

Appendix 1

Breaches

62. ~~GMWDA~~ Sita will rely on the facts and matters set out above, and in the correspondence referred to, in support of its pleaded case below. Given the nature of the case and the fact that most of the relevant facts are known to GMWDA but not to Sita it will be necessary for Sita to provide further particulars of the matters pleaded below following disclosure in these proceedings.
63. In breach of its obligations under the Regulations and/or the 2006 Regulations and/or Articles 43 and 49EC and/or general principles of Community law, GMWDA
- a. failed to provide the debrief information required under the Regulations and/or such information as would enable Sita to enforce its rights; and/or
 - b. failed to act with the necessary transparency; and/or
 - c. failed to take the necessary steps to identify the “most economically advantageous tender”; and/or
 - d. failed to treat Sita and VL equally

each as further particularised below.

a) and b): GMWDA failed to provide the debrief information required and/or failed act with the necessary transparency;

63A Regulation 23 (as amended) and regulation 32 of the 2006 Regulations set out the debrief obligation. That requires that the “characteristics and relative advantages” of the successful tenderer are provided by reference to the evaluation made in accordance with regulation 21 (regulation 30 of the 2006

regulations), namely an evaluation that identifies the “most economically advantageous tender”. Where the characteristics and relative advantages of the most economically advantageous tender are subject to change after a debrief has been supplied, but before the contract has been entered into, that obligation has not been finally discharged.

63B The duty of transparency requires, at least:

(i) That Sita should have the information necessary to enable it to decide whether or not GMWDA’s decision to enter into a contract with VL in April 2009 was well-founded. Further, Sita should have the information necessary to know whether GMWDA’s decision to continue negotiations with VL alone between January 2007 (assessment of BaFO) until April 2009 (contract entered into with VL) was well-founded at any time, or at all.

(ii) That, when GMWDA provided a reply to Sita’s requests for information on VL’s bid or otherwise supplied Sita with debrief information, the information should be:

- a. true information; and/or
- b. information that was not materially misleading; and/or
- c. the information on which GMWDA seeks to rely in alleging that Sita had the knowledge to bring its claim at any time earlier than it did.

(iii) That the information provided by GMWDA concerning the relative position of VL and Sita at all relevant times, and the changes in VL’s bid between BaFO in January 2007 and April 2009, when the contract with VL was entered into should be clear and unequivocal.

63C In breach of GMWDA's obligation under regulation 23 (regulation 32 of the 2006 Regulations) and/or in breach of its obligation of transparency, GMWDA failed to provide Sita with the necessary information at either the Alcatel debrief in May 2009 or before entering into the contract with VL in April 2009 or at any other relevant time and/or provided misleading information as set out in §§64-66 below. For the avoidance of doubt any relevant time refers at least to any time at which GMWDA alleges that Sita should have issued proceedings.

The Alcatel debrief of April and May 2008

64. GMWDA relied on the January 2007 assessment, and the re-assessment made in or by June 2007 when providing the debrief information for the purposes of the Alcatel stage as set out in GMWDA's letter of 9 May 2008. That information was out of date. There had been a reassessment in July 2007 (3 June 2009 letter from Paul Dunn refers: TB1/919), a major reassessment made by Ernst & Young in December 2007 (17 July 2009 letter refers: TB1/970) on which GMWDA relied when making their decision to proceed with VL in April 2008, as well as a further re-evaluation at that time, April 2008 (3 July 2009 letter refers: TB1/952).

64A GMWDA expressly answered Sita's questions as to changes in the VL bid since the debrief of January 2007 by a letter dated 9 May 2008 (TB1/829) by reference to the future publication of the Project Agreement on the grounds that "such publication will provide you with at least as much as, if not more than, the information to which you are entitled to in law" (TB1/831). That would not be finalised until the close of negotiations and could not be published until after the agreement had been signed. GMWDA thereby expressly postponed (i) its final debrief obligation, and therefore (ii) the time at which Sita might bring proceedings, if the information contained in the Project Agreement provided any such grounds.

