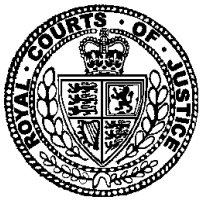

Neutral Citation Number: [2022] EWHC 3293 (TCC)

Case No: HT-2022-000353

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

7 Rolls Building, Fetter Lane,
London, EC4A 1NL

Date: Wednesday 21st December 2022

Before :

MR JUSTICE EYRE

- -

Between :

MEDEQUIP ASSISTIVE TECHNOLOGY LIMITED	**Claimant**
- and -	
THE MAYOR AND BURGESSES OF THE ROYAL BOROUGH OF KENSINGTON AND CHELSEA	**Defendant**
- and –	
NOTTINGHAM REHAB CENTRE LTD (trading as NRS HEALTHCARE)	**Interested Party**

- -
- -

Azeem Suterwalla (instructed by **George Green LLP**) for the **Claimant**
Joseph Barrett (instructed by **Bevan Brittan LLP**) for the **Defendant**
Jason Coppel KC (instructed by **Anthony Collins Solicitors LLP**) for the **Interested Party**

Hearing date: 15th December 2022

- -

Approved Judgment

Mr Justice Eyre :

1. These proceedings concern a challenge to the outcome of a procurement process conducted by the Defendant. The Defendant conducted that process on behalf of the London Community Equipment Consortium ("the Consortium") in relation to a new framework agreement ("the Agreement") for the provision of Community Equipment Services ("CES"). The Agreement was to replace an existing framework agreement between the Consortium and the Claimant. The only tenderers in the process were the Claimant and the Interested Party. As a result of that process the Defendant intends to issue the contract to the Interested Party. The Claimant has commenced proceedings challenging the procurement process and the Defendant has applied pursuant to regulation 96(1) of the Public Contracts Regulations 2015 ("the Regulations") for the lifting of the suspension which those proceedings triggered under regulation 95. The Claimant opposes that application and has responded with an application for expedition of the trial of its claim.

The Background in Outline.

2. CES involve the provision of equipment to individuals living in the community either to improve their quality of life while in the community or, and more typically, to enable them to live independently in the community when otherwise their needs would cause them to be in hospital or in some other care setting. The equipment in question can take many forms and includes items such as mobility aids, bathing and toileting aids, pressure care mattresses, sensory aids, community nursing beds, moving and handling equipment. Prompt provision of the equipment can be important in order to facilitate the discharge from hospital of a person in need of the equipment or to enable a terminally ill person to move from hospital to die at home.

3. An agreement for the provision of CES is typically made between a provider and a local authority, a clinical commissioning group, or a health trust or trusts (or a combination of those bodies). It will require the provider to store and then to deliver community equipment to a multiplicity of locations.

4. The Consortium consists of twenty-one of the thirty-three London boroughs. Under the Agreement there will be call off agreements between the contractor and the individual boroughs. It is common ground that the Agreement is the largest of its kind in the United Kingdom and one of the largest in Europe (there was some question as to whether it was or was not the largest in Europe but it is clearly one of the largest). There was some dispute as to the extent to which the Agreement and its predecessor were unique in terms of the problems to be addressed as well as in their scale. The Claimant contended that the size of the population covered by the Agreement combined with the diversity of the ethnic backgrounds of members of that population and the variety of needs to be met together with the problems of delivering equipment across the London conurbation meant that providing CES under the Agreement was markedly different from providing such services elsewhere in the United Kingdom. It can readily be accepted that the problems encountered in delivering the Agreement are different in scale from those encountered elsewhere. I do not, however, find that they are different in nature from those encountered in delivering CES in other large conurbations in the United Kingdom where there are also populations of diverse ethnicity with multiple needs and where there can be marked problems of traffic congestion.

5. The existing framework agreement has been in place since 2017. The Claimant was the incumbent under that agreement and it was also the provider of services under predecessor agreements which had been in place since 2009. The earlier agreements were smaller in scale with the first involving seven boroughs and they expanded in extent as more boroughs joined the Consortium. Before the first consortium agreement in 2009 the Claimant had been providing CES to an increasing number of London boroughs since 1993.

6. The Agreement is to run from 1st April 2023 for a five year term but with provision for a two year extension.

7. The Claimant was told that it was the unsuccessful tenderer on 5th September 2022 and commenced proceedings on 23rd September 2022.

8. In the Particulars of Claim the Claimant makes a wide-ranging attack on the procurement process and on its outcome. The Defendant is said to have failed to provide adequate reasons for its decision. There is said to have been a breach of the duty of transparency in an alleged failure adequately to inform tenderers in advance of the scoring methodology and in evaluating the tenders on the basis of undisclosed criteria. The Claimant asserts that the Interested Party's tender should have been rejected as not meeting the requirements of the Invitation to Tender. Finally, there are said to have been numerous failings in the evaluation process.

9. The Defendant applied to lift the suspension on 8th November 2022 and the Claimant's application for expedition was made on 21st November 2022.

The Potential Timeline.

10. The practicalities of when the dispute would be determined if a trial were to be expedited are relevant to the adequacy or otherwise of damages for both the Claimant and the Defendant and to the balance of convenience. They are, therefore, relevant to the question of whether the suspension should be lifted and in turn to whether the trial should be expedited.

11. The Claimant estimates that the trial of this matter will take 10 – 12 days. On the footing of expedition it proposes a timetable culminating in a trial in August or September 2023. In those terms the timetable is unrealistic. Even if, in the light of expedition, the trial of this matter were to be regarded as appropriate vacation business (which is questionable at best) it would not be practicable to set aside 10 – 12 days of court time in the vacation. That is because to do so would involve dedicating solely to this matter all of (or substantially all of) the capacity of this court for that period of time to the exclusion of other vacation business (which would, by definition, involve matters where there was a real degree of urgency). If revised to take account of that aspect the Claimant's timetable would provide for a trial in the early part of the Michaelmas term of 2023 with judgment at the end of that term at the earliest.

12. The Defendant says that the difficulties with the Claimant's proposed timetable go beyond that. It says that in the light of the extent of the issues raised in the claim; the number of witnesses who will be involved (on the footing that most if not all of the evaluators engaged in the procurement process will have to give evidence); and the participation of the Interested Party the trial would take 16 days or more. It also says

that the timetable proposed by the Claimant is too compressed for proper preparation of the case even on an expedited basis. Instead the Defendant's assessment is that it would not be possible to have a trial until February or March 2024 at the earliest.

13. Any assessment at this stage of the likely length of the trial inevitably involves a considerable degree of speculation. I am satisfied that the Defendant's estimate is markedly at the upper end of the appropriate range. Although possible it is unlikely that the number of witnesses currently envisaged will in fact be needed at trial and the cross-examination of those evaluators who are required to give oral evidence is likely to be brief. However, I am also satisfied that the Claimant's estimate is over-optimistic if only because account needs to be taken of the involvement of the Interested Party. On the current limited material it appears to me that the trial is likely to be of the order of 12 – 14 days in duration though probably towards the upper end of that range.

14. As to the timetable leading up to such a trial Neil Williams has provided a statement for the Claimant setting out his proposed timetable while Emily Heard has set out a different and longer timetable for the Defendant. Both are solicitors experienced in cases of this kind and each is seeking to make an honest assessment of what will be required albeit that each is seeing matters from a particular viewpoint. Miss Heard's assessment is more detailed and more closely reasoned than that of Mr Williams. However, there are aspects of Miss Heard's analysis which appear unduly pessimistic. Thus, and by way of example, I was not persuaded that the difficulty of obtaining witness statements in June and July because of the taking of holidays will be as great as Miss Heard believes.

15. I have already noted that at least some elements of the Claimant's proposed timetable are unduly optimistic. In that regard there is force in Miss Heard's point that the involvement of the Interested Party will not only lengthen the trial but will mean that the steps leading up to the trial will involve more work and take more time than the Claimant believes.

16. If expedition is ordered the parties will have to give a degree of priority to the preparation of this case and there will have to be compression of the timetable. Nonetheless I am satisfied that the very earliest the matter could be ready for trial consistent with proper preparation would be the latter half of the Michaelmas term 2023. If the court were able to accommodate the trial then there would be a judgment either right at the end of that term or more likely in the early part of 2024.

