Neutral Citation Number: [2024] EWHC 766 (TCC)

Case No: HT-2023-000228

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
TECHNOLOGY AND CONSTRUCTION COURT

Royal Courts of Justice, Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 05/04/2024

Before :

MR JUSTICE FREEDMAN

- -

Between :

WORKING ON WELLBEING LTD TRADING AS OPTIMA HEALTH

Claimant

- and –

(1) SECRETARY OF STATE FOR WORK AND PENSIONS

(2) DEPARTMENT FOR WORK AND PENSIONS

Defendants

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- -

Ms Valentina Sloane KC (instructed by **Eversheds Sutherland (International LLP**) for the **Claimant**
Mr Azeem Suterwalla and Mr Alfred Artley (instructed by **Government Legal Department**) for the **First Defendant and the Second Defendant**

Hearing dates: 5, 6 and 7 March 2024

Supplementary submissions (as ordered): 8 March 2024 and 11 March 2024

Judgment handed down in draft: 27 March 2024

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Approved Judgment

This judgment was handed down remotely at 10.00am on 5 April 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

MR JUSTICE FREEDMAN:

I Introduction

1. OH Assist Ltd is a holding company of the Claimant company, Working on Wellbeing Ltd. Both companies trade as Optima Health. The Claimant ("Optima") is incorporated in England and Wales having its registered office at 20 Grosvenor Place, London, England SW1X 7HN. It is an economic operator for the purpose of the Public Contracts Regulations 2015, as amended. Optima or the group employs about 1500 employees and positions itself as a leading occupational health provider in the market. It is a well-resourced company.

2. Each Defendant is a contracting authority for the purpose of those Regulations. The First Defendant is the Secretary of State for Work and Pensions. The Second Defendant ("DWP") is the ministerial department supporting the First Defendant. The expression the Defendants and DWP will be used inter-changeably in this judgment. For the avoidance of doubt, where the term DWP is used, it is not in distinction to the First Defendant.

3. The proceedings concern the procurement of a call-off contract for occupational health and employee assistance programmes ("OHEAP"). Occupational health services support workplace wellbeing and help to prevent or reduce absence. Employee Assistance Programmes assist in managing mental health and wellbeing in relation to both work-related and personal mental health matters. The dispute arises out of the rejection of a bid of Optima by the Defendants on the ground of non-compliance with a requirement not to bid in excess of maximum unit sums in respect of three items. The Defendants submit that they were entitled to reject the bid for non-compliance, particularly having regard to the fact that there was a tenderer who submitted a compliant bid. The Defendants submit that not to do so would have or would be likely to have infringed principles of transparency and equality of treatment. The Defendants submit also that their position was not irrational or otherwise challengeable.

4. Optima puts its case in many respects to the effect that the rejection of the bid was unlawful including but not limited to submissions that the Instructions to the tenderers were not clear and transparent and that the reasons for rejection were not transparent. If there was non-compliance, that ought to have been put right by reducing the excessive sums to the maximum sums or otherwise and/or by seeking clarification: alternatively, in the circumstances, the rejection of the Claimant's bid lacked proportionality and/or the Defendants ought to have waived any non-compliance and/or exercised any discretion in favour of Optima.

II Background

(1) The Framework Agreement

5. Under Schedule 7 of the Framework Agreement, buyers such as DWP can award call-off contracts either via a direct award or a further competition (commonly referred to as a "mini-competition"). As part of their tender submissions to join the RM6182 Framework, bidders had to provide a pricing schedule which included the maximum prices that they would charge for each individual service item in a contract awarded under the Framework ("Framework Maximum Prices"): see the witness statement

of Mr Birch ("Birch WS") [14]. As part of the successful tender to be awarded a place on Lot 1 of the Framework Agreement, the Claimant completed a Pricing Schedule setting out prices for individual line items ("the Framework Agreement Pricing Schedule").

6. Other than in exceptional circumstances (which are not relevant to this case), the prices in the Framework Agreement Pricing Schedule are maximums that the Supplier will charge and "will be used as the basis for the charges (and are maximums that the Supplier may charge) under each call-off contract" (paragraph 1.1.1 of Framework Schedule 3). It was accepted on the facts of the case by the parties through the witnesses that there was no possibility of the application of exceptional circumstances in the instant case. It therefore follows that the charging of in excess of a maximum price does not appear to have a rational explanation.

(2) The Invitation to Tender ("the ITT")

7. DWP had previously been receiving OHEAP services from People Asset Management Ltd. ("PAM") via a call-off contract under a predecessor framework (RM3795), which expired on 28 February 2022 (Birch 1/10). DWP chose to hold a further competition pursuant to Framework Schedule 7 of the Framework Agreement, on the basis that this would allow competition across the six suppliers on Lot 1, allowing them to reduce their prices for individual services compared to Framework Maximum Prices. (Birch1/15).

8. All six suppliers on Lot 1 were invited to participate in the competition, five of whom expressed interest (Birch1/19). These bidders were provided with the Invitation to Tender on 7 February 2022, which consisted of an explanatory document 'Attachment 1 – About The Procurement Competition V2' and a number of questionnaires to be completed. The ITT explained that the Contract being procured would be three years with an option to extend for a further one year (paragraph 2.2 of Attachment 1).

9. The questionnaires in the ITT included questions on quality, social value, and information security, and a pricing template , in which bidders needed to provide a price for each line item specified by DWP (the unit cost for each service). The evaluation criteria were weighted as to 70% weighting for quality and 30% weighting for price.

10. The pricing template was an Excel spreadsheet, which consisted of several tabs, including an "Instructions" tab. Each different service to be priced consisted of its own line in the spreadsheet and was designated with an "OH" (Occupation Health) or "EAP" (Employee Assistance Programme) number (e.g. the template OH1 was for the provision of Telephone Support, Services, Online Portal and Publicity and Promotion). For each of these service lines the template required the bidder to provide a price, as well as certain other information, such as the cost for providing the service and the number of staff employed on that service. The prices were capped for each bidder by its Framework Agreement Pricing Schedule, which comprised that bidder's maximum prices.