64B Further, that debrief obligation could not be fulfilled unless the redactions, if any, were limited in such a way that Sita could understand the characteristics

and relative advantages of the VL bid as it then stood. The Project Agreement was supplied to Sita on 3 June 2009 without any of the schedules in which most of the information required would be found (TB1/927). Further heavily redacted information was supplied on 19 June 2009 (TB1/939). The debrief was partially completed by the alternative means of the correspondence from 3 June 2009.

65. In correspondence with Sita, GMWDA continued to rely on the debrief information of 2007, through SJ Berwin, as late as 8 July 2009 (TB1/969). There had been major further changes to the VL bid since the Ernst & Young re-evaluation in December 2007.

Sita's request for a further Alcatel letter

66. By a letter of 22 December 2008 (TB1/893) Sita sought a further Alcatel letter from GMWDA before the contract was finally entered into in April 2009. GMWDA refused and relied on the 2007 debrief information (letter of 27 January 2009: TB1/895) as well as the debrief letters of 18 April and 9 May 2008 "by which" it said "the Authority fully complied with its obligations...". And further that "in today's circumstances, the Authority does not consider it appropriate for any further Alcatel letter to be sent". GMWDA continued to rely expressly on the debrief of April and May 2008: §§64A and 64B above are repeated.

- 66A In its letter of 16 April 2009, GMWDA informed Sita that the contract had been entered into with VL and referred back to the obligation set out in the letter of 9 May 2008 concerning publication of the Project Agreement. It informed Sita that the Project Agreement would be published "in the very near future" (TB1/900). GMWDA thereby again expressly invited Sita to await publication of the Project Agreement for the completion of the debrief, and the provision of the information on which Sita might bring proceedings, if there were grounds.

Sita's knowledge

67. Accordingly Sita did not know the relative scores or the characteristics and relative advantages of the VL bid at the time the Alcatel letter was issued in April 2008, or when the contract was finally entered into in April 2009. On the basis of the information supplied, Sita understood only that it was GMWDA's position that a fair comparison of Sita's best bid and VL's Ineos Chlor bid resulted in a 6 percentage score difference and that this conclusion had not been undermined in the post-BaFO negotiations by April 2007.
68. Sita did not know that in December 2007 Ernst & Young recorded that the scores for both VL and Sita for MSB1 were similar. Sita did not know that this conclusion, and the decision to proceed with VL, was based on assumptions as to what cost increases would have applied to Sita's bid. Sita did not know that those cost increases, if they had applied equally to Sita, were presumed to have been assumed entirely by GMWDA.
69. Sita did not know that major changes had been made to the substance of VL's bid before April 2008, including that the initial assessment had been made on the basis of a different site. Sita did not know that VL's capital costs increased by 50% before April 2008 and had doubled by the time the contract was entered into. Sita did not know that major changes had been made to the financing and other matters, including the introduction of a second SPV, when it asked for and was refused a further Alcatel letter before the contract was entered into.
70. Sita did not know that further assessments had been made based on assumptions as to the likely changes to Sita's bid as a result of the financial crisis, had it been asked to submit a further tender. Sita did not know that GMWDA assumed that it (i.e. GMWDA) would bear the cost of any such increases either directly or through the unitary charge in making its assessment.
71. Sita did not know that comparisons subsequent to the January 2007 assessment were made against its MSB1 bid and not its best bid.

72. Sita still does not know the effect of the changes disclosed on the final scores as between Sita and VL and is unable to calculate them for itself on the basis of the information supplied. There is no evidence that the final contract entered into with VL was ever the subject of any score. Such scores are available to GMWDA. Sita only knows the information contained in the correspondence from GMWDA and S J Berwin in June and July 2009, and in the subsequently disclosed information (after proceedings were issued and the Particulars of Claim served).