17. As O'Farrell J noted in *Bombardier Transportation UK Ltd v London Underground Ltd* [2018] EWHC 2926 (TCC) at [85] any judgment will potentially be subject to an appeal. I do not, however, read O'Farrell J's explanation of that point as bearing the weight which the Defendant sought to place on it. The Defendant and the Interested Party appeared at times to be saying that this meant that the suspension, if not lifted, should be regarded as likely to run not only until trial but also until the end of the period which it would take for an appeal to be made and to be determined (including the time for a hearing in and judgment by the Court of Appeal). It appeared to be said that in considering the lifting of the suspension the court should regard the consequence of maintaining the suspension as being a delay until the determination of an appeal. I do not accept that such an approach is correct nor that such was what O'Farrell J had in mind. Rather in my judgement the appropriate course when considering the likely duration of the suspension is for the court to look to the length of time which will be

needed for a determination at first instance but to be conscious that such will be the earliest date at which the suspension will be lifted and that there is a possibility that the period will be extended, perhaps substantially extended, by the appeal process.

18. In those circumstances I approach the matter on the footing that the earliest time when the matter will be determined will be the beginning of 2024 and that if not lifted the suspension will last at least until then.

19. What will be the consequences for the mobilisation of services under the Agreement of the suspension being lifted and of it being retained in place?

20. The Defendant and the Interested Party say that if the suspension is lifted now the Interested Party will be able to provide services under the Agreement from the intended start date of 1st April 2023. However, if the suspension is not lifted then a period of at least 6 months will be needed from the lifting of the suspension. In short it is said that the Interested Party has already made some progress towards mobilisation and that it has a dedicated team in place ready to complete the necessary work. However, if there is significant delay the position will be very different. The team currently in place will have been stood down and a new team will have to be formed and the scope for building on the progress made to date will be limited. It is said that in addition to reforming a mobilisation team the Interested Party will have to negotiate afresh with suppliers and to identify and obtain properties to use as depots and the like.

21. The Claimant says that the Defendant and the Interested Party are too optimistic in one regard and too pessimistic in another. It says that it is not realistic to say that if the suspension is lifted now there can be mobilisation by 1st April 2023. It says that the limited progress made to date and the scale of the work which will be needed, given that the Interested Party is not the incumbent contractor, mean that the Interested Party will not be in a position to commence providing the services until some months after 1st April 2023. It also says that there is an inconsistency in the Interested Party's contentions that it will only need three months from now to be ready to provide the services and that it will need more than six months from the lifting of suspension if the suspension is continued.

22. I accept in general terms the description by David Straughan for the Interested Party of the tasks involved in preparing to undertake the provision of CES. In short terms: premises will have to be identified and obtained; vehicles will have to be obtained; staff will have to be identified, recruited, and trained (albeit a significant number of those currently undertaking the work will transfer under the TUPE provisions); appropriate information technology will need to be put in place; and initial quantities of stock will need to be identified and obtained.

23. It is relevant to note that but for the commencement of proceedings the timetable contemplated was for the successful tenderer to be identified in early September 2022 and for the provision of services to begin on 1st April 2023. I have no reason to believe that was an unrealistic timetable even for a successful tenderer operating from a standing start. I note that the Interested Party has made some progress already and that it has its mobilisation team in place ready to move into a more intense phase of preparation. I am satisfied that if the suspension were to be lifted now the Interested Party would be in a position by at the latest a matter of weeks after 1st April 2023 to commence the provision of services and that there is a reasonable prospect that such

commencement could be achieved by 1st April 2023. Similarly, the Interested Party's description of the likely effects of a long period of suspension is persuasive and I accept that after such a suspension a period of at least six months would be needed before services could be provided.

24. It follows that if the suspension is lifted now services under the Agreement will commence on 1st April 2023 or shortly thereafter. If the suspension is not lifted then such provision will not begin until July 2024 at the earliest and potentially not until the Autumn of 2024 with some risk that it could begin even later in 2024.

25. The Claimant says that it will remain willing to continue the provision of CES to the Consortium after 1st April 2023 and also that the benefits said by the Defendant to flow from the Agreement are already provided under the existing agreement. In the light of that it says that the suspension will not adversely affect those to whom the services are currently being provided nor those who will need such services after 2023. I will consider those contentions when assessing the adequacy of damages for the Defendant and the balance of convenience.

The CES Market and the Positions of the Claimant and of the Interested Party in that Market.

26. I have described the general nature of CES above. Those engaging the providers of such services are public bodies of various kinds. The procurement exercises for such contracts will almost invariably be governed by the Regulations and to the extent that any are not (because their value is below the requisite threshold) they are likely to be conducted in an equivalent manner to those which are subject to the Regulations.

27. There is a regular turnover of such contracts. There were differences between the evidence of the Claimant and that of the Defendant and the Interested Party as to the number and value of the contracts which are likely to be put up for tender in 2023 and 2024. Those were, however, in reality differences of detail and emphasis rather than of substance. It is clear that there is a regular flow of such contracts but that the number and value of those which are up for tender at any given time will vary. The Claimant's "Strategic Report, Directors' Report and Financial Statements" for the year ended 31st December 2021 were signed on 19th May 2022. At that time the Strategic Report set out a positive assessment of the future state of the market saying under the heading "Future Developments":

> "The existing and forecast shift in population demographics has resulted in a growing market which, together with on-going pressure on government budget spend, has produced significant opportunities for the Company to expand.
>
> As the population ages, and advances in medical technology facilitate care in the home, growth can reasonably be expected from existing contracts. In addition, visible tenders for further CES moving to the outsourced market signpost significant opportunities in the coming years.
>
> There are also expanding opportunities in the self-funding retail market and CES linked activities including Planned Preventative Maintenance, and Home Improvement & Minor Adaptations."

28. However, even though there is a regular flow of such contracts and even though the Claimant itself describes the market as growing it has to be remembered that the

Agreement is of a markedly different scale from other such contracts. As already noted it is the largest contract of its kind in the United Kingdom by some way. In the light of that I proceed on the footing that opportunities to tender for contracts even approaching this scale and value will be infrequent.

29. There are three significant providers of CES in the United Kingdom of which the Claimant and the Interested Party are the larger two. In his witness statement David Griffiths, the Claimant's Managing Director, described the Claimant as the leading provider of CES and explained the scale of its operations. Mr Griffiths set out a number of respects in which he said that the service provided by the Claimant and its methods of working were market-leading and/or unique to the Claimant. I have no doubt that such is the honestly held perception on the part of the Claimant. The "business review and results" in the Claimant's Strategic Report refers to a range of authorities with whom the Claimant has contracts, identifying a number of extensions of existing contracts together with the award of a number of new contracts.

30. Unsurprisingly, David Straughan, a director and the Chief Operating Officer of the Interested Party, does not see matters in the same light as Mr Griffiths. He says that although the Claimant may hold more contracts than the Interested Party those held by the latter are of greater scale and value. There is no doubt that the award of the Agreement to the Interested Party will mean that the value of the contracts it holds will be greater than the value of those held by the Claimant.

31. The difference between those perceptions is immaterial for present purposes. It is clear that both the Claimant and the Interested Party are substantial businesses with each having an annual turnover in excess of £200m. Each is a major participant in the CES market and each holds a range of contracts in that field. At different times one or other is or will be the holder of more contracts and/or contracts of greater value than the other depending on the success or failure each has from time to time in the recurring procurement contests.

32. Despite the scale of the Claimant's business it is right to note that the existing framework agreement is a significant part of the Claimant's operation and contributes a sizeable sum to its turnover. There was disagreement as to the precise extent of this and in part this depends on whether focus is on the number of authorities covered by the agreement or on contribution to turnover. Again the precise proportion is not crucial. What is relevant for current purposes is that although the existing agreement contributes less than half of the Claimant's turnover it does contribute a significant proportion of that turnover such that the loss of the income from the Agreement will have a real impact on the Claimant's financial position going forward. That is hardly surprising given that the Agreement is the largest of its kind in the United Kingdom.

33. It is to be noted that in 2021 the Claimant was successful in obtaining a framework contract from three London boroughs who are not members of the Consortium. This means that even without the Agreement the Claimant will retain a presence in the London market but unsurprisingly the value of that contract with three boroughs is dwarfed by the value of the Agreement with twenty-one boroughs.

34. In February 2022 the Claimant was taken over by Medux BV. Medux is a business based in the Netherlands which describes itself as the largest European provider of mobility aids for care organisations and for the elderly living at home. Standing behind

Medux is SHV Holdings NV a very large trading group. It appears that the focus of the Medux operation is on wheelchairs, mobility scooters, and walkers and similar products together with beds and related products. Thus the focus is similar to but not identical to that of the Claimant's business.