11. The pricing template included indicative volumes for each service line, but paragraph 1.1 of the Instructions tab stated that these were not guaranteed. Rather "*The volumes quoted in the schedule are indicative, and are not guaranteed. They are based on an average over 3 years. This period comprises of a year of business as usual, a pandemic year, and year emerging from the pandemic. Please note that future volumes cannot be assumed or guaranteed from these figures. The purpose of the volumes is to provide a basis for comparison and evaluation."*

12. It followed that even where the indicative volume for a certain service line was zero, bidders still needed to provide pricing information as it was possible that the service might still be required during the lifetime of the contract. The purpose of the indicative volumes was only to create a pricing scenario against which bidders' pricing submissions could be fairly evaluated (McPherson WS(2)[18]).

13. The Instructions tab, at section 3, also explained how the pricing template would be evaluated. It explained that: (a) the amount that would be evaluated would be a Total Offer Price (represented in cell F272 in the tab "Summary"); (b) the Total Offer Price would be derived by taking the total of the individual offer prices for each service, multiplied by three to give a three-year offer price; (c) in the overall evaluation of the bid, the Total Offer Price would attract a weighting of 30% for the price evaluation, with quality and social evaluation representing 70%; (d) the maximum score available for price would be 30, with this score being awarded to the lowest price quote. Remaining quotes would receive a pro-rated price score, dependent on the difference with the lowest quote, and would be calculated to a stated formula; and (e) Direct Cost, Indirect Cost and Full Time Employee ("FTE") would not form part of the Total Offer Price evaluation.

14. Paragraph 1.4 of the Instructions Section in the Pricing Schedule stated "*All unit prices must not be greater than your prices from the CCS Occupational Health Services RM6182- National Managed Service*."

15. In the section headed "Completion of Schedule E", it is stated at paragraph 2.4.2: *"Please provide an offer price for every service in the schedule where a volume is provided, and where a volume of nought is provided, in tabs (A) to (N)..."*.

16. Paragraph 5.2 of the Instructions Section in the Pricing Schedule included at 5.2 *"for the ITT documentation to be considered complete, the information on Offer Price, Direct costs Indirect costs and FTE numbers must be supplied where requested."*

17. Attachment 1 of the ITT also included the following instructions to bidders**:**

> *"2.2 ... The maximum contract value is governed by the CCS Framework Occupational Health, Employee Assistance Programmes and Eye Care Services RM6182 Lot 1, any bids for any service line submitted to the Framework by invited bidders in excess of this will be discounted.*
>
> *...*
>
> *2.4 The Contract is being offered under Crown Commercial Services Occupational Health, Employee*

> *Assistance Programmes and Eye Care Services Lot 1 – Terms and conditions which will govern any resultant contract.*
>
> *…*
>
> *6.3.1. You must comply with the rules in this Bid Pack and any other instructions given by us. You must also ensure members of your consortium (if relevant), group companies, subcontractors or advisers comply.*
>
> *…*
>
> *6.9 Our rights*
>
> *6.9.1 Verify information, seek clarification or require evidence or further information about your bid.*
>
> *6.9.2. Exclude you if:*
>
> *• You submit a non-compliant bid"*

18. Attachment 2, How to Bid, set out the Price Evaluation Process at section 1.4. That included the following, on evaluation:

> *"1.4.1 Prices submitted by Potential Providers in the Price Schedule will be recorded and evaluated in accordance with the following process.*
>
> *1.4.2 Potential Providers are required to provide a completed pricing schedule against the Price Questionnaire within the e-Sourcing event.*
>
> *1.4.3 Prices offered will be evaluated against the range of prices submitted by all Potential Providers for that item.*
>
> *1.4. The Potential Provider with the lowest price for the requirement shall be awarded the Maximum Score Available. The remaining Potential Providers shall be awarded a percentage of the Maximum Score equal to their price, relative to the lowest price submitted"* (emphasis added).

19. Attachment 2 set out the Evaluation Criteria. It included Questionnaire 1 and stated in section 2.2:

> *"Questionnaires 1 and 2 contain "Pass/Fail" questions and act as a doorway for progression to the following stages of the evaluation. Potential Providers are strongly advised to*

> *read and understand the specific guidance provided before responding to these questionnaires".*

20. In the same Attachment, Questionnaire 1 set out "*Key Participation Requirements*" and explained in its "*Guidance*":

> *"The following questions are "Pass/Fail" questions. If Potential Providers are unwilling or unable to answer "Yes", their submission will be deemed non-compliant and shall be rejected".*

21. Question 1.3 in Questionnaire 1 was:

> *"Do you agree, without caveats or limitations, that in the event that you are successful the Terms and Conditions of Occupational Health Services, Employee Assistance Programmes and Eye Care Services RM6182 will govern the provision of this contract?"*

22. Attachment 2 set out a variety of other requirements, such as a page and word count requirement at paragraph 2.13:

> *"As attachments are permitted, the maximum page limit on attachments is set at A4 – 30 single sides pages (including diagrams, graphs, pictures and screen shots etc). This page count must not be exceeded and any text which is in excess of this limit shall be disregarded and shall not be considered in the evaluation process".*

(3) Conduct of the procurement

23. Optima initially submitted its tender on 4 March 2022. The other four bidders were PAM, Health Partners, TP Health and Health Management. None of the bidders returned a fully completed pricing schedule, so on 22 March 2022 DWP emailed all bidders to inform them of this. DWP attached a copy of the pricing template with certain cells highlighted yellow which bidders were asked to ensure that they had completed. The email stated the following:

> *"Following our initial financial evaluation it has been found that none of the bidders have returned a fully completed financial bid. All parties will now need to complete the attached Pricing Template in full. All yellow sections must be completed.*

> *Failure by a bidder to complete all the required cells and/or to provide cost, FTE or other information (whether evaluated or not) requested by DWP as part of this tender process, may result in the bidders tender being deemed non-compliant.*
>
> *"DWP reserves the right to exclude non-compliant bids in accordance with clause 6.9.2 of the Invitation to Tender".*
>
> *If you require any additional guidance or assistance on how to complete the pricing template please let me know ASAP.*
>
> *Please return all completed templates to me by 5pm Tuesday 29th March 2022. Any templates received after this date will be deemed as non-compliant and will be excluded from this process".*

24. Optima and the other bidders resubmitted their pricing schedules (the "Second Pricing Schedule") on 29 March 2022. The Defendants' disclosure showed that DWP evaluated the tenders and found that Optima had scored the highest aggregated score (on technical and financial scores together). Following the evaluation of bids, a Commercial Approval Document ("CAD") was drawn up in the course of June and July 2022 in advance of a planned meeting of the Commercial Approval Board ("CAB") in July 2022. That CAD stated that Optima's bid was in first place and recommended the award of the Contract to Optima.