72A Sita does not know whether there was ever commercial certainty in relation to VL's risk profile. The allocation of risks had to be set out in the BaFO Risk Matrix (TB1/468 et seq). Risks were re-allocated during negotiations (TB1/961). Sita does not know how these re-allocations of risks were scored and whether the implications of any extra costs associated with the re-allocation of risks to GMWDA were taken into account. Sita has been provided with no evidence that they were taken into account.

GMWDA's position

72B GMWDA has subsequently and wrongly denied that Sita was entitled to any more information than it already had concerning the January 2007 assessment, including that that assessment had not been "undermined" by December 2007:

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(i) GMWDA letter of 18 May 2009: Sita was "not entitled" to further information. The Project Agreement would (only) be published to comply with the Freedom of Information Act and the Environment Information Regulations. (TB1/905-906).

(ii) GMWDA letter of 3 June 2009: the 18 April 2008 and 9 May 2008 letters from GMWDA "more than fulfilled its obligations to provide information as to the award of the contract pursuant to regulation 23...

Such actions fully satisfied GMWDA's obligations to debrief bidders, and gave Sita a chance to compare the relative characteristics and advantages of the different final bids..." (TB1/918, at pp918/919)

c) GMWDA failed to take the necessary steps to identify the "most economically advantageous tender"

73. It is a consequence of regulation 21 that a contract can only be entered into with the bidder that provides the "most economically advantageous tender". It is unknown on what precise basis, whether relative scores, or a qualitative review, GMWDA made its decision to proceed with VL at the various stages of the post BaFO negotiations, including at the point at which a contract was entered into in April 2009. The information available to Sita regarding GMWDA's decision-making process, first concerning the various decision points, and, secondly as to assumptions made, these matters is as follows:

a. The Press Release of 8 April 2009 showed very substantial increases in VL's costs;

January 2007

(i) In January 2007 GMWDA proceeded on the basis that there were 6 or 7 percentage points between Sita and VL's scores, and that GMWDA would proceed with VL's uncoded bid including Ineos Chlor providing that it scored no worse than its coded bid (TBp762e)iii)

June 2007

(ii) In June 2007 GMWDA compared the VL coded bid with an alternative proposal at Ineos Chlor (Runcorn) and concluded that they scored similarly. GMWDA had no firm basis on which to draw this conclusion. For example the evaluation methodology had changed (confidential information supplied 26 November 2009: not redacted, p33§3.2); capital costs at the Ineos Chlor site had not been finalised

(confidential information supplied 26 November 2009: not redacted, p34§4.3); the issue of asset reversion, i.e GMWDA's expectation that it would have rights to the site at the end of the contract, had not been offered at the Ineos Chlor site (confidential information supplied 26 November 2009: not redacted, p34§4.7)

December 2007

(iii) ~~(b)~~ In December 2007 GMWDA proceeded on the basis that as a result of the changes to VL's bid, the scores of VL and Sita were similar: in a Report commissioned by GMWDA, Ernst & Young concluded that Sita's original BaFO bid had a similar score to VL's updated bid. ~~The assumptions on which that conclusion were based have not been disclosed.~~ The assumptions on which this conclusion was based have now been partially set out (confidential information supplied 26 November 2009: p162 et seq: partially redacted). It is impossible on the information supplied to follow the assumptions to the final scores assessed and/or to consider the full implications in relation to the conclusion that the results were "similar" (confidential information supplied 26 November 2009: not redacted, p177§2.8). For example, it is apparent that the assessment was made without any formal resubmission by VL (confidential information supplied 26 November 2009: not redacted, p172§2.5)

April 2008

(iv) Any further increase in VL's costs would be expected to lead to a favourable assessment of Sita's bid relative to VL's. In April 2008 GMWDA considered the further increases in costs since January and December 2007 and proceeded on the basis that the increased costs still fell within their "affordability" envelope. In a further report commissioned from Ernst & Young, Ernst & Young had insufficient evidence from which to draw any conclusions that the VL bid remained the "most economically advantageous tender" (confidential

information supplied 26 November 2009: relevant passages not redacted p230, §§7.1.10-7.1.11)

April 2009

- (v) In April 2009 GMWDA finally entered into an agreement with VL on the basis of further increased costs, on the assumption that further increases would also have been incurred by Sita (for example in the second letter from John Bland dated 3 July 2009 (TB1/952)).