35. On instructions Mr Suterwalla explained in his skeleton argument that the Claimant and Medux, and the other companies under the same ownership, operate on a stand-alone basis with separate directorates and management teams; with separate targets for their businesses; and with no direct control being exercised by one company over the other. I accept that is the position and in part it follows from their nature as a separate legal entities. Nonetheless it is clear that while standing alone the companies do not operate without having any regard to each other and that they take advantage of the benefits which flow from working together when such are present. In his evidence Mr Hughes of the Defendant quoted from the account of the acquisition which was given on the Claimant's website. There the Claimant's Chief Executive Officer, James Ibbotson, was quoted as saying that he looked forward to "the collaboration with Medux" and that "this partnership is a major step forward for Medequip. By working alongside Medux, we can capitalise on its vast experience as the market leader in the Netherlands and further accelerate Medequip's growth". The website entry went on to say that "by joining forces Medux and Medequip will strengthen their services and broaden their customer bases."

36. I am satisfied that as Mr Ibbotson said the relationship between Medux and the Claimant is one of partnership (albeit not of a legal partnership or joint venture) in which they work alongside each other. The material exhibited by Mr Griffiths illustrated one way in which this was done. Mr Griffiths explained in a note his concerns about how the loss of the Agreement would affect the Claimant's commercial negotiating strength when dealing with suppliers. In doing so he referred to an agreement which had been negotiated with one supplier. That had been negotiated in partnership with Medux and had involved "combining the purchasing power of the two organisations". Similarly, when setting out his concerns about the effects of the loss of the Agreement Mr Griffiths adverted to the potential effect on the Claimant's ability to obtain financing. He said that the reduction in earnings which would flow from loss of the Agreement would reduce the Claimant's headroom under its funding facilities. However, he immediately followed that by saying that there might be a need for a restructuring of facilities "in the event that other members of the enlarged group perform below expectations". This again indicates that when dealing with funders as well as with suppliers the Claimant will negotiate together with other Medux companies. I will consider below the extent to which the Claimant's relationship with Medux is relevant either to the adequacy of damages as compensation for its loss (in the event of the claim succeeding) or to the balance of convenience.

The Principles governing Applications to lift the Automatic Suspension and for Expedition.

37. The applicable principles are well-established and were not contentious as between the parties before me. I have noted in particular the articulation of the relevant principles by Coulson J in *Covanta Energy Ltd v Merseyside Waste Disposal Authority* [2013] EWHC 2922 (TCC) at [34] – [36] and [39] – [48] and in *Sysmex (UK) Ltd v Imperial College Healthcare NHS Trust* [2017] EWHC 1824 (TCC); by Stuart-Smith J in *Openview Security Solutions Ltd v Merton LBC* [2015] EWHC 2694 (TCC) at [9] –

[40] and in *Alstom Transport UK Ltd v London Underground Ltd* [2017] EWHC 1521 (TCC) at [13] – [22]; by Fraser J in *Lancashire Care NHS Foundation Trust v Lancashire CC* [2018] EWHC 200 (TCC) at [14] – [30]; by O'Farrell J in *Draeger Safety UK Ltd v London Fire Commissioner* [2021] EWHC 2221 (TCC) at [20] – [21] and in her treatment of the particular tests at [22] – [53]; and by Joanna Smith J in *Kellogg Brown & Root Ltd v Mayor's Office for Policing & Crime* [2021] EWHC 3321 (TCC) at [22] – [24]. As Stuart-Smith J noted in *Alstom v London Underground* at [13] the exposition of the principles in different cases will be tailored to address the issues of fact and law raised in the particular case. As a consequence there will be differences of emphasis in the way in which the principles are expressed but there is no debate as to the principles which are applicable.

38. In the light of those authorities I can set out my understanding of the applicable approach comparatively shortly.

39. The court is to approach the question of the lifting of the automatic suspension by way of considering whether an interim injunction restraining the placing of the contract would be granted if the suspension were not in place. If such an injunction would be granted the suspension is to remain in place but if it would not be then the suspension is to be lifted. It follows that the principles derived from the decision in *American Cyanamid Co v Ethicon Ltd* [1975] AC 396 come into play.

40. The first question is, therefore, whether the Claimant has shown that there is a serious issue to be tried. This is a comparatively low hurdle. The court is not to conduct a mini or quasi-trial. Exceptionally there will be cases where it can be seen at the interim stage that even though a serious issue has been shown the claim is clearly either particularly weak or particularly strong. This will only be where it can clearly be seen that by reference to "evidence as to which there is no credible dispute that the strength of one party's case is disproportionate to that of the other party" (per Lord Diplock in *American Cyanamid v Ethicon* at 409). Where that is the position such strength or weakness of the claim can be of some relevance if and when the court reaches the stage of considering the balance of convenience. That is because such strength or weakness will be relevant to the degree of risk that the grant or refusal of an injunction (or in a procurement case the lifting or retention of the suspension) will cause irremediable prejudice if a different view of the merits prevails at trial. A claimant with a weak case is less at risk of suffering irremediable prejudice if the suspension is lifted and conversely the risk of irremediable prejudice to a defendant by keeping the suspension in place is less where a claimant has an evidently strong case. However, it will only be exceptionally that the court will be able to take such a view of the merits at this stage and it will be rare for the strength or weakness of a claim to be relevant save to the extent of demonstrating the presence or absence of a serious issue to be tried.

41. If a serious issue has been shown the court will turn to consider whether damages would be an adequate remedy for the claimant if the suspension is lifted and the claim is ultimately successful at trial. This question can also be expressed as being that of whether it is just in all the circumstances for the claimant to be confined to the remedy of damages. The two expressions come to the same thing or to adopt Stuart-Smith J's language in *Openview* at [18] are to be seen as "two sides of the same coin, even if, in some cases, the formulations may carry slightly different emphasis". If damages will be an adequate remedy for a claimant then it will be just for that party to be confined to that remedy; conversely if they will not be an adequate remedy then it would not be just

for the claimant to be so confined. However, the latter formulation, deriving from *Evans Marshall & Co Ltd v Bertola SA* [1973] 1 WLR 349, does serve as a reminder that the question of the adequacy or inadequacy of damages is not to be approached narrowly. Rather the court must look to the case in the round to consider the adequacy of damages as a remedy.

42. The fact that the assessment of damages after a trial will not be straightforward and that there will be difficulty in such an assessment does not necessarily mean that damages will not be an adequate remedy for a claimant. However, this is a matter of degree and "there may be circumstances where the number of uncertainties or variables that have to be brought into the calculation of the aggrieved tenderer's lost chance may persuade the court that damages would not be an adequate remedy" (per Stuart-Smith J in *Openview* at [32]). Particularly this is so in cases where the claimant's allegation is that the authority determined the procurement process on the basis of unpublished criteria. That was the context of Stuart-Smith J's remarks in *Openview*. It was also the context of *NATS (Services) Ltd v Gatwick Airport Ltd* [2014] EWHC 3133 (TCC) where Ramsey J put the matter thus at [82] – [83] in an approach showing the interplay between characterisation of the test as being the adequacy of damages and as being whether it is just to confine the claimant to the remedy of damages:

> "82 It is evident that the question of adequacy of damages does not depend solely on whether or not the court could and would do its best in difficult circumstances to assess damages. As Sachs LJ said in *Evans Marshall v Bertola* at 380 C to D:
>
> > *"The courts have repeatedly recognised that there can be claims under contracts in which as here, it is unjust to confine a plaintiff to his damages for their breach. Great difficulty in estimating these damages is one factor that can be and has been taken into account. Another factor is the creation of certain areas of damage which cannot be taken into monetary account in a common law action for breach of contract: loss of goodwill and trade reputation are examples…"*
>
> 83 In the present case I consider that there would be great difficulty in estimating the damages which would have to be assessed if the breach in terms of undisclosed, irrational and inappropriate criteria were to be proved. The court would have to assess what would be the impact if those criteria had been disclosed to the tenderers and what would be the impact if rational and appropriate criteria had been applied. Even with two tenderers the court will be left to speculate on a range of possibilities and, whilst it would do its best to come to a conclusion, the difficulty in estimating the damages is, as Sachs LJ said a factor to be taken into account in determining whether it would be unjust to confine a claimant to damages for breach".

43. The passages cited by Coulson J in *Covanta* at [44] provide further instances of cases where the extent of the difficulty in assessing damages caused the court to accept that damages were not an adequate remedy for a claimant.