25. An internal review revealed that there were problems with the procurement and the evaluation of the quality submissions was reconducted. The Second Pricing Schedule remained non-compliant: certain service line items exceeded its Framework Maximum Prices and Optima's pricing also contained a number of qualifications (McPherson 2/10). All other bidders' pricing schedules were also subsequently discovered to be non-compliant at this stage (McPherson 2/31).

26. The CAB was cancelled when it was discovered by DWP (Sam Birch) that there was no Award Recommendation Report and that no full legal risk assessment had been carried out for the Procurement, which Mr Birch requested be completed (Birch WS [28]). Mr Birch was not involved in the evaluation process until the HR Services Team in DWP was transferred to him in May 2022 (Birch WS [7]).

27. Mr Birch instructed colleagues to investigate the Procurement up to that point (i.e. July 2022), which led to the identification of a number of issues in the procurement process up to that point, including errors in the quality evaluation. There was detected a paucity of reasons given by the individual evaluators for each of the scores for bidders's quality submissions, which were extremely sparse, and an absence of records of the moderation meetings at which those consensus scores had been awarded.

28. Optima's Amended Particulars of Claim [73(ix)] claimed that DWP should have awarded the Contract to it at this point following the evaluation of bids following submission of the Second Pricing Schedule. This has not been argued in the course of

the hearing: it does not feature in the written and oral arguments on behalf of Optima. Confirmation is requested before the hand-down of the judgment that there is no claim by reference to [73(ix)] of the Amended Particulars of Claim.

(4) September 2022: the Third Pricing Schedule

29. Due to the delays in the process, bidders were given a further opportunity in September 2022 to resubmit their pricing schedules, either revalidating their existing pricing or amending it to take into account the prevailing economic conditions: see the first witness statement of Mr McPherson ("McPherson WS(1)" at [10]). Optima resubmitted its pricing schedule on 13 October 2022 (the **"**Third Pricing Schedule"), in common with the other four bidders. Optima reduced its prices for some service line items. The value of the tender was below the maximum contract value applying its Framework Agreement prices. The Claimant did not receive any request for clarification or information from DWP.

30. Following the wider review of the Procurement, which concluded in January 2023, it was identified that all bidders' schedules were non-compliant: see the second witness statement of Mr McPherson (McPherson WS(2) at [33]), as some of the quoted service line unit prices exceeded Framework Maximum Prices and/or contained caveats or qualifications in respect of their pricing: see McPherson WS(1) at [10].

31. An internal email of 10 January 2023 shows that DWP was aware of the "*potential high possibility*" of a bidder missing an item in their pricing schedule which was not in line with the Framework and how to manage that was not clear. The following question was posed internally:

> *"do we need to generalise the requirement to check/amend/reconfirm that all pricing is in line with the Framework for all Bidders, if so how do we manage a Bidder that potentially misses an item in their return that we are aware of, potential high possibility?".*

(5) February 2023

32. Bidders were offered a further opportunity by DWP to resubmit their pricing schedules in a communication sent on 1 February 2023 ("the Fourth Pricing Schedule").

33. On 1 February 2023, DWP sent a communication to bidders stating:

> *"…to ensure that any contract awarded has been fairly and compliantly competed we are now offering Potential providers the opportunity to review their financial submission and, if they wish to do so, submit a revised "Pricing Schedule" against the "Price Questionnaire"".*

34. The communication set out a long list of requirements and clarifications and stated, "*Please review and ensure that your pricing submission (either the original, or a revised submission) aligns with the ITT and the following requirements, clarifications and assumptions".*

35. It also stated: *"All potential providers should ensure that their original and/or revised pricing submitted takes into account the requirement, under Framework RM6182, not to exceed the current Framework pricing for any individual item priced."* There was a statement at 5.1 of the Instructions to the Fourth Pricing Schedule which was a part of the variation of the original instructions in the following terms: *"Please check the Pricing Schedule carefully before submission as to be considered compliant, cells requiring Offer Prices, Direct Costs, Indirect Costs and FTE numbers to be input must be completed (yellow cells), in accordance with all further instructions and clarifications."*

36. Optima did not submit a new Pricing Submission.

37. On 24 February 2023, DWP issued a communication to bidders stating:

> *"Further to our communication of 1st February and subsequent clarifications received, we would like to provide an update on progress.*
>
> *The clarifications have demonstrated that some service delivery methods required have not being [sic] included in the original Q5 Pricing Schedule and additionally that some volumes have been allocated erroneously to certain service lines. In order to ensure bidder's prices correctly reflect the services to be delivered under the contract and to ensure all bidders are treated equally and fairly, DWP are in the process of taking proportionate steps to provide a revised Q5 Pricing Schedule which we will aim to make available to all Bidders shortly".*

38. The pricing template itself remained substantively the same but included revised instructions (and DWP's email to each bidder attached their most recently populated pricing schedule): see Birch WS [31]) and McPherson WS (1) [12].

39. Following further clarification questions from bidders. DWP decided that the existing pricing template was not fit for purpose, as bidders were continuing to have difficulties in aligning their prices to the service delivery requirements in the existing pricing template. Bidders had only been allowed to quote for one different delivery method per service, notwithstanding that DWP might potentially require several different delivery methods: this had led bidders to caveat their pricing submissions accordingly: see McPherson WS (1) at [15].

40. Bidders were therefore told by a communication on 24 February 2023 that a revised pricing template would be provided. This was because in the light of subsequent clarifications, some service delivery methods required had not been included in the original Q5 Pricing Schedule and additionally that some volumes have been allocated erroneously to certain service lines. Thus, *"to ensure all bidders are treated equally and fairly"*, DWP stated that it was taking proportionate steps to provide a Q5 Pricing Schedule.