Assumptions made by GMWDA

- (vi) ~~(e)~~ The January 2007 assessment showed that Sita's best bid was VB1 and that VL's best bid was MSB1. That assessment, on which Sita was 6 percentage points behind, has formed the basis of subsequent re-assessments. Subsequent comparisons have been based on fundamentally different assumptions, namely a comparison between Sita's MSB1 (and not its best bid) and VL's MSB1, although based on a different site with different costs than the contract entered into.
- (vii) ~~(d)~~ Assumptions have been made as to the likely increase in Sita's bid, had it been asked to re-submit a bid. Those assumptions are without foundation:
- (viii) ~~(f)~~ They take no account of the differences between VL and Sita's position in the market, for example as regards access to finance, parent company support, and relative experience of waste contracts;
- (ix) ~~(h)~~ They take no account of the fundamental purpose of the Regulations which is to enable competition. Sita would not necessarily have expected GMWDA to assume all/any of the increases in any costs that would have been incurred.

(x) ~~(iii)~~ They take no account of the greater margins identified by GMWDA in Sita's bid, and the consequent scope for absorbing additional costs.

(xi) ~~(iv)~~ They take no account of the unreliability of the VL bid as evidenced by its material under-costing of its capital costs in its BaFO bid.

(xii) ~~(v)~~—They take no account of Sita's offers to re-enter the competition. Those offers were made by Sita without knowledge of the material increases in VL's costs at the time the offers were made. GMWDA should have realised that Sita would only make such an offer, involving further expense, if they believed they could supply an offer that might be competitive with VL, even without knowledge of the increases in price.

GMWDA cannot identify the VL final bid as “the most economically advantageous tender”

73A According to information supplied on 26 November 2009, GMWDA did not carry out any full comparative analysis of the Sita and VL bids after December 2007. GMWDA refused Sita's offers of further bids. Any subsequent analyses were primarily concerned only with the increases in VL's bid since BaFO. Therefore GMWDA cannot identify VL's bid as being the “most economically advantageous tender” and cannot therefore establish compliance with its obligations under regulation 21 (regulation 30 of the 2006 Regulations).

74. Accordingly, either the VL offer which formed the proposal on which the decision to proceed with VL in April 2008 and/or the further offer which formed the subject of the contract entered into on 8 April 2009 was not the “most economically advantageous”, or GMWDA had no valid basis, or no basis on which it could rely, to support its position that either or both of those offers were the “most economically advantageous”. . on the information

~~available, GMWDA wrongly failed to offer the contract to Sita when the VL costs increased and/or wrongly failed to invite Sita to offer a further bid. Further, GMWDA has no basis upon which to determine or proceed on the basis that VL offered “the most economically advantageous tender” either at the times when GMWDA directed their minds to the matter during the procurement process and/or when they entered into a contract with VL and/or if Sita had been able to supply a further bid.~~

74A Therefore GMWDA was in breach of regulation 21 (and/or regulation 30 of the 2006 Regulations) in entering into the contract, and was in breach of its obligation of equal treatment and transparency in failing to take any or any proper steps to ensure that any contract was entered into in compliance with regulation 21 (and/or regulation 30 of the 2006 regulations).

d) GMWDA failed to treat Sita and VL equally.

75. GMWDA wrongly entered into a contract with VL without giving Sita a fresh opportunity to provide a further tender in breach of its obligations under regulation 21 (regulation 30 of the 2006 Regulations). GMWDA permitted VL to make material changes to their tender post-BaFO without offering Sita a further opportunity to submit a bid in competition with the bid that was being developed with VL. Such changes went beyond those permitted in the negotiated procedure because (a) they amounted to a substantial upward re-negotiation of the price and/or (b) they amounted to a material change in the specifications, scope and allocation of risk compared with the VL BaFO bid and/or (c) they materially affected the relative scores of the bidders’ tenders. Subject to what further information might be supplied on disclosure, such changes include those set out above at §73(ii)-(v) and in the correspondence and documents referred to in those paragraphs.