44. If damages will be an adequate remedy for a claimant or if it is just to confine the claimant to that remedy then that will normally be the end of the matter and save in exceptional circumstances the suspension will be lifted.

45. The burden on both the first two questions lies on the claimant and it is the claimant who must show there is a serious issue to be tried and that damages will not provide it with an adequate remedy.

46. The court must next consider whether damages will be an adequate remedy for the defendant if the suspension is maintained in place and the criticisms of the procurement process are ultimately found to be unmeritorious. By parity of reasoning to that adopted in relation to the preceding question this can be expressed as raising the question of whether it is just to confine the defendant to its claim on the cross-undertaking in damages.

47. Particular considerations arise when addressing this question in the context of procurement cases where the defendant will be a public body. There will be cases where damages will demonstrably be an adequate remedy even for such a body if the suspension is kept in place and it is precluded from placing the contract in accordance with its procurement process. This will be the position where awarding the contract would mean that the authority was able to obtain particular goods or services at a particular price and where the restraint on awarding the contract means that it has to obtain identical goods or services for a higher price. There, an award in due course of the difference between the two amounts would adequately compensate the authority in question for the inability to place the contract at the lower sum at the earlier time. In such a case the same goods or services will have been obtained during the period of the suspension but at a higher price than would have been the position in the absence of the suspension. There will, however, be circumstances where damages will not be an adequate remedy for a public body. This will potentially be the position where the contract is to provide particular services for the public or to provide those services in a particular way and where the maintenance of the suspension means that for a period of time the services will not be provided or will not be provided in the way desired by the authority. Such an impact on the provision of services by the public body in question will not be measurable in financial terms and damages would not normally be an adequate remedy for a defendant authority in those circumstances (see per Lord Goff in *R v Secretary of State for Transport ex p Factorame* [1991] 1 AC 601 at 673 A-B).

48. If damages would not be an adequate remedy for either party then the court has to have regard to the balance of convenience. The court does so in order to determine which course of action is likely to create the lesser risk of injustice by having caused irremediable harm to a party who is ultimately successful. Here again there are factors of particular relevance in procurement cases.

49. Thus in procurement cases it will be necessary to take account of the interests of the successful tenderer in assessing where the balance of convenience lies. That tenderer will be precluded for the period of the suspension from taking up the contract which it otherwise would have obtained as a result of the procurement process – a process which may turn out to have been unimpeachable.

50. Further, there is a public interest in allowing public bodies to give effect to their decisions. This interest is relevant when the requirements of the balance of convenience are being assessed as is consideration of the extent to which and the period for which suspension of the placing of a contract will prevent services of public benefit being provided.

51. There is a public interest in public bodies acting lawfully and in ensuring that such bodies comply with the requirements of the Regulations. However, that interest is met by applying the *American Cyanamid* approach. In the absence of any suggestion that a particular procurement process has been tainted by corruption neither the public interest in compliance with the Regulations nor the prospect that an ultimate award of damages to an unsuccessful tenderer will involve a double payment out of public funds should cause a different approach to be taken. The position was explained thus by Stuart-Smith J in *Alstom v London Underground* at [39]:

> "Ms Hannaford advanced two submissions in relation to the public interest. Her first was that there is a public interest in procurements being carried out properly. I agree. However, for the reasons that I gave at [27] of *Openview*, which I repeat and adopt, I do not accept that the undoubted public interest in procurements being carried out properly tends of itself to support the maintenance of the automatic suspension. Ms Hannaford made the point that the Regulations provide more than one possible remedy. I agree; and, in my judgment, that supports the conclusion that the appropriate remedy should be identified without preconception or prejudice as to which one may be appropriate. Despite Ms Hannaford's submissions to the contrary, I remain of the view that the appropriate course is for the Court to apply established principles and that it will only be in an exceptional case that it can be said that the application of *American Cyanamid* principles fails to give adequate support to the public interest in procurements being carried out properly. Of course, setting aside the automatic suspension at a time when the Court does not know what the final outcome of the Claimants' allegations will be gives rise to the possibility that the Defendant will end up paying a contract sum to the successful tenderer and damages to the aggrieved Claimant. However, that possibility is not a reason for maintaining the automatic suspension if it is otherwise inappropriate to do so. On the contrary, the prospect of paying damages as well as a contract price if it breaches its obligations is an integral part of the scheme under the Regulations for encouraging proper and principled procurements since it is to be assumed that contracting authorities will (in general) wish to avoid double payment. If there were even a whiff of corruption in a given case (e.g., that the procurement had deliberately been conducted in breach of the regulations to achieve a given end irrespective of the risk of double payment), I have no doubt that any Court would regard that as a feature tending to support the maintenance of the automatic stay. However, I make plain that there is no evidence to give rise to even a whiff of that sort in the present case".

52. In *Kellogg, Brown & Root* at [118] – [121] Joanna Smith J analysed the authorities and explained why the passage I have just quoted is properly to be seen as reflecting the approach to be taken in this regard. I respectfully agree with and adopt that analysis.

53. The likely duration of the suspension will be relevant and potentially a factor of considerable weight. The longer the duration of the suspension the greater will be the risk of irremediable prejudice being caused to the authority which conducted the procurement or to the successful tenderer if their position is ultimately vindicated. Conversely if the court can be confident the suspension will be short-lived the risk of such prejudice will be so much the less.

54. Other considerations will rarely be equal but where they are or where the balance of convenience does not fall clearly on one or other side account is to be taken of the benefit of maintaining the *status quo ante*. That is the position as it was before the commencement of proceedings namely that the procurement process had led to a particular result and that the authority was entitled to award the contract in question to a tenderer other than the claimant.

55. The various questions are to be considered sequentially and a failure by a claimant to establish a serious issue to be tried or that damages will not be an adequate remedy for it will, other than in exceptional circumstances, be the end of the matter. It is, however, to be remembered at each stage that the objective is for the court to take the course which creates the least risk of irremediable harm being suffered if a different view is ultimately taken of the merits. The court has to have regard to the risk of prejudice to a claimant if the suspension is lifted and the contract awarded to another tenderer as the result of a procurement process which is ultimately found to have been flawed. Similarly, regard must be had to the risk of harm to an authority or to the successful tenderer if the suspension is maintained in place and the challenge to the procurement process is ultimately found to have been unfounded.

56. That objective is of special relevance when the court is considering the balance of convenience but it is to be borne in mind that it is the reason for the questions which have to be asked at each stage. It is, accordingly, relevant to the way in which those questions are to be approached and to the considerations to be taken into account at each stage. The formulation of the test at the second stage by reference to whether it is just to confine the claimant to the remedy of damages accords with this objective because it focuses attention on wider considerations and requires even at that stage regard to be had to all the circumstances. This objective also means that various considerations can be relevant at more than one stage of the process. I have already noted that exceptionally the strength or weakness of a claimant's case can be relevant to where the balance of convenience lies. Similarly, matters affecting the adequacy or otherwise of damages can also be relevant at that stage. A claimant who narrowly establishes that damages will not provide it with an adequate remedy will necessarily be less well-placed to persuade the court that the balance of convenience favours maintenance of the suspension than one who has established that point convincingly.

57. The application of those principles will involve consideration of the circumstances of the particular case. As Joanna Smith J noted in *Kellogg, Brown & Root* at [25] "every case in this area turns on its own facts". No two procurement exercises will be exactly the same and no two tenderers will have precisely the same circumstances. Indeed the circumstances of the same business tendering for different contracts at different times will probably also differ. As was Joanna Smith J in *Kellogg, Brown & Root* (and indeed as happened in the other cases which I have cited) I was referred to a considerable number of authorities and my attention was drawn to the approach taken to sundry considerations. Those citations were helpful as illustrations of the application of the general principles to particular circumstances. However, save to the limited extent I have already mentioned or will explain below I do not understand the judges in those cases to have been purporting to determine how the principles should be applied in different circumstances. Still less were they purporting to set out matters which necessarily would be determinative for or against maintenance of the suspension in all cases nor purporting to identify a consideration which necessarily and in all cases would be either relevant or irrelevant to the court's application of the principles I have noted above.

58. In *W L Gore & Associates GMBH v Geox SPA* [2008] EWCA Civ 622 Lord Neuberger identified, at [25], four factors which the court should take into account when considering an application for expedition. They are: whether a good reason for expedition has been shown; whether expedition would interfere with the due

administration of justice; whether expedition would cause prejudice to the other party to the application; and whether there are any other special factors operating in favour or against expedition. Those factors are to be considered against the background of the overriding consideration identified by Vos LJ in *Petter v EMC Europe Ltd* [2015] EWCA Civ 480, at [17], namely that for the court to order expedition it must be satisfied that objectively viewed there is some real urgency sufficient to justify taking that course.