41. On 13 March 2023 the Fourth Pricing Schedule was overtaken by a substantially revised pricing template ("the Revised Pricing Schedule"), issued on 13 March 2023. DWP communicated as follows at the same time:

> *"We have made amendments to the pricing schedule in order to provide the most accurate information possible, and to ensure a transparent process, for all bidders."*

42. The communication also stated as follows:

> *"You should ensure that your revised pricing takes into account the requirement, under Framework RM6182, not to exceed the current Framework pricing for any individual item priced."*

43. DWP's case is that the Revised Pricing Schedule was substantively different from the previous pricing template: based upon the CCS Framework RM6182 schedule, it was designed only to cover the service lines and delivery methods that DWP required (and sought prices for different delivery methods separately) (McPherson1/18-19). Optima disputes this and contends that the Revised Pricing Schedule "*differed subtly from all previous versions"*: see Mrs Newey's witness statement ("Newey WS") at [90] . In particular, Optima says that it did not identify that DWP had made amendments in relation to cells OH58, OH229 and OH230.

44. The communication set out various requirements and clarifications and stated, *"Please review and ensure that your pricing submission (either the original, or a revised submission) aligns with the ITT and the following requirements, clarifications and assumptions"*. The communication did not specify the consequence of a tender not aligning with the requirements, clarifications and assumptions. The Instructions at para. 5.2. in the Revised Pricing Schedule stated, *"For the Pricing Schedule to be considered compliant, the requested prices and information Base Costs, Overhead, Profit expectation and FTE numbers must be supplied where requested"*.

45. Paragraph 1.4 of the Instructions of the Revised Pricing Schedule contained new emphasis, namely:

> *"All unit prices quoted must **not** be greater than your prices from the CCS Occupational Health Services Framework,*

RM6182, lot 1- fully managed service."

46. Paragraph 1.8 of the Instructions of the Revised Pricing Schedule again reiterated that: "*Pricing must take account of the requirement, under Framework RM6182, not to exceed the current Framework pricing for any individual item priced*". The same point was reiterated in response to a clarification question on 15 March 2023, which referred to a previous clarification question response on 1 February 2023, stating that "*The revised pricing required to be submitted may not be higher than the current Framework prices, as the Authority is required to adhere to framework prices at the time of tender*".

47. In common with the other four bidders, Optima submitted its Revised Pricing Schedule on 24 March 2023. Optima completed the questionnaire with "*Key Participation Requirements*" and expressly confirmed the following:

> *"Optima Health agrees, without caveats or limitations, that in the event we are successful, the Terms and Conditions of Occupational Health Services, Employee Assistance Programmes and Eye Care Services RM6182 will govern the provision of this contract".*

48. Optima believed that it had submitted its tender in accordance with all instructions. The total value of its tender was below the maximum contract value applying its Framework Agreement prices.

(6) The evaluation

49. On receipt of tenders, DWP's finance team checked each bidder's pricing against their Framework Maximum Prices. It transpired that Optima had exceeded its Framework Maximum Prices in relation to three service delivery lines (McPherson1/30).

(i) For OH58 (Occupational Health Physician – face to face offsite), Optima had bid £105 whereas its Framework Maximum Price for this service line was £40 . Optima states that in the Revised Pricing Submission, DWP changed the column headed "Check" to "Face to Face" without identifying that as a change. The volume for this line item was "0".

(ii) For OH229 (Occupational Health Advisory – telephone/virtual), Optima had bid £165 whereas its Framework Maximum Price for this service line was £105. Optima states that in the Revised Pricing Schedule, DWP changed this cell to a telephone price without identifying that amendment. The volume for this line item was 10.

(iii) For OH230 (Specialist Advisor – telephone/virtual) Optima had bid £560 whereas its Framework Maximum Price for this service line was £208.50.

Optima states that in the Revised Pricing Schedule, DWP changed this cell to a telephone price without identifying that amendment. The volume for this line item was 0.

50. The overall effect on the evaluation was nil where there was a volume of 0 as in respect of OH58 and OH230, albeit that there could be a call-off, if required at the prices, and the volume shown not was based on an expectation that future years would replicate past years. The effect on the evaluation where there was a volume of 10 in respect of OH229 was £600, that is to say calculated as follows:

Tender price: £165

Maximum price: £105

Difference: £60 per items

Times 10 (the number of items tendered based on previous usage)

Overall difference: £600.

Optima says that since the price in the Framework Agreement Pricing Schedule for each line item was readily available to DWP, the price could be reduced to the maximum price.

51. DWP says that even if it was apparent that there was an error on the part of Optima, there was no way of knowing whether the intention of Optima was to insert the maximum price or some lesser price. There were two consequences. First, the difference was not £600, but on the basis that there were no more than 10 orders, potentially between £600 and £1,650 per annum. Second, if in fact, there would have been a call-off in respect of previous years, the difference would have been between £65 and £105 per order in respect of OH58 and between £351.50 and £560 per order in respect of OH230.

52. It has subsequently come to light that Optima also exceeded its Framework Maximum Price in relation to OH98 (Functional capacity evaluation – Occupational Health Physician – face to face onsite), where it bid £180, in excess of its Framework Maximum Price of £170: see Newey WS [136].

53. Of the four other bidders, one had withdrawn in March 2023 following its acquisition by another supplier on the Framework; another had been excluded on qualitative grounds, and a third had also submitted prices in excess of its Framework Maximum Prices (Birch WS [32- 34]) . As such, PAM was the only compliant bid.

(7) The decision

54. DWP considered how to proceed in the light of the non-compliant bids it had received, and a number of options were discussed internally as is evident from a number of internal documents which have been disclosed, albeit redacted for legal professional privilege.

55. One option was to ask Optima and the other non-compliant bidder to resubmit their pricing schedules. DWP decided this would be unfair in circumstances where PAM had submitted a compliant bid, and other suppliers might also argue they should be allowed to resubmit other parts of their bid (including quality submissions) (Birch WS [37]).

    (a) Another option was to not take into account the specific service line items that were in excess of Framework Maximum Prices. However, this would have skewed the financial evaluation and made the bids non-compliant on a different basis (as not all the required services would have been priced). (Birch WS [38(1)])

    (b) A further option was to reduce the non-compliant prices by reducing them to the framework maximum prices: however, there was no mechanism in the ITT to permit this, such that it was not clear what the relevant prices should then have been reduced to (Birch WS [38(2)]).