Breach of an implied contract

75A GMWDA invited Sita to submit a tender (the ITT) and a BaFO for a waste services contract as further described in §§1-7 above:. Two parties only, Sita and VL, were invited to submit a BaFO. In response to these invitations Sita

submitted tenders, including a BaFO, which were evaluated by GMWDA. Sita and GMWDA thereby entered into a contract (the “Contract”).

75B It was an implied term of the Contract that the contract, if awarded to either party, would be entered into with that party which offered the “most economically advantageous tender” (the “first” implied term). The “most economically advantageous tender” was to be determined according to the criteria set out in the ISBaFO section 7 (TB1/439-447). It was a further implied term of the contract that VL and Sita would be treated equally and fairly (the “second” implied term).

75C Following the evaluation of bids in January 2007 as set out in §17 above VL was appointed Preferred Bidder and Sita was appointed Reserve Bidder. Sita remained in the process as Reserve Bidder throughout the procurement. The implied contract continued to impose the aforesaid obligations upon GMWDA until a contract with VL was entered into on 8 April 2009:

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(i) Sita was appointed Reserve Bidder by a letter from GMWDA dated 26 January 2007 (TBp764)

(ii) At the debrief meeting on 30 January 2007 GMWDA observed “Reserve Bidder is an issue GMWDA takes very seriously....We recognise things can go wrong and if these circumstances arose GMWDA would have no qualms asking Sita to return”. (TB1/773-782);

(iii) GMWDA invited Sita to provide an “update” in a letter dated 2 July 2007 (TB1/799). Sita responded with an update on 3 July 2007 (TB1/801-802), and a further response was received from GMWDA dated 9 July 2007, referring to a possible further need to return to the Reserve Bidder (TB1/803).

(iv) In December 2007 GMWDA received a report from Ernst & Young, commissioned for the express purpose of considering whether Sita should be invited to resubmit proposals (confidential information supplied 26 November 2009: not redacted, p166§1.1). It concluded that the scores of Sita and VL were similar.

(v) By a letter dated 16 April 2008, Sita offered to supply a further bid (TB1/822-3). GMWDA replied by a letter dated 18 April 2008, noted that the points raised had been considered, but that the final position would be set out in an Alcatel letter, which letter amounted to a rejection of the offer (TB1/824);

(vi) Sita made a further offer in by a letter dated 19 November 2008 (TB1/882), which was rejected in the following terms: it “would not be appropriate to invite you to refresh your bid” (TB1/892). This is in contrast to GMWDA’s observation that Sita should have provided GMWDA with appropriate information if it thought it could improve upon its bid (TB1/922).

75D During the procurement process the price and/or risk of VL’s tender increased. In breach of the first implied term, GMWDA entered into a contract with VL even though it was not the “most economically advantageous tender”. Alternatively, GMWDA entered into a contract with VL without determining whether it was the “most economically advantageous tender” and/or on grounds other than that it was “the most economically advantageous tender”:

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(i) In January 2007 Sita’s score was 6 points or more behind VL’s. By December 2007 the scores of VL and Sita were “similar”;

(ii) By April 2008 negotiations with VL had led to a further increase in the price and/or risk of the VL offer;

(iii) Further increases in the price and/or risk of the VL offer took place between April 2008 and April 2009, when the contract was entered into;

75E In breach of the second implied term GMWDA failed to treat Sita equally and fairly. Paragraph 75 above is repeated.

75F As a result of the breach or breaches as pleaded above in paragraphs 63 to 75E above, Sita has wrongly been deprived of the contract, or wrongly deprived of a chance of winning the contract.