59. Although those are the factors of relevance generally to issues of expedition I am satisfied that their operation in circumstances such as those of this case where the court is considering an application for expedition together with an application to lift the suspension imposed by regulation 95 can be condensed somewhat. The question of the lifting of the suspension is to be addressed on the basis that there will be an expedited hearing. That is because that is the approach most favourable to the Claimant seeking to maintain the suspension (or rather because in the absence of expedition the arguments against maintaining the suspension are considerably strengthened) and because if the suspension is maintained fairness to the Defendant and to the Interested Party will call for expedition. Thus if the suspension is maintained the requirements for ordering expedition will be almost inevitably be met. If the suspension is lifted the question of expedition will still need to be considered but the force of the arguments in favour of it will be markedly reduced.

Has a Serious Issue been shown and should Account be taken of the Strength of the Claim?

60. The Defendant accepts that the case advanced by the Claimant shows a serious issue to be tried. This is on the footing that factual matters capable of giving rise to a claim have been alleged. However, on behalf of the Defendant, Mr Barrett says that claim can be seen to be a weak one such that account should be taken of this weakness in the event that the court has to consider the balance of convenience. Mr Barrett drew attention to the breadth of the attack being mounted by the Claimant inviting the court to conclude that this scatter-gun approach indicated the absence of particular points of force or substance. He pointed to the large margin by which the Interested Party's scores resulting from the evaluation process exceeded those of the Claimant. Mr Barrett said that, of itself, this demonstrated the weakness of the claim and the poor prospects of success. In order to succeed the Claimant would have to show either that the Defendant should have excluded the Interested Party from the procurement process or that a considerable number of the scores obtained in the evaluation process should be altered by significant amounts such as to reduce the scores obtained by the Interested Party or to increase those of the Claimant and that it was irrational for the actual scores to have been given. Mr Barrett also said that the contention that the Interested Party's tender should have been treated as being abnormally low was untenable. Such an argument could only succeed if the Claimant could show that the only rational course would have been for the Defendant to treat the tender as abnormally low. There is, the Defendant says, no prospect of such a conclusion being reached on the figures here. That is in the light of the level of profit which, in estimating the value of its damages claim, the Claimant says that it would have made if awarded the contract. Although less than the amount of the Claimant's tender the Interested Party's tender was nonetheless at a level which, on the Claimant's assessment of the figures, would still yield a profit for the Interested Party and that, the Defendant says, is fatal to the contention that the tender

should have been seen as being abnormally low. The Defendant says that it is also of note that although at least some of the matters of which the Claimant now complains were apparent in the course of the procurement process the Claimant did not, at it could have done, commence proceedings before the outcome of the process was known. The Defendant says that this is an indication that the Claimant did not, in truth, regard the points as having substance.

61. For the Claimant Mr Suterwalla not only rejects that analysis but says that to the contrary the claim can, even at this stage, be seen with sufficient clarity as having good prospects of success such that account should be taken in favour of the Claimant of that strength in the analysis of the balance of convenience. In that regard Mr Suterwalla points to breadth of the allegations being made. He says that the Claimant's ability to identify so many deficiencies in the procurement process and to support its contentions with detailed reasoning demonstrates the considerable extent of the flaws in the process.

62. The arguments advanced by both Mr Barrett and Mr Suterwala were cogent and plausible by way of analysis of the picture disclosed by the pleadings. They demonstrate why it is not possible at this stage to form anything approaching a concluded view as to the strength or weakness of the claim. The force of the arguments and the strength or weakness of the underlying claim will have to be determined after a trial in the light of consideration of the evidence and of the documentary background. This is not a case where it can be said at this stage that the strength of either the claim or the defence is disproportionate to that of the other. In those circumstances to the extent that I have to consider the balance of convenience I will take no account in that exercise of the alleged strength or weakness of the claim.

The Adequacy of Damages for the Claimant.

63. The Claimant points to a number of factors the combined effect of which, it says, is that damages would not be an adequate remedy if the suspension were to be lifted with the claim ultimately succeeding at trial. I will assess each in turn and then consider whether the combined effect of those matters which remain of weight after that assessment means that damages will not be an adequate remedy for the Claimant.

Reputational Harm.

64. The Claimant says that the loss of the contract has caused and will cause it reputational harm for which damages will not be an adequate remedy. There are in reality three elements in this alleged harm to the Claimant's reputation and they fall to be considered separately.

65. At points in his witness statement Mr Griffiths sought to contend that the Claimant's reputation would be affected by the fact that it failed to obtain the contract replacing a contract which the Claimant had held for a number of years. In essence the suggestion was that there would be some form of stigma attached to the Claimant's failure to obtain the new replacement contract and that this would be seen as having been a reflection of the adequacy of the Claimant's performance under the existing agreement. For the reasons I will now explain there is no substance in this argument.

66. It is to be remembered that the position is that of a failure by the Claimant to obtain a further contract where there has been a fresh procurement exercise at the end of the

term of the existing framework agreement. That is a very different situation from that which might appertain if there had been a termination of the existing framework agreement at some point in its course because of some form of poor performance. Such a termination might well cause harm to the reputation of the contractor in question but that is not the case here. As I have already noted contracts in this field will be awarded following formal procurement processes conducted by public bodies. All concerned will be well-used to and familiar with instances in which the same contractors compete for various contracts with each being successful in some procurement exercises and unsuccessful in others. They will also be familiar with instances where a replacement contract has been awarded to a contractor who did not hold the existing contract. No stigma or discredit attaches in those circumstances to the contractor who previously held the contract but who fails to obtain the new contract. Just as no stigma attaches amongst the authorities who will be placing contracts similarly I do not consider that any stigma attaches amongst those who might seek to work for such contractors. Those seeking to work for contractors in this field (or those whom the contractors might wish to attract as employees) will be well-used to the "win some: lose some" nature of the process and will not, without more, be discouraged from seeking employment with a contractor which has happened not to obtain a contract replacing one which it had previously held.

67. Moreover, if my preceding assessment is not correct and there is some stigma arising in those circumstances then any such stigma will be time-limited. If the Claimant is right it will in due course obtain a judgment in which the court will say that it should have been awarded the new contract or, at least, that the procurement process which awarded the new contract to the Interested Party was flawed. That would be an adequate vindication of the Claimant's reputation (see in that regard Coulson J's characterisation of the position in *Sysmex* at [50]).

68. It follows that the Claimant's failure to obtain the contract replacing the contract it previously held does not create reputational harm such as to mean that damages are not an adequate remedy.

69. Next, it is said that the prestigious nature of the Agreement means that there is particular reputational harm flowing from the Claimant's failure in the procurement process and that this harm cannot adequately be compensated in damages. The failure to obtain a particularly prestigious contract can be an instance where damages will not be regarded as an adequate remedy for a claimant who ultimately shows at trial that the failure was the result of a flawed procurement exercise. O'Farrell J put the matter thus in *Camelot UK Lotteries Ltd v The Gambling Commission* [2022] EWHC 1664 (TCC) at [94]:

> "As a matter of principle, loss of reputation and market position may be relied on to establish that damages would not provide adequate compensation for a party seeking to maintain the automatic suspension in a procurement challenge; for example, where there is evidence that loss of a unique prestigious contract is likely to impact adversely upon a party's reputation so as to reduce its prospects of future profitable work…"

70. However, it is necessary to note the kinds of contracts which have been regarded as carrying prestige of this kind. Thus in *Bombardier Transportation UK Ltd v London Underground Ltd* [2018] EWHC 2926 (TCC) at [59] the contract for provision of rolling stock for the London Underground was said to be "distinctively prestigious" and carrying a global reputation.

71. In *Camelot v The Gambling Commission* the reputational harm flowing from a failure to obtain the replacement licence to run the National Lottery was not such as to mean that damages were not an adequate remedy.

72. In *NATS v Gatwick* Ramsey J described the position in that case thus at [84]:

> "I am also persuaded on the evidence in this case that the contract for air navigation services at Gatwick Airport would have a particular impact on the reputation of NATS in the global marketplace. Gatwick is the world's largest single runway airport with a very large number of annual movements. It is seen in the marketplace as a being of major importance in the increasingly competitive market for air navigation services".