    (c) The final option was to exclude the bids. DWP considered that this was the most natural interpretation of "*discount*" in paragraph 2.2 of Attachment 1 of the ITT, which referred to discounting bids rather than individual line items; and also that this was consistent with paragraph 6.9.2 of Attachment 1 of the ITT, which gave DWP the right to exclude non-compliant bids (Birch WS [38(3)]).

56. The evidence of Mr Birch is that DWP considered that this final option was the most appropriate for the non-compliant bids: although it took into account that the impact of Optima's non-compliances on the evaluated price scenario was only £600[1], it was mindful of the need to treat bidders equally and fairly. As volumes were only indicative, the actual significance of the non-compliances could have been greater. Furthermore, the need for bid prices not to exceed Framework Maximum Prices had repeatedly been made clear to bidders during the course of the Procurement (Birch WS [39-40]).

57. Following internal discussion, a CAD was drawn up recommending the exclusion of Optima and the other non-compliant bidder, and the award of the Contract to PAM. This was presented to CAB on 5 May 2023, who then approved the Decision. Given the value of Contract, further approval for the award decision was subsequently sought from the Minister for Lords and HM Treasury; approval was granted by both on 7 June 2023 and 25 May 2023 respectively (Birch WS [42-44]).

[1] This is only on the assumption that the difference was in respect of 10 items on OH229, and assuming that the real sum would have been the maximum sum, and that there would have not been a call-off on OH58 and OH 230.

58. DWP informed Optima of the Decision (and its intention to award the Contract to PAM) on 7 June 2023 ("the First Award Notice"). DWP informed the Claimant that its tender had been unsuccessful, stating:

> *"In accordance with Section 2 and Section 6.9.2 of Attachment 1 to the ITT, 'About the Procurement Competition V2", your Pricing Schedule resubmission of the 24 March 2023 was deemed non-compliant and not included in the 'Price Evaluation Process' for exceeding CCS Framework RM6182, Lot 1 pricing for service line items; OH58 (tab E), OH229 and OH230 (tab G)."*

59. The First Award Notice stated that the successful tenderer was PAM. Optima draw attention in this case that PAM had been given a total quality score of 74.38 and total weighted quality score of 52.06. The Claimant's quality score was higher: its total quality score was 95 and its total weighted quality score was 66.50.

60. A revised award letter was provided voluntarily on 20 June 2023, with additional information regarding the relative advantages and disadvantages of the winning bidder (together the "Award Letters"). As regards quality, Optima had the highest total quality score of 95 (hence a total weighted quality score was 66.50). This compared to a total quality score of 74.38 and a total weighted quality score of 52.06 for PAM.

61. DWP accepts that, but for disqualifying Optima from the Procurement for its pricing non- compliances, it would have been the first placed bidder [CB/A8/32].

(8) Correspondence

62. By letters dated 12, 15 and 23 June 2023, the Claimant (by its solicitors) wrote to the Defendants explaining that the decision to deem the Claimant's tender non-compliant and to exclude it ("the Decision") was unlawful.

63. By a letter dated 22 June 2023, the Defendants (by their solicitors the Government Legal Department) responded to a letter before action of Optima's solicitors and provided a full statement of their position. Among other things, they made the following points, namely:

(i) The terms of the Revised Pricing Schedule sent on 13 March 2023 set requirements which were clear and transparent, and there was also a clarification period.

(ii) It was stated that the characteristics of the winning bidder, PAM, had been identified, and it was agreed that Optima had scored higher than the successful tenderer or any other tenderer. It was stated: *"We confirm that had your client not been disqualified, it would have been the highest scoring bidder in the competition"*.

(iii) The instructions not to exceed the prices for any individual item were summarised and in part quoted, and it was stated that the effect of the

provision that the bid would be discounted meant that the bidder would be disqualified. The alternative right to disqualify for a non-compliant bid under Clause 6.9.2 was referred to.

(iv) To allow Optima to change their bid in the face of a compliant bidder, PAM, would offend the equal treatment and transparency requirements. There was no need for further clarification.

64. By a further letter of the Defendants by their solicitors dated 29 June 2023 in response to a letter from the solicitors for Optima, some of the above points were repeated and amplified. The points were made that in respect of the two items where the price line had a zero quantity against it, it may still be called off during a contract at the price set out in the tender. The suggestion was made on behalf of Optima that it ought to be permissible as a matter of proportionality to admit the bid of a bidder who had provided one non-compliant price line. The answer to this was:

> *"…the difficulty in the point you seek to make is that a line cannot be drawn which would result in equal treatment for all bidders, i.e. if it is said that there was only one non-compliant price line, then it could be said that there is no difference between a bidder in that position and a bidder who has submitted, for example, 4, 6 or 10 non-compliant price lines. To accede to your argument would therefore be a "slippery slope", which could not meet the requirement that all bidders be treated equally."*

65. In the course of the case, disclosure of internal documents has been provided, albeit redacted for legal professional privilege. Attention was drawn to the document dated 3 May 2023 of Mr McPherson to Mr Birch in which there was reference to a possible ambiguity about the word "discounted" as opposed to the words "excluded" or "disqualified" and other internal emails at that time. The possibility of excluding the non-compliant bidders was seen in comparison with risks of four other options, namely:

(i) clarifying the price with the bidders and requesting resubmissions, which would have been an option if all the bidders had been non-compliant;

(ii) discounting prices by not taking non-compliant prices into account, and thereby skewing the financial evaluation and not having bids for all the services;

(iii) discounting prices to the level of the maximum price cap, but there was no process for this and there was a compliant bidder;

(iv) abandoning the procurement and re-running.

66. Attention is drawn by Optima to the extensive redactions for privilege. Optima submitted that the document could not be understood as a result of the level of redactions. The Defendants submitted that there was sufficient information in the document to understand that other possible options had been considered and rejected.

