition to the pantheon of judicially invented archetypes, like its illustrious predecessors the officious bystander and the man on the Clapham omnibus: see the judgment of Lord Reed JSC in *Healthcare at Home v Common Services Agency* [2014] UKSC 49, at [26], citing with approval a passage from the judgment of the Lord Justice Clerk below, at [59].

63. Mr Suterwalla argued against the admissibility of and need for the kind of evidence that the defendants were suggesting would be heard at trial. As the Lord Justice Clerk had said in *Healthcare at Home* in the Court of Session (in part of the passage cited with approval):

> "[The court] 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…"

64. Applying the relevant principles to the facts here, Mr Suterwalla said it was plain that the RWIND tenderer would have understood that the manner in which Neology responded to the tender questions was appropriate. It followed, he argued, that Newcastle's evaluation panel had fundamentally erred by penalising Neology for its responses.

65. He complained that, for example, Newcastle had, on the one hand, permitted documents to be appended in respect of question 1; yet, Neology had evidently been penalised for overloading the documents appended to its answer to that question; in particular, the 68 page commissioning manual.

66. Similarly, in relation to question 2, he complained that Newcastle had unfairly penalised Neology by treating the request for an outline employment and skills plan as "unanswered". Newcastle could not hope to justify at any trial its assertion in the award letter that Neology's response to that part of question 2 had been more of an outline of the social value the bidder would bring to the contract, than an employment and skills plan.

67. Mr Suterwalla submitted that Newcastle had misconstrued the ITT by deciding, contrary to what would be the understanding of the RWIND tenderer, that the commissioning manual was not permissible as a narrative source in favour of Neology's bid. The rubric in the ITT had expressly permitted the appending of

documents to an answer, in the case of question 1, while no such express permission appeared in the rubric to questions 2, 3 or 4.

68. On the defendants' side, Mr Barrett submitted that, as well as being fatally weak, the case was manifestly unsuitable for summary judgment. He submitted that disclosure and evidence at trial were needed to explain how Newcastle had assessed the tenders. The court, he said, needed to hear evidence as to the relevant factual context and matrix in order properly to understand and construe the tender documents as a whole: *DHL Supply Chain Ltd v Secretary of State for Health and Social Care* [2018] EWHC 2213 (TCC) at [31], per O'Farrell J.

69. Mr Barrett invited me to treat the case as essentially one of mere disagreement with the scoring. He referred me to observations on scoring and marking in *Woods Building Services v. Milton Keynes Council* [2015] EWHC 2011 (TCC) at [13]-[14] (Coulson J, as he then was); and in *J Varney & Sons Waste Management Ltd v. Hertfordshire County Council* [2010] EWHC 1404 (QB) per Flaux J (as he then was) at [192]-[193], showing that the standard was akin to *Wednesbury* unreasonableness which, in this context, is broadly equivalent to the standard of "manifest error" derived from the European jurisprudence.

70. As to the facts, Mr Barrett submitted that there were specific provisions permitting documents to be appended in the case of questions 2 and 3 as well as in the case of question 1. Question 2 included a request for "recent examples" of four kinds of documents; while question 3 included a request for "examples of the required documentation". These invitations to attach documents did not mean a bidder could outflank the generic prohibition against appendices being "included or embedded in the [attached] document to support your answer".

71. Mr Barrett submitted that at a trial, Newcastle would show by evidence that it was fully justified in responding as it did to Neology's answers to the four questions; that it did not misconstrue either the ITT or Neology's answers; and that the evaluation panel's scoring decisions would be shown to be unassailable and beyond reproach.

72. I come to my reasoning and conclusions on the summary judgment application. I start with the question: against what must the defendant contracting authority be shown to have no real prospect of defending? In my judgment, Mr Suterwalla's answer is correct. It is sufficient to show that the defendant has no real prospect of avoiding the remedy of setting aside the award decision. I do not accept that the claimant economic operator must go further and show that it would necessarily have won the contract.

73. In a case where the tendering exercise was conducted in breach of the economic operator's duties under the Regulations, to achieve setting aside of the award decision at trial a claimant would probably have to show, in Moore-Bick LJ's phrase in the *Lettings International* case, at least loss of a significant chance of obtaining the contract. I can see no reason in principle why at the summary judgment stage, a clamant able to meet that same threshold and with a cast iron case on breach of duty should not obtain that remedy.