73. In *DHL Supply Chain Ltd v Secretary of State for Health & Social Care* [2018] EWHC 2213 (TCC) the contract was for provision of "all medical devices and hospital consumables (other than medicines)" for the NHS together with related information technology and logistics contracts. That was accepted by O'Farrell J as being "prestigious and high value" (see at [46]).

74. The contract in *Draeger v London Fire Commissioner* was the provision of breathing apparatus to the London Fire Brigade. The Defendant's internal reports explained that "other fire and rescue services throughout the UK were watching [the] procurement with a view to following LFB's lead" (see at [35]). It was in those circumstances that O'Farrell J accepted, at [41], that the procurement while neither unique nor high value was "likely to be perceived as setting the standard for improved protective equipment in this sector" with the consequence that it was arguable that damages would not be an adequate remedy for the claimant.

75. In *Vodafone Ltd v Secretary of State for Foreign, Commonwealth, & Development Affairs* [2021] EWHC 2793 (TCC) the contract in question was for the provision of a secure communications system for the Foreign and Commonwealth and Development Office requiring the "provision of connectivity between 532 sites in more than 170 countries" (see at [3]). Kerr J accepted, at [84], that this contract was "highly prestigious" explaining at [85]:

> "I am prepared to accept Vodafone's assessment, not directly contradicted by the defendants, that in the field of international global communications this contract is second only in prestige to an equivalent contract to supply those services to the government of the USA. Such opportunities do not arise frequently; the last one was 11 years ago".

76. In *DWF LLP v Secretary of State for Business, Innovation, & Skills* [2014] EWCA Civ 900 the question of reputational harm was not considered at length but it is apparent that the procurement exercise was for the provision of legal services to the Insolvency Service throughout England, Wales, and Scotland.

77. The Agreement is not comparable to contracts of the kind which were considered in those cases. I have summarised the nature of the contract and of the services to be provided at [4] above. I accept that this is by some way the largest contract of its kind in the United Kingdom but as already noted the services provided and the problems being addressed are not confined to London and are not different in kind from those provided and addressed in other major conurbations throughout the country. The fact that the services are provided to a consortium of twenty-one London boroughs does not mean that it is in the highly prestigious category. The Agreement is, indeed, an example of joint working by a number of local authorities but that does not mean that it is,

without more, prestigious nor that it means that the Defendant's choice of contractor is likely to be followed by other authorities. Mr Griffiths's assertion that the outcome of the procurement exercise would be of interest to authorities in the Greater Manchester area who are said to be contemplating a similar form of joint working was speculative. In any event the situation is very different from that in *Draeger v London Fire Commissioner*. It is readily understandable that other fire brigades may well regard the make of breathing apparatus chosen to be used in London as an appropriate type of equipment to acquire and as a consequence go to the successful tenderer as the supplier of that equipment. However, while other authorities deciding to engage in joint working may well consider adopting the structure used by the Consortium it does not follow that they would be likely to follow the Consortium in the choice of the contractor to provide services and such provision would inevitably be subject to a procurement exercise governed by the Regulations.

78. The consequence is that the Claimant has not shown that the Agreement was a highly prestigious contract of the kind where failure in the procurement exercise could give rise to reputational harm for which damages would not be an adequate remedy.

79. As to reputational harm more generally I adopt O'Farrell J's condensation of the effect of the relevant authorities which she expressed thus in *DHL v Secretary of State for Health & Social Care* at [45]: "Damage to reputation may be a relevant factor but requires cogent evidence showing that such loss of reputation would lead to financial losses that would be significant and irrecoverable as damages or very difficult to quantify fairly…". I do not accept that Kerr J in *Vodafone v Secretary of State for Foreign, Commonwealth, & Development Affairs* was at [79] – [83] setting out any different test from that enunciated by O'Farrell J in *DHL*. Mr Suterwalla was, however, right to say that Kerr J approached the question in a more nuanced way than by a simple application of the three criteria identified by Stuart-Smith J in *Openview* at [39]. I note that Stuart-Smith J described those as "general criteria which need to be reviewed and considered in the light of the facts of each case" and which were "not to be applied by rote".

80. In the circumstances of this case it is unnecessary to engage in further reflection on the precise nuances of the relevant test. That is because here the reality is that when questions of stigma and the alleged high prestige attaching to the Agreement have been put aside the matters on which Mr Griffiths relies as harm to the Claimant's reputation really relate to a different line of argument. In reality the points being made are about the consequences of the reduction in the scale of the Claimant's operations which will follow from the loss of the work for the Consortium together with matters related to that line of argument. It is to that contention that I will now turn.

<u>The Effect of the Loss of the Contract on the Size and Structure of the Claimant's Business; on its Standing; and on the Scale of its Operation.</u>

81. The effect of the outcome of the procurement exercise is that the Claimant will have lost a high value contract which makes a substantial contribution to its operations and turnover. The contention advanced by the Claimant is that the Claimant will become a smaller business as a consequence and that this will affect the way it is perceived in the market and will have a number of harmful practical consequences. It is said that these will affect the Claimant in a number of ways.

82. Thus it is said that the reduction in size will have an impact on staff recruitment and retention. It is said that potential staff of ability will want to make their careers in larger organisations. It is then said that the reduction in size will affect the Claimant's ability to obtain funding. Dealings with suppliers will, the Claimant says, be affected. The reduction in the scale of the Claimant's operation will mean that it will be less able to negotiate reduced prices because it will be less able to offer large orders. There will similarly be a loss of economies of scale. Finally, suppliers will be less likely to seek to invite the Claimant to participate in pilot projects or to offer to the Claimant new products.

83. There will indeed be a reduction in the scale of the Claimant's operation. I am not, however, persuaded that the Claimant has established that the effects will be at anywhere near the level asserted by Mr Griffiths. The Claimant will remain a significant participant in the CES market. At worst it will be the second largest rather than the largest of the two principal businesses in this field in the United Kingdom. It will retain in addition the benefits of working alongside Medux and the other Medux companies. I have set out my assessment of that relationship at [34] – [36] above. I am satisfied that this relationship will greatly reduce the extent to which the reductions of scale flowing from the loss of the Agreement will impact on the Claimant's attractiveness to potential employees and on its dealings with funders or potential suppliers. In the last respect even without the Medux connexion I do not accept Mr Griffiths's suggestion that the loss of the Agreement means that suppliers will be unwilling to offer new products to the Claimant. In the absent of cogent evidence to the contrary it seems to me that in any functioning market one would expect the suppliers of products to be keen to sell their new products to as many purchasers as possible and not to seek to confine them to a single purchaser let alone to exclude a potential purchaser which even after the loss of the Agreement would be the second-largest in the UK market. The fact of the Medux connexion makes it even less plausible that a producer of equipment in this field would deliberately refrain from offering its equipment to the Claimant.

84. To the extent that the reduction in the scale of its operations impairs the Claimant's negotiating strength with suppliers then the effect of that can be identified and quantified at least to some extent. It will be a matter of (a) assessing on the balance of probabilities the extent to which and the amount in which the Claimant would have been able to obtain a discount from the spot price for goods or services if its operation had included the provision of services to the Consortium and (b) contrasting that with the level of discount which the Claimant is able to obtain without that addition to its business. It is of note that Mr Suterwalla was able to set out such a calculation in respect of community beds in his skeleton argument at [39(2)].

85. Similarly the loss of licence fees and revenue on development work flowing from the fact that fewer authorities will be using the Claimant's bespoke Information Technology systems will be capable of quantification.

86. In summary there will be a reduction in the scale of the Claimant's operation but it will remain a major participant in a growing market. The consequences of the reduction in scale will in part be capable of quantification. To the extent that the consequences are not so capable they are speculative and likely to be modest and not such that it would not be just to confine the Claimant to its remedy in damages.

The Loss of Opportunities for Innovation.

87. The Claimant says that because of the scale of the work for the Consortium that work is particularly fruitful of innovations. I have already explained that I do not accept that the problems being addressed in providing CES to the members of the Consortium are different in kind from those being addressed in other conurbations in the United Kingdom. I accept that the larger population being served under the Agreement and the larger number of authorities with whom the contract holder will be dealing mean that there is a statistically greater prospect of innovative solutions coming to light than in the course of the provision of CES to a smaller population through a single authority. This prospect has been lost by the Claimant but the effect is speculative at best and the Claimant will remain engaged in providing CES to large numbers of persons through agreements with a number of authorities. It follows that this element can have only minimal weight in support of the contention that damages will not be an adequate remedy for the Claimant.