67. The evidence of Mr Birch explains how the matter was considered at the time. In particular, it explains how upon consideration, there was no ambiguity about the meaning of the word "discounted" in context: see para. 38 of his statement. He also referred to the consideration of the various options and how requesting resubmissions of Optima and the other bidder would give them an unfair advantage when there was a compliant bid from PAM, which was of concern due to the principle of fairness. There was also consideration of the power under Clause 6.9.2 which provided the right for DWP to exclude a bidder if they submitted a non-compliant bid. Mr Birch stated that account was taken that the difference in price was small, although as volumes provided were indicative, the price differential could be greater. The decision was to treat all bidders fairly and consistently with the ITT: see Mr Birch's statement at para. 39. Mr Birch gave evidence as to how the various options were presented internally and how the exclusion of the non-compliant bidders was accepted as the correct decision: see his statement at paras. 40-45.

(9) Direct Awards

68. Because of the various delays during the procurement process, DWP has directly awarded three separate call-off contracts (the "Direct Awards") under the Framework to PAM. The first ("DA1") was awarded for an initial term from 1 March 2022 to 31 August 2022, and subsequently extended to 30 November 2022; the second ("DA2") was awarded for an initial term from 1 December 2022 to 31 March 2023, and subsequently extended to 31 July 2023. The third ("DA3") was awarded for an initial term of 1 August 2023 to 31 December 2023 and subsequently extended to 21 March 2024.

69. The Core Terms of the Framework Agreement provide:

> *"2.4 If the Buyer decides to buy Deliverables under the Framework Contract it must use Framework Schedule 7 (Call-Off Award Procedure) and must state its requirements using Framework Schedule 6 (Order Form Template and Call-Off Schedules). If allowed by the Regulations, the Buyer can:*
>
> *(a) make changes to Framework Schedule 6 (Order Form Template and Call-Off Schedules);*
>
> *(b) create new Call-Off Schedules;*
>
> *(c) exclude optional template Call-Off Schedules; and/or*
>
> *(d) use Special Terms in the Order Form to add or change terms."*

III The evidence

70. The oral evidence was given as follows:

(i) by Mrs Newey, employed as Business Development and Propositions Director by a holding company of Optima;

(ii) by Mr Birch, employed by the Cabinet Office (Government Commercial Organisation) in the role of Associate Commercial Specialist;

(iii) by Mr McPherson, an interim manager in the role of Commercial Lead at the DWP.

71. It should be said of all of the witnesses that they came over as doing their best to assist the Court. Each of them was well prepared and had a good knowledge of the subject matter. They made appropriate concessions when challenged. There are a number of features common to the witnesses which should be stated.

72. First, from time to time, the statements did veer to being an argument to support the cases rather than being simply an account of the statements. An example of this is that the statements commented on the tender documents as if they had been considered with the same depth in advance of completing the tender as in the context of the instant dispute. The witnesses, and especially Mrs Newey, who made points about alleged ambiguity and lack of clarity of the terms, conceded that their focus on these points developed with the dispute. An example was that she repeatedly said that there was nothing to indicate the consequence of putting in an excessive price.

73. If this appeared to be a mantra, it simply reflected the way in which issues develop in court cases, and the issues and the case of a party sometimes take over from the limited recollection beyond the documents themselves. In fairness to Mrs Newey and the other witnesses, they could not recall when in the process these points had occurred to them. It therefore is important not to dwell too much on the subjective and the after the event evidence of witnesses relating to the terms of the tender.

74. Second, and this applies in particular to Mrs Newey, witnesses were not involved in every aspect of the communications both at the time of the tenders and when the dispute ensued. An example is that when Mrs Newey was considering the way in which the tenders were prepared by Optima, there were matters outside her knowledge which were in the knowledge of witnesses who were not called, especially Mr John Dunwoodie, head of commercial cost modelling. Not every witness could be expected to know everything of the activities of each of the persons engaged on their party's side.

75. It was apparent from questions in cross-examination that there was a suggestion on behalf of the Defendants that the case about the complexity of the tender process could not be made without a witness like Mr Dunwoodie giving evidence. It might have enhanced the case, and it might have set back the case. The likelihood is that it

would have done neither. There were serious limitations as to the extent to which the witnesses were able to enhance the case by their oral evidence, given matters set out in the first point. If the process had been so complex, then nobody could have sent a compliant bid. There is no evidence to the effect that PAM's bid was not compliant, and such checking as was undertaken by the solicitors for Optima indicated that it was compliant. Further, and in any event, it is possible reviewing the matter to identify where Optima went wrong, that it was Optima's fault and nobody else and that had they acted with reasonable skill and care, the non-compliance would not have taken place.

IV Legal Principles

(a) The PCR

76. There has been little controversy about the legal principles. The starting point is to consider the Public Contract Regulations 2015 ("PCR"), as amended. The award of the Contract was governed by the PCR, as amended. The PCR gave effect to two EU Directives: the Public Sector Directive 2014/24/EU and the Remedies Directive 89/665/EEC. Notwithstanding that the Procurement Act 2023 has received royal assent and is intended to replace the PCR, that Act is not yet in force and the PCR remain in force notwithstanding the UK's departure from the European Union ("Brexit"), as a form of "retained EU law" (s. 6 European Union Withdrawal Act 2018 – "EUWA").

77. Section 6(7) EUWA defines "retained EU case law" as incorporating any principles laid down by, and any decisions of, the European Court, as they had effect in EU law immediately before IP completion day (31 December 2020). S. 6(3) EUWA provides: *"(3) Any question as to the validity, meaning or effect of any retained EU law is to be decided, so far as that law is unmodified on or after IP completion day and so far as they are relevant to it— (a) in accordance with any retained case law and any retained general principles of EU law, and (b) having regard (among other things) to the limits, immediately before IP completion day, of EU competences.*" DWP's position is, therefore, that Brexit has no impact on the legal principles to be applied in this case.