74. Next, I consider the meaning and effect of the ITT and the requirements in it which the tenderers had to satisfy. This is, as Mr Suterwalla submitted, ascertained by

reference to what the "RWIND" tenderer would understand the words in the ITT to mean. It is not relevant what the tenderers thought the words meant, as pointed out by the Lord Justice Clerk in the *Healthcare at Home* case. No more is it relevant what the contracting authority's representatives thought the words meant; the court does not hear evidence from a person "offered up as a candidate for the role of reasonable tenderer", as the Lord Justice Clerk put it.

75. The court can at trial "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" (*ibid.*). There is some evidence of that kind before me; and it could be supplemented at trial, for example, on the distinction between "software" and "interface".

76. Subject to that point, I doubt whether a trial is necessary to ascertain the true meaning and effect of the ITT and the requirements it placed on tenderers. There is probably sufficient evidence before me to ascertain, putting myself in the shoes of the RWIND tenderer, the correct understanding of the ITT and its requirements. If Newcastle was suggesting it could lead evidence relevant to that issue beyond explaining technical terms and the circumstances of the industry, I do not accept that.

77. There was some discussion at the hearing about whether a trial was needed to enable the evaluators to explain the reasoning underlying their scores and comments. I accept that such evidence is in principle admissible and that the trial procedure includes cross-examination and fact finding. But I have doubts about whether a contracting authority could lead evidence flatly contradicting scores given or comments made in reaching the award decision.

78. Such evidence, if admissible at all, would be likely to be unconvincing. The outcome report (which in some cases, though not this one, is mandatory under regulation 84) is there to stand as the formal record of the proceedings. It is not a document that a party may easily go behind. I mention this because Mr Barrett's criticisms, in particular to the response to question 1, at times appeared more severe than the criticisms made in the award letter and outcome report.

79. Those observations lead me to conclude that – apart from on the issue of the distinction between "software" and "interface" - I am in a good position to decide at this stage what the meaning and effect of the ITT was; and in a reasonably good position to decide what Newcastle's assessment of Neology's answers was, as well as having the scores generated by that assessment.

80. On the first of those two issues, the drafting of the ITT was not of the highest quality but it was tolerably clear. It is a legal document though not like a statute. The understanding of the RWIND tenderer includes an ability to apply practical common sense when considering what it means and requires of tenderers.

81. The word limit was clearly intended to promote equal opportunity between bidders. Advantage could not be obtained by making a case in more comprehensive terms than the word limit permitted. The prohibition against persuasive material being "embedded" in appendices was clearly intended to prevent the word limit being evaded.

82. The permission and indeed request to include attached documents, expressly stated in questions 1, 2 and 3, had to be read in that light. The RWIND tenderer would see that a distinction was being drawn between, on the one hand, persuasive narrative which must be kept within the word limit (diagrams, charts and tables apart); and, on the other, illustrative documents or templates for types of document. The latter class of documents could safely be appended to illustrate the bidder's *modus operandi* but must not contain the narrative intended to persuade Newcastle to rate the bid more highly than other bids.

83. Next, I come to consider the comments made and scores awarded by Newcastle. As stated in the award letter, the comments were in some respects favourable as well as unfavourable and this was reflected in the scoring which was, apart from question 1, in the middle of the range of scores available. The comments in the award letter indicated that the content of the full 68 page commissioning manual could not count as part of Neology's bid.

84. That was also Newcastle's case in its submissions to me. The explanation was that the request was for an "outline" commissioning manual and that had to appear in the narrative and within the word limit. It was not congruent with the ITT's requirements simply to rely on the content of a full commissioning manual appended to the answer to question 1, and outside the word limit.

85. Mr Barrett also submitted on instructions that the evaluators considered the content of the full 68 page manual anyway and found it to be "defective", to use his word. I do not think that submission is supported by evidence. However, I do think that Newcastle has a reasonably strong case that it was right, in fairness to the other bidders, not to regard the narrative content of the full 68 page manual as a permissible part of Neology's answer to question 1.

86. Turning to Newcastle's assessment of Neology's answers to questions 2, 3 and 4: I do not accept Mr Suterwalla's argument that Newcastle plainly breached the principles of equality and transparency, applying undisclosed criteria, by deeming "not answered" the request for an employment and skills plan.

87. I do not think that in this context one can equate the word "unanswered" with a wrongful disqualification of Neology's employment and skills plan, as far as it went. I think the comment merely denotes that Newcastle was unimpressed with the answer, for the reasons given. The employment and skills plan was more like an outline of the social value Neology would bring.