The Loss of the Claimant's Head Office.

88. The Claimant's head office is currently on the Heathrow site in Harmondsworth That site is used for providing services under the existing framework agreement and the Claimant's head office is located above parts of the site which are used for providing those services.

89. The Claimant says that having failed to obtain the Agreement it will no longer be able to continue to have its head office at that location. It will have to close that office and move elsewhere. Mr Griffiths proceeded from that point to say that as a consequence the Claimant would be at risk of losing its specialised head office staff who may not be prepared to commute to a different location. Those are said to be specialist staff engaged in functions such as payroll, human resources, the management of purchasing, and the oversight of payments, invoicing, and money collection.

90. I accept that the Claimant will proceed on the basis that it needs to move its head office from the current site. The evidence as to this was not particularly detailed but I accept that the Claimant will no longer have a need for the balance of the site and would find maintaining a head office above premises which it does not operate unsatisfactory. However, the evidence provided simply failed to establish that as a consequence the Claimant will have to move its head office to a location such that it will lose its current head office staff. The Claimant has shown that a number of the head office staff live close to the current head office but it has not shown that it could not move that head office to another location in the same general area with the consequence that commuting time for the staff would not be materially increased. The Claimant does not need to have its head office in the territory of an authority to which it provides services (and given the nationwide scope of the services the Claimant provides its head office will inevitably be some distance from some of the authorities with whom the Claimant deals wherever it is located). In the absence of cogent evidence there is no reason why the Claimant could not obtain replacement office premises in a location close to the current head office such that the staff currently working at that office could readily commute to the new head office. The Claimant produced no such evidence and I do not accept that it has shown that there is a material risk of the loss of such staff.

91. The relocation of the Claimant's head office will involve expenditure and it may well be that any replacement premises will be more expensive than the current head office.

Those, however, are matters which can readily be quantified and which can form the basis of a damages claim and for which damages will be an entirely adequate remedy.

The Loss of Specialist Staff.

92. The staff currently engaged in providing services under the existing framework agreement will, if the awarding of the Agreement to the Interested Party proceeds, transfer to the latter under the TUPE provisions and so will be lost to the Claimant (although it will be open to the Claimant to allocate some of those staff to other roles with the effect that they will not transfer under those provisions). The loss of specialist staff can be a matter which means that damages are not an adequate remedy for a contractor harmed by deficiencies in a procurement process. The Claimant says that is the position here. However, careful analysis of the degree of specialism and of the effect of the loss of the staff in the particular case is required before that analysis can be accepted.

93. It is clearly the position that those engaged in leadership roles in the provision of CES will need and will have knowledge of and skill in the organisation of logistics operations and experience in working with local authority, health, and social care staff. That undoubtedly involves a degree of specialist skill. However, that is not true of all the employees who will transfer to the Interested Party. Those involved in the operation of the Claimant's depots and in the delivery of aids and other equipment are doubtless skilled and experienced. They can be described as specialists to that extent but their specialist skills appear to be in the fields of warehousing and delivery services and as such they are not confined to the provision of CES but are common to many others engaged in logistical provision of various kinds and so those staff can be replaced by other recruited from those fields.

94. I have already addressed the impact of the loss of the contract on the scale of the Claimant's operation. It is apparent that even after the loss of the contract it will remain engaged in the provision of CES to a number of local authorities and related bodies. Even after the loss of the staff engaged on the current framework agreement the Claimant will retain a cadre of skilled and experienced staff both those engaged at levels of leadership and management who will have particular specialism in this field and those engaged in warehouse operations and in delivery whose skills are less narrowly specialised.

95. The position of the Claimant is markedly different from the circumstances with which the court has been dealing in cases where the loss of specialist staff has been found to mean that damages will not be an adequate remedy for a losing tenderer.

96. Thus in *Lancashire Care NHS Foundation Trust v Lancashire CC* Fraser J accepted that the lifting of the automatic suspension would "result in the loss of senior staff who currently manage the full range of children's services across *all* contracts" and that it would reduce the Claimant's ability "to maintain *other* contracts for other children's health services in addition to the ones the subject of the procurement challenge" (see at [40] – original emphasis).

97. The position was even starker in *Counted4 Community Interest Company v Sunderland CC* [2015] EWHC 3898 (TCC). There the staff were engaged in the treatment of drug and alcohol abuse and were without question highly specialised and the lifting of the

suspension would have involved the loss of the bulk of the claimant's staff and the jeopardising of its ability to continue in operation. Carr J summarised the effect of the claimant's evidence, which she accepted for the purposes of the hearing before her, thus at [22]:

> "the impact of the lifting of the suspension on the Claimant …would be (in his words) "devastating and irreversible". The Claimant has a unique drug service team made up of skilled, experienced and professionally qualified staff. It has created a multi-disciplinary team of experts and a multi-functional team. The Claimant is at the moment almost wholly reliant on the existing contract. Virtually all of the current infrastructure is dependent on it. Should NTW be awarded the contract now, the bulk of the Claimant's staff would have to be 'TUPEd' over to the new provider, as otherwise the Claimant does not have the income to sustain the workforce. Its ability to service one other contract for services at Stockton would be put at risk…"

98. In those circumstances Carr J concluded that there would be irremediable prejudice not capable of being compensated in damages if the suspension was lifted saying, at [40]:

> "… if the suspension is lifted, the Claimant will lose its highly and uniquely trained workforce under TUPE regulations, that workforce being predominantly engaged on the existing contract. It is a team that has taken years to develop; its skills are not available on the wider market. The Defendant ripostes by stating that in such circumstances the highly trained team would not be lost to the general public. But that ignores the irremedial harm to the Claimant which is the issue under consideration here. …"

99. Those are the kinds of cases in which the court has held that the loss of specialist staff means that damages are not an adequate remedy for the particular claimant. In both those cases there was a high degree of specialism; the transfer would have been of all or almost all of the claimant's staff; and the loss of the staff would have affected the claimant's continued capacity to perform other contracts or to function at all. It will immediately be noted that those are very different indeed from the circumstances here. Although the Claimant will lose some of its specialist staff the degree of specialism in question is rather less than in those cases. More important the Claimant will retain a number of such specialists and its very existence will not be threatened by the loss of the staff who will transfer to the Interested Party. It cannot credibly be suggested that the loss of the staff who will transfer to the Interested Party will mean that the Claimant will be unable to continue to perform the contracts it has for the provision of CES to local authorities in widely disparate parts of the United Kingdom. Accordingly, this is not a case where the Claimant's loss of specialist staff means that damages will not provide it with an adequate remedy.

100. There is a separate but related argument advanced on behalf of the Claimant. This is that there are a number of staff who are engaged on the work for the Consortium under the existing framework agreement but who also provide input into other activities of the Claimant. That input and the resilience provided by having a larger number of staff to be called upon for support or assistance when needed will be lost. To some extent this is an aspect of the argument based on the reduction in the scale of the Claimant's operation but it is in any event a loss which can be quantified and for which damages will be an adequate remedy. In principle the Claimant should be able to assess and to provide evidence of the extent to which the loss of the input from those staff engaged on work for the Consortium but whose spare capacity was used on other projects has necessitated the employment of additional staff to assist with those other projects. The additional cost of engaging such staff can be quantified and so this aspect of the impact

on the Claimant of the loss of the Agreement can adequately be compensated in damages.

The Duration of the Agreement.

101. The Claimant says it is significant that the Agreement will last for five years with the expectation of a two year extension so that the Claimant will be locked out from providing CES to the Consortium for a period of seven years. As a related contention it says that this means that its capacity to provide such services in London will have degraded over that period reducing its prospects of being successful in a procurement exercise for the replacement for the Agreement in due course. I do not accept that this adds anything of substance to the other points and it is of note that the Interested Party was the successful tenderer in the procurement exercise under challenge despite not being the incumbent contractor.

The Difficulties of Quantifying the Value of the Claimant's Claim.

102. In his oral submissions Mr Suterwalla contended that the fact that the claim is in part that the Defendant proceeded on the basis of unpublished criteria means that this case is in the category I identified at [42] and [43] above of cases where damages are not an adequate remedy because of the extent of the speculation which would be involved in their quantification. The allegation that the Defendant proceeded by reference to unpublished criteria is in the Particulars of Claim but is far from being at the forefront of the claim. Similarly, this argument was at most hinted at in Mr Suterwalla's skeleton argument.