(b) General principles under the PCR: the retained EU law

78. Reg. 18 of the PCR sets out general principles of procurement, including equal treatment, non-discrimination and transparency:

> *"18. — Principles of procurement*

> *(1) Contracting authorities shall treat economic operators equally and without discrimination and shall act in a transparent and proportionate manner.*
>
> *(2) The design of the procurement shall not be made with the intention of excluding it from the scope of this Part or of artificially narrowing competition.*
>
> *(3) For that purpose, competition shall be considered to be artificially narrowed where the design of the procurement is made with the intention of unduly favouring or disadvantaging certain economic operators."*

79. Reg. 56 sets out the general principles in awarding contracts. It materially provides:

> *"(1) Contracts shall be awarded on the basis of criteria laid down in accordance with regulations 67 to 69,*[These relate to Contract award criteria (Reg. 67), life-cycle costing (Reg. 68) and abnormally low tenders (Reg 69)] *provided that the contracting authority has verified in accordance with regulations 59 to 61 that all of the following conditions are fulfilled:—*
>
> *the tender complies with the requirements, conditions and criteria set out in the contract notice or the invitation to confirm interest and in the procurement documents, taking into account, where applicable, regulation 45;*[Reg, 45 permits a contracting authority to authorise or require tenderers to submit variant bids]
>
> …..
>
> *(4) Where information or documentation to be submitted by economic operators is or appears to be incomplete or erroneous, or where specific documents are missing, contracting authorities may request the economic operators concerned to submit, supplement, clarify or complete the relevant information or documentation within an appropriate time limit, provided that such requests are made in full compliance with the principles of equal treatment and transparency."*

80. The principle of equal treatment is that once a contracting authority has laid down the terms on which bidders are required to tender, it is obliged to require strict compliance, at least with "fundamental requirements" or "basic terms" of the tender: see *Commission v Denmark* (ECLI:EU:C:1993:257):

> *"37. ... observance of the principle of equal treatment of tenderers requires that all the tenders comply with the tender conditions so as to ensure an objective comparison of the tenders submitted by the various tenderers ... .*
>
> *...*
>
> *39. With regard to the Danish Government's argument that Danish legislation governing the award of public contracts allows reservations to be accepted, it should be observed that when that legislation is applied, the principle of equal treatment of tenderers, which lies at the heart of the directive and which requires that tenders accord with the tender conditions, must be fully respected.*
>
> *40. That requirement would not be satisfied if tenderers were allowed to depart from the basic terms of the tender conditions by means of reservations, except where those terms expressly allow them to do so."*

81. The principle of transparency, as is explained in Case C-19/19/00 *SIAC Construction Limited v County Council of the County of Mayo* (EU:C:2001:553):

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

82. In *Stanley International Betting* (ECLI:EU:C: 2018:1026) (19 December 2018) it was further explained (at §57):

> *"In that context, the purpose underlying the principle of transparency, which is a corollary of the principle of equality,*

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

(c) The RWIND tenderer

83. The reference to a reasonably well-informed and normally diligent tenderer (the "RWIND" tenderer), as referred to in the *SIAC* case above, is a reference to a hypothetical construct. As explained in *Healthcare at Home Ltd* v *Common Services Agency* [2014] UKSC 247 in an invitation to tender for a public contract, the formulation of the award criteria must be such as to allow all RWIND tenderers to interpret them in the same way (per Lord Reed JSC at [7-8]).

> *"7. It was in order to articulate the standard of clarity required in this context by the principle of transparency that the European Court of Justice invoked the RWIND tenderer. In the case of SIAC Construction Ltd v County Council of the County of Mayo (Case C-19/00) [2001] ECR I-7725, where there was a disagreement between the parties as to the interpretation of tender documents, the court stated:*
>
> *"41. Next, the principle of equal treatment implies an obligation of transparency in order to enable compliance with it to be verified (see, by analogy, Case C-275/98 Unitron Scandinavia and 3-S [1999] ECR I-8291, paragraph 31)."*
>
> *More specifically, this means that the award criteria must be formulated, in the contract documents or the contract notice, in such a way as to allow all reasonably well-informed and normally diligent tenderers to interpret them in the same way."*

84. In that passage, the court explained what the legal principle of transparency meant in the context of invitations to tender for public contracts: the award criteria must be formulated in such a way as to allow all RWIND tenderers to interpret them in the same way. That requirement set a legal standard: the question was not whether it had been proved that all actual or potential tenderers had in fact interpreted the criteria in

the same way, but whether the court considered that the criteria were sufficiently clear to permit of uniform interpretation by all RWIND tenderers.

85. The yardstick of the RWIND tenderer is an objective standard applied by the court (at [12]), such a standard being essential to ensure equality of treatment. The court's task is to determine whether the invitation to tender is sufficiently clear to enable tenderers to interpret it in the same way, so ensuring equality of treatment [14].

(d) The duties of transparency and equal treatment

86. The contracting authority is required to comply with its duties of transparency and equal treatment, and to perform its evaluation of the different tenders without manifest error. Coulson J (as he then was) set out a statement of the principles in *Woods Building Services v Milton Keynes Council* [2015] EWHC 2011 (TCC) in the following terms at [5-9]:

> *"2.1 Transparency*
>
> *5. In this case, the duty of transparency focused on the award criteria. It is trite law that "the award criteria must be formulated, in the contract documents or the contract notice, in such a way as to allow all reasonably well-informed and diligent tenderers to interpret them in the same way": see SIAC Construction Ltd v County Council of the County of Mayo [2001] ECR1-7725, at paragraph 41.*
>
> *6. The award criteria must be drawn up "in a clear, precise and unequivocal manner in the notice or contract documents so that first, all reasonably informed tenderers exercising care can understand their exact significance and interpret them in the same way and, secondly, the contracting authority is able to ascertain whether the tenders submitted satisfy that criteria applying to the relevant contract": see Commission v The Netherlands [2013] All ER (EC) 804 at paragraph 109.*
>
> *7. The true meaning and effect of the published award criteria is a matter of law for the court: see Clinton (t/a Oriel Training Services) v Department of Employment and Learning and Another [2012] NICA 48 at paragraph 33. A failure to comply with the criteria is a breach of the duty of transparency: see Easycoach Ltd v Department for Regional Development [2012] NIQB10.*
>
> *8. Unlike other allegations commonly made during procurement disputes, such as whether or not a manifest error has been made in the evaluation, a breach of the transparency obligation does not allow for any "margin of appreciation":*

> *see paragraph 36 of the judgment of Morgan J in Lion Apparel Systems v Firebuy Ltd [2007] EWHC 2179 (Ch).*
>
> *2.2 Equal Treatment*
>
> *9. The duty of equal treatment requires that the contracting authority must treat both parties in the same way. Thus "comparable situations must not be treated differently" and "different situations must not be treated in the same way unless such treatment is objectively justified": see Fabricom v Belgium [2005] ECR1-01559 at paragraph 27. Thus the contracting authority must adopt the same approach to similar bids unless there is an objective justification for a difference in approach.*
>
> *10. Morgan J's observation in Lion Apparel, noted above, is equally applicable to the duty of equality: again, when considering whether there has been compliance, there is no scope for any 'margin of appreciation' on the part of the contracting authority."*