88. I find nothing wrong with Newcastle's brief comment on Neology's answer to question 3. The observation that the response was "generic in parts and not tailored specifically to Newcastle…" was one that it was open to Newcastle to make. It is no answer that, as Neology submitted, the response was not required to be other than generic. It could have been more specific and, if it had been, no doubt would have merited a higher score.

89. The use of the phrase "financial assumptions" in the comment on the answer to question 4 is also innocuous and not unfair, in my judgment. The bringing of £180,000 of value was not supported by any calculations. It was Neology that had chosen to quantify in money terms the contribution it claimed it would make. To say

that the figures were based on financial assumptions was no more than the truth in the absence of any supporting explanation of the figures.

90. In the light of those observations, I am satisfied that the case is wholly unsuitable for summary judgment. I agree with Mr Barrett that the criticisms made by the claimant are, on closer observation, more in the nature of disagreements with the scoring and with the reasoning underpinning it than instances of breach of principles of equal treatment, transparency and proportionality. Neology comes nowhere near administering the knock-out blow to the defence necessary to obtain summary judgment. There is no obvious unfairness or manifest disparity of treatment as between tenderers.

91. The court is, at this stage, essentially looking at (i) the nature of the procurement (ii) the evaluation criteria and their weighting (iii) the wording of the questions asked in the invitation to tender (iv) the claimant's response to the questions asked (v) the numerical scores awarded and (vi) the narrative comments on the claimant's answers, expressed at the time in the feedback letter and later in the outcome report.

92. An examination of those matters in the present case reveals no obvious flaw in the conduct of the procurement. Mr Suterwalla's eloquent submissions do not persuade me otherwise. Nor does it assist Neology to emphasise, as it did, that disclosure has not yet taken place. Summary judgment must stand on its own two feet, unaided by disclosure.

93. For those reasons, I dismiss the application for summary judgment. I turn to Newcastle's application to lift the automatic stay.

The first defendant's application to lift the automatic stay

94. The effect of Neology bringing its claim was to trigger the automatic suspension of contract-making, requiring the contracting authority (here, Newcastle) to refrain from entering into the contract with the successful tenderer: see regulation 95(1) of the Regulations. This is often referred to as the automatic stay or the automatic suspension.

95. Newcastle applies to lift the automatic stay pursuant to regulation 95(2)(a) and 96(1)(a) of the Regulations. The application requires the court to suppose the stay were not in place and to lift it unless the court would grant interim relief applying ordinary *American Cyanamid* principles: see, e.g. Coulson J (as he then was) in *Covanta Energy Ltd v MWDA* [2013] EWHC 2922 (TCC) at [34].

96. It is not disputed that the court should approach the application on the footing that there are serious issues to be tried. That will commonly be the position in advance of disclosure, unless the case is demonstrably hopeless.

97. As to the appropriateness or adequacy of damages as a remedy, it is useful to look at Coulson J's account in *Covanta* at [39]-[48] of the cases on adequacy of damages, leading to his observation at [48] that the question is now formulated as requiring the court to assess "whether it is just, in all the circumstances, that the claimant be confined to his remedy of damages".

98. Factors such as difficulties in assessing damages, the likelihood of damage to reputation and goodwill, loss of market standing and probable loss of skilled staff are all potentially relevant to the court's assessment, as Mr Suterwalla pointed out in argument by reference to various cases which serve as examples. Several cases were cited to me on both sides but I do not think it would help to go through them all when the assessment is ultimately one of fact.

99. Neology submits it would be difficult, indeed impossible, to calculate its losses. There would be unquantifiable damage in the market place, according to Mr Luke Normington, Neology's managing director. He explained in his witness statement that Neology's financial planning was modelled on assumed receipt of at least £0.5 million per annum of revenue from CAZs during the period of their implementation.

100. Mr Normington's evidence is that the more cameras Neology makes, the less each one costs to make because of economies of scale in "supply chain and purchasing power". For example, he says, it costs about 15 or 20 per cent more per camera unit to make fewer than 500 ANPR cameras each year than it does to make 750 or more such camera units each year.

101. Without these costs savings through economies of scale, Neology says it cannot compete adequately with Siemens in this market, in particular because the latter is involved in participating in development of the central government specification. If Neology is shown at trial to have submitted the most economically advantageous tender to the three Tyneside authorities, it would be unfair for Siemens nonetheless to enjoy its continuing market advantage.