103. Mr Barrett and Mr Coppel KC say that the allegation that the Defendant took account of unpublished criteria is not tenable in the absence of a particularised contention that if the Claimant had known of the criteria the tender would have been in different terms. There is force in that argument but it is not fatal at this stage and I have already explained that I do not regard either the strength or weakness of the claim to be sufficiently clear to enable me to take account of that consideration in the exercise I have to undertake.

104. The Claimant's argument is not compelling but it is right to say that the assessment of damages would involve a degree of speculation if the contention that the procurement exercise is found to have been flawed in this respect were to succeed. With some reluctance I conclude that the Claimant has narrowly raised a sufficiently arguable contention as to the adequacy of damages in this regard.

Conclusion.

105. Most of the matters on which the Claimant has relied as indicating the inadequacy of damages are misconceived, speculative, or overstated and I have no hesitation that damages would be an adequate remedy for most of the consequences which the Claimant says will follow from the loss of the Agreement. That conclusion comes even more readily if the test is expressed as being one of considering whether it is just to confine the Claimant to the remedy of damages. However, as I have just explained the Claimant has narrowly succeeded in raising sufficient question on the point of whether it will be possible properly to quantify damages if the unpublished criteria allegation

succeeds to surmount this hurdle. I turn, therefore, to the next stages in the *American Cyanamid* process.

The Adequacy of Damages for the Defendant.

106. The Defendant says that maintenance of the suspension will delay until the Summer of 2024 and perhaps until the Autumn of that year (or even later) the introduction of the new arrangements which should have commenced in April 2023. It points to the benefits which it believes will flow from the new arrangements and which will, if the suspension is maintained, be delayed for something over a year.

107. In his evidence for the Defendant David Hughes explains that the terms of the Agreement were the result of work by a project group which had been engaged in this exercise since 2018 and which had consulted the members of the Consortium, clinicians, service users and their carers and families. Mr Hughes lists the benefits which it is believed will flow from the new arrangements. These include a more flexible working model; new Key Performance Indicators backed up by enforcement mechanisms; changes to the stock management system; moves to reduce vehicle emissions; and the introduction of the London Living Wage as the minimum rate of pay. Mr Hughes also says that the new arrangements will result in significant costs savings but I note that the delay in achieving those savings is clearly a loss for which the Defendant can be adequately compensated in damages.

108. In his witness statement Mr Griffiths sets out a detailed critique of the alleged benefits of the new arrangements. He says that in large part they are already being provided or that the current framework agreement (or the call off agreements under it) is operating in an equivalent way. Mr Griffiths goes further and says that the new arrangements are not entirely an improvement on those under the existing framework agreement and that the changed arrangements will in some respects provide a worse service to those needing equipment.

109. There is no challenge to the evidence from Mr Hughes that the terms of the Agreement are the result of reflection and consideration by the members of the Consortium after a period of consultation. The local councils are the bodies with responsibility for the provision of these services to their citizens. They are best placed to know both whether the services are being delivered in a particular way under the existing framework agreement and whether the changes which have been made from that agreement leading to the terms of the Agreement are likely to be an improvement or not. Certainly it is for the local authorities to decide the way in which they want the services delivered.

110. Almost inevitably there will be scope for debate as to the extent to which the changes which it is said are being made are in truth changes from the current arrangements and also as to the extent to which the changes are an improvement. It may well be that the differences in terms of the practical operation of the system are not as great as the Defendant perceives them to be and also that different persons will have different views as to whether the new arrangements are an improvement. However, I come back to the point that the Consortium has decided that it is beneficial for the CES to be delivered in a particular way and on particular terms. If the suspension is maintained the Consortium will not be able to implement that decision for the period of the suspension and for such time thereafter as is necessary to enable the new arrangements to be put into effect. Provision of services will continue in the interim. The Claimant is willing

to continue to supply the services and this is not a case where there will be a gap in provision. Nonetheless the fact remains that the Defendant will not be able to provide the services in the form and on the terms it wishes. That is a loss which cannot adequately be compensated in damages.

The Balance of Convenience.

111. I turn to the balance of convenience.

112. I have already explained that the Claimant has only surmounted the hurdle of showing that damages will not provide it with an adequate remedy by the narrowest of margins. There is a risk that damages will not be an adequate remedy for the Claimant and that it will suffer irremediable harm if the suspension is lifted and it succeeds at trial but that risk is modest. There will be an impact on the Claimant of losing the contract but other than in terms of the loss of the profit which would have been made from the Agreement that impact will be markedly less than is asserted by the Claimant. The Claimant will remain a significant participant in this growing market; it will be working alongside Medux and will derive the benefits of that cooperation; it will retain a significant number of contracts for the provision of CES; and it will retain a cadre of specialist staff.

113. If the suspension is maintained the Defendant and the other members of the Consortium will be precluded from providing services to those for whom they are responsible on the terms and in the way in which they wish to do so. They will be prevented from doing so for a period of more than a year and potentially longer. The services will continue to be provided but on the basis of the current arrangements which the Defendant wishes to change and, as the Defendant sees matters, improve.

114. There will be a real impact on the Interested Party. It will be prevented from providing services pursuant to the Agreement for the period of time I have already noted. At the very least there will be real disruption to the Interested Party in not being able to implement the arrangements when it intended to do so and this will be reflected in a cost to the Interested Party. I also accept that if the suspension is maintained but the result of the procurement process is upheld at trial then the Interested Party will incur additional expense in having to start mobilisation afresh (or substantially so) in 2024. There is a further factor which is that the Interested Party will be subjected to a delay before it obtains the benefits of increased scale which would flow from being the contractor under the Agreement and the other benefits which the Claimant says will come from operating the Agreement. I have not been convinced that the benefits of operating the Agreement are as great as the Claimant asserts but if the Claimant is right about the extent of those benefits then it follows that the Interested Party will suffer the detriment of being deprived of those benefits for the period of the suspension.

115. I have to take account of the possibility that the Claimant is right and that it has been deprived of the Agreement by a flawed procurement process and by failings on the part of the Defendant. I have to be aware of that possibility as an element in the balance of convenience but as I have already explained the claim cannot be said to be of either such evident strength or such evident weakness that an assessment of the Claimant's prospects of success can come into play at this stage.

116. The Claimant says that the new arrangements are likely to break down if the Agreement is awarded to the Interested Party. The Claimant criticises the Interested Party's proposals for performance of the Agreement and the preparations which have been made. It says that the fact that the Interested Party is prepared to provide the services at a lower figure than the Claimant shows that the Interested Party has not priced the project adequately and that there is a risk that the Interested Party will not be able to sustain the performance of the Agreement. I reject that contention. The Interested Party is a substantial business with considerable experience in this field being a sizeable participant in the CES market. It has produced a tender which the Defendant is satisfied meets the requirements of the procurement process. I have no doubt that the Claimant genuinely believes that the Interested Party will not perform the Agreement as well as the Claimant would have done but there is simply no basis for concluding that the arrangements will break down if the services are provided by the Interested Party rather than by the Claimant.

117. I have already explained that the Defendant and the other members of the Consortium are best placed to determine how the services are to be delivered with the consequence that the Claimant's argument that the new arrangements are not an improvement on the existing framework agreement cannot come into the equation.

118. No one factor is conclusive but looking at matters in the round I find that it is clear where the balance of convenience lies and that it falls in favour of lifting the suspension. Again standing back I am satisfied that this is the course which creates the least risk of irremediable harm if a contrary conclusion is reached at trial.

Conclusion as to the Lifting of the Suspension.

119. Accordingly, I direct that the suspension be lifted.

Expedition.

120. In those circumstances the question of expedition can be addressed shortly.

121. To order expedition would have an effect on the due administration of justice. At the lowest it would have that effect by providing court time for the matter to be determined earlier than would otherwise have been the case. That will potentially prejudice those other court users whose matters would have been considered at that time but for the expedition of this claim and whose cases would, as a consequence, be considered later than would otherwise have been the position. There is also the potential for expedition to increase the costs of this matter. That was not addressed in the material before me but it is the common experience of the courts that if the timetable for preparation of a case is significantly reduced then the costs of such preparation are likely to be increased if only because there is less scope for the delegation of the necessary work to less-experienced and as a consequence lower-charging fee earners. Moreover, in circumstances where the suspension has been lifted and where the risk that damages will not be an adequate remedy for the Claimant is modest at its highest there is no sufficient real need for urgency to warrant taking this course.

122. The application for expedition is, therefore, refused.