102. Mr Suterwalla put it thus in his skeleton argument:

> "If Siemens is able to continue to consolidate its market position in circumstances where it has not submitted the most economically advantageous tender, Neology will be at a significant competitive disadvantage in the marketplace, and indeed may be forced out of it, the consequences of which cannot properly be assessed and are not limited to financial loss."

103. He submitted that it is difficult to calculate lost profit where Neology's resources would have been deployed in different markets, other than the CAZ market. It is also impossible, he says, to quantify the reduced value of the chance that, if it did attempt to stay in the CAZ market, Neology would win future ANPR contracts within that market.

104. As for loss of reputation, Neology makes essentially the same point: that the CAZ market is a narrow business opportunity where Neology's aspiration as a relatively new player must be to challenge the market dominance of Siemens, which can already boast of success in winning the contracts to supply ANPR in Leeds and Birmingham, Sheffield and Portsmouth.

105. Mr Suterwalla is essentially making the obvious point that success breeds success, and vice versa, in the CAZ market as in business generally. He cited Portsmouth as an example of direct disadvantage through not having won the Newcastle contract. The award criteria for the Portsmouth CAZ ANPR contract accorded significant weight to such prior experience.

106. In oral argument, Mr Suterwalla emphasised that this was a short lived, narrowly restricted market. Only in a handful of UK cities were CAZs being established. Mr Normington's evidence is that the technology is highly specialised. It is not the same technology as used for ANPR cameras for e.g. bus lane or traffic light enforcement because of the requirement to communicate electronically with the dedicated central government Joint Air Quality Unit (**JAQU**) set up under the auspices of two government departments.

107. Neology submitted, next, that damages would be an appropriate and adequate remedy for Newcastle. In his skeleton argument, Mr Suterwalla stated that "Neology has confirmed that it is willing to provide a cross-undertaking, as appropriate". Mr Suterwalla suggested that the trial could take place next spring and would take no more than a week, without the need for any expert evidence.

108. He argued that Newcastle could not point to any real and pressing urgency; it had shown no sense of urgency itself, first delaying award of the contract from April to June 2020, citing the Covid-19 pandemic as the reason; and then waiting nearly two months after the claim was brought (on 26 June 2020) before applying (on 24 August 2020) to lift the stay.

109. Mr Suterwalla submitted that the written evidence of Mr Graham Grant, Newcastle's Head of Transport, effectively amounted to acceptance that the Tyneside CAZ would be unable to "go live" until the latter part of 2021. Therefore, he argued, a trial in the spring of 2021 would cause no delay to implementation of the Tyneside CAC and no prejudice to Newcastle or the people of Tyneside.

110. Mr Suterwalla made detailed forensic criticisms of Mr Grant's evidence. For example, he took issue with Mr Grant's assertion that progress of a CAZ in other cities such as Birmingham and Leeds is irrelevant to progress on the Tyneside CAZ. This is because, these other cities will share the same central government vehicle tracker system which must therefore be ready to "interface" with local ANPR cameras before a CAZ can go live. Birmingham's CAZ is not scheduled to go live until the summer of 2021.

111. Neology also relied on a scientific study to support an argument that, while the Tyneside CAZ is expected to deliver a net overall reduction in nitrogen dioxide levels, the public benefits of the CAZ may be overstated since the vehicles responsible for high levels of nitrogen dioxide will emit the noxious gas elsewhere, so that the CAZ's gain will be another area's loss. Some of the nitrogen dioxide will be displaced rather than eliminated.

112. Newcastle's professed legal obligation to deliver the CAZ is met by Neology's willingness to provide an undertaking in damages, Mr Suterwalla argued. Even if the UK were fined by the European Commission for breaching its obligations under the Clean Air Directive, and passed on the fine to Newcastle, the latter could be adequately compensated from the fruits of that undertaking.

113. Neology went on to submit that if damages is an adequate and appropriate remedy for neither party, the balance of convenience and justice favours continuing the stay rather than lifting it. The court, on that footing, is required to determine which of

those courses is likely to carry the least risk of injustice to either party if it is subsequently established to be wrong.

114. Neology repeated its points on prejudice to Neology's business, contrasted with the absence of prejudice to Newcastle and the public interest, given that a trial could take place next spring and Newcastle was itself the cause of delays. Mr Suterwalla said there is a clear public interest in ensuring that Newcastle has not carried out an unlawful procurement process. Public bodies should not pay twice over when awarding public contracts, as would happen if Newcastle had to pay Siemens for the services and also damages and costs to Neology.

115. Finally, Neology submitted that, if necessary, the court could consider the respective strengths of each party's case which, the merits appearing strongly in Neology's favour at this stage, could tip the balance of convenience and justice in favour of declining to lift the stay, other things being equal. In support of that argument, he relied on the points made in his summary judgment application.

116. For Newcastle, Mr Barrett submitted that this was a plain case where damages were an appropriate and adequate remedy for Neology; that was an end to the matter and meant that the stay should be lifted without the need to consider the further issues, i.e. whether damages would be an adequate remedy for Newcastle and whether the balance of convenience favoured lifting the stay.

117. Neology had already quantified its pleaded claim for damages in the sum of £1,198,158.79. The damages claim, like the contract at issue, was relatively modest in value compared to some major procurements that had produced litigation in recent years. There was nothing unique, exceptional or unusual about the nature of the goods or services being procured, Mr Barrett argued.

118. He disputed Neology's proposition that this contract was vital to its future ability to participate in this market. He did not accept that ANPR systems for use in a CAZ were qualitatively different from those used for other purposes such as congestion charge zones or bus lane enforcement. The cameras were of the same type and the process involved sending pictures of car number plates electronically to a recipient so it could take any appropriate action.

119. By way of example, Mr Barrett cited online research by Mr Grant which had unearthed a statement from a Neology company announcing that it had won a contract to provide ANPR cameras in Copenhagen. The claimant company was, like its Danish counterpart, part of a larger corporate group. Neology in the UK had already won substantial ANPR contracts, including in respect of CAZs.

120. Mr Barrett said the cases where damages had been found inadequate featured much more extreme facts than this case; notably, *Alstom Transport v Eurostar International Limited and Siemens plc* [2010] EWHC 2747 (Ch), *NATS (Services) Ltd v Gatwick Airport* [2014] EWHC 3133 (TCC) and *Bombardier Transportation UK Ltd v London Underground Ltd* [2018] EWHC 2926 (TCC).

121. Those cases, Mr Barrett argued, had involved sums that were colossal, projects of worldwide renown and prestige and contracts that were, for those reasons, truly unique. The present case, by contrast, involved modest sums and a modest contract

involving only 35 ANPR cameras, the smallest number out of all the CAZ contracts for cities in this country.

122. Mr Barrett went on to submit that, if it were necessary to consider the issue, damages would not be an adequate remedy for Newcastle or for the people of Tyneside. Newcastle is legally required, pursuant to a statutory direction from central government, to implement the Tyneside CAZ as soon as possible. If the stay prevented it from doing so, it would be in breach of that legal obligation.

123. That would damage the public interest, hamper compliance with the Clean Air Directive and expose Newcastle to financial loss. The supposed undertaking in damages was not adequate, Newcastle submitted. The evidence does not show that Neology has substantial resources or assets and the undertaking proffered does not extend to a guarantee from its parent company.

124. Finally, Mr Barrett submitted that, if it were necessary to consider the balance of convenience, the balance came down firmly in favour of lifting the stay. Otherwise, there would be substantial delay, at least until early 2022, in implementing the mandatory CAZ on Tyneside. It had already been disrupted by the bringing of these proceedings as well as by the current pandemic.

125. The health and well-being of the people of Newcastle and the wider public would be adversely affected by further delay, Mr Barrett submitted. Neology had no answer to the weighty public interest in the CAZ proceeding as soon as possible. The quality of the air on Tyneside needed to improve and lifting the stay would allow that to happen. Siemens could start work under the contract soon if the stay were lifted and the CAZ could go live in the summer of 2021.

126. Mr Barrett took issue with Neology's account of delay on Newcastle's part in the past; submitting also that such delay was, in any case, irrelevant in principle to the urgency of future implementation of the CAZ. The court had to consider the position as it now stood, not conduct an enquiry into what had happened in the past. Delays in the past only made prompt implementation more urgent.

127. Other arguments advanced by Neology were challenged by Mr Barrett. Newcastle would not have to pay twice because the merits of the claim were so weak. In any case, it was for Newcastle, as a public body, to weigh the risk of incurring liability to pay damages and to act accordingly. The status quo should be preserved, other things being equal; that meant allowing the contracting authority to select its contractor of choice.

128. I have considered those rival arguments, which were developed in detail in written and oral submissions, supported by lengthy witness statements. I start from the proposition, not disputed by either party, that there are serious issues to be tried. The claim, while not nearly strong enough for summary judgment, does surmount that low hurdle.

129. Would it be unjust to Neology to confine its remedy to damages in the event that the claim succeeds at trial? In my judgment, it would not be. I find Newcastle's arguments considerably more persuasive on this issue than Neology's.

130. Mr Normington's claim in evidence that loss of this one contract would drive Neology out of the CAZ market completely, was unconvincing. It was not supported by any financial documents such as business plans or projections. The economies of scale to which he attested did not adequately explain, with concrete evidence, why loss of this contract would of itself imperil Neology's business in the CAZ market.

131. Mr Normington spoke of the percentage differential in the cost of manufacturing under 500 cameras, as against the cost of manufacturing more than 750 cameras. The Tyneside CAZ contract involves 35 cameras, fewer than the contract for any other CAZ in the country. It was not clear that the cameras of which he was speaking were confined to those required for a CAZ contract, rather than including those deployed elsewhere in the world, for example in carrying out the Copenhagen low emission zone contract discovered by Mr Grant.

132. I accept that it is not easy for the court to quantify Neology's damages claim; though Neology itself has managed to put a figure on it, slightly in excess of £1 million. It is often difficult to assess the quantum of a damages claim for loss of a business opportunity or lost future profits. That difficulty does not absolve the court from quantifying the claim as best it can, if liability is established. Nor does the difficulty, alone, mean that damages are inadequate as a remedy.

133. I accept Mr Barrett's contention that the amount of business at issue here is modest, as are the sums involved and the quantum of the claim. I agree with him that those sums and this contract are in no way comparable to the business that stood to be lost in cases such as *Alstom Transport*, *NATS (Services) Ltd* and *Bombardier*.

134. I accept that there is some loss of respect in the marketplace where a tender is unsuccessful. Not winning a tender is always a setback for a business. But this is not a case where this contract is the only CAZ contract which Neology could, potentially, obtain. If at trial it transpires that it was wrongly shut out from this contract, it will be able to point to that fact within a year or so, will have been vindicated by the court's judgment and will be compensated in damages.

135. I conclude without any great difficulty that this case falls the other side of the line from the cases where the procurement is prestigious and internationally famous and involves vast sums of money on a different scale from the sums at stake in the present case. In my judgment, and essentially for the reasons submitted by Mr Barrett, Neology does not persuade me that it is unjust to confine it to its remedy in damages.

136. That is sufficient to dispose of the application to lift the automatic stay. If it were necessary to do so, I would also accept Newcastle's arguments in support of its proposition that damages would not be an adequate remedy for it, Newcastle; and that if the balance of convenience and justice is considered, the public interest in achieving implementation of the mandatory CAZ on Tyneside is the decisive factor supporting the lifting of the stay.

137. I would not accept Mr Suterwalla's argument that there is no prejudice to Newcastle because a trial can be held in the spring of 2021 and no delay to the CAZ would result from that trial taking place. It is by no means certain that judgment would be available before the autumn of 2021; meanwhile, Siemens would not be able to position itself to start work on the contract straight away following that judgment.

There would be a possibility of an appeal or at least an application for permission to appeal.

138. I think it is more likely than not that leaving the stay in place would delay the CAZ, i.e. that it will be implemented more quickly if the stay is lifted. I think that is in the public interest for a very obvious reason; the sooner the CAZ is implemented, the cleaner the air will be in the Tyneside area, even if some of the nitrogen dioxide is relocated rather than eliminated altogether.

139. I am not impressed, on the facts as they appear to me at this stage, by the argument that Newcastle is likely to have to pay twice over in respect of this procurement. That will only be so if the damages claim succeeds at trial. I have already decided that the merits do not come close to the threshold required for summary judgment. At this stage, the merits appear quite weak.

140. For those reasons, again substantially reflecting Newcastle's arguments, I would not be willing to leave the automatic stay in place even if I had been of the view that damages were not adequate as a remedy for Neology. In several of the cases where that latter conclusion has been reached, the court has still refused to leave the stay in place because of a public interest in the procurement proceeding and the services being provided timeously. This is also such a case.

Conclusion; disposal

141. For those reasons, I will dismiss the claimant's application for summary judgment and order that the automatic stay be lifted.