87. Where disqualification of a bid is an option open to a contracting authority, the principles of fairness and equality of treatment require transparency and clarity to bidders as to that option being available*: MLS (Overseas) Limited v Secretary of State for Defence* [2017] EWHC 3389 (TCC). In *MLS,* O'Farrell J declared that a contracting authority had acted unlawfully by rejecting as non-compliant a tender on the basis of a rule that was arbitrary or not sufficiently clear from the ITT:

> *"76. The MOD submits that the Reasonable Tenderer would have assumed that the pass/fail score against Question 6 must have some effect on the outcome of the competition and would have appreciated that a "fail" score would lead to automatic or discretionary rejection of the tender. Reliance is placed on the expert evidence of Mr Brown and Mr Lobl that "pass/fail" questions would generally give rise to automatic or discretionary rejection. However, all the examples referred to by the experts in their reports formed part of tender documents that set out the express consequences of any failure to pass the stipulated threshold. Therefore, they do not assist in ascertaining what the Reasonable Tenderer would assume in the absence of expressly stated consequences.*
>
> *77. The MOD's submission ignores the fact that, even if the Reasonable Tenderer must have assumed that a "fail" score for any part of Question 6 would have some effect, the ITT did not enable the Reasonable Tenderer to determine whether the consequence of such failure would be mandatory or discretionary rejection. If a "fail" score resulted in automatic disqualification, Question 6 would operate as a minimum*

> *threshold standard. If the right to reject were discretionary, there would be circumstances in which a "fail" score would have no effect on assessment of the tender or would have some effect on the weighting given to other scores in the tender, falling short of outright disqualification. Without knowing whether a "fail" score would lead to mandatory or discretionary rejection, the Reasonable Tenderer would not know whether, or how, that particular criterion would be weighted in the evaluation.*
>
> *78. The MOD submits it is not open to MLS to base its case on any ambiguity in the ITT because such complaint was not pleaded and would be out of time. However, that is a mischaracterisation of MLS's case. MLS submits that it was unlawful for the MOD to reject its tender based on criteria that were not set out clearly, or at all, in the ITT.*
>
> *79. For the above reasons, I find that, on a proper construction of the ITT, the Reasonable Tenderer would not understand whether or how a "fail" score against the response to Question 6.3 would, or could, result in a rejection of the tender.*
>
> *80. Accordingly, the MOD acted unlawfully, in breach of its obligations of transparency and equal treatment, in applying criteria that were arbitrary or not sufficiently clear from the ITT and in rejecting MLS's tender on that ground."*

88. The requirement of transparency and clarity is also clearly set out in Capita *Business Services Limited v The Common Agency for the Scottish Health Service* [2023] CSOH 9 at [7] per Lord Braid (Court of Session Outer House):

> *"Where disqualification of a Bid is an option open to a contracting authority, the principles of fairness and equality of treatment demand particular transparency and clarity: William Clinton (t/a Oriel Training Services) v Department for Employment and Learning and another [2012] NICA 48 , paragraph 35; see also MLS (Overseas) Limited v Secretary of State for Defence [2017] EWHC 3389 (TCC). If failure to meet a particular criterion or to comply with a particular requirement of the process is to result in disqualification of the tenderer, the tender documentation must clearly and transparently spell that out. Whether there is such transparency and clarity is to be determined by having regard to what the RWIND tenderer would have understood the documentation to mean: Federal Security Services Limited v Northern Ireland Court Service [2009] NIQB 15."*

89. In the *William Clinton* case in the Court of Appeal in Northern Ireland, the Court of Appeal stated:

> *"[35] The judge correctly concluded that the wording of SC1 had failed to clearly and transparently spell out to the tenderers what was expected of them if they were to satisfy the requirements of SC1, a criterion of fundamental importance to the whole process because, if not satisfied, the result was the exclusion of the tenderer from further consideration thereby excluding the tenderer from further consideration no matter how good the rest of his tender may have been. Such a criterion, a breach of which was fatal at the outset to the whole tender, was one in respect of which the principles of clarity, fairness and equality of treatment demanded particular clarity and transparency.* (emphasis added)
>
> *[36]. The appellants suggest that if the criterion was ambiguous it was for the respondent to ask for clarification and in the light of his failure to do so he could not complain of being disqualified for non-fulfilment of the criterion. Where, as here, a criterion is unclear and one reader may interpret it in one way (and, as noted, in this instance Mr Lynas was initially prepared to read it in the same way as the respondent) it is not an answer to the charge of lack of clarity or transparency to say that if the reader had asked for clarification he would have been told what was required. A patent ambiguity is one thing. A criterion the meaning of which may and does in fact lead one party to one approach and another reasonable party to a different one is not patently ambiguous but is simply a criterion without a clear meaning. The reader may fail to see an ambiguity.*
>
> *[37] In view of the conclusion reached on the first question it must follow that the DEL was guilty of manifest error in its decision to exclude the respondent from the competition."*

90. The Court of Appeal affirmed the decision of McCloskey J (as he then was) who in the High Court set aside an exclusion decision because the *"phraseology of this criterion, in my view, gave rise to an unacceptable degree of doubt and uncertainty"* (paragraph 40).

(e) Manifest error

91. Returning to the judgment of Coulson J in *Woods Building Services v Milton Keynes Council* at [10-11]**:**

> *"2.3 Manifest Error*

> *11. The relevant regulation of the Public Contracts Regulations 2006 allows redress where the contracting authority has made a manifest error in its evaluation. As Morgan J makes plain in paragraph 37 of his Judgment in Lion Apparel, this is a matter of judgment or assessment, so in this respect the contracting authority does have a margin of appreciation. The court can only disturb the authority's decision in circumstances where it has committed a manifest error. Morgan J went on at paragraph 38 to say:*
>
> > *"When referring to a 'manifest' error, the word 'manifest' does not require any exaggerated description of obviousness. A case of 'manifest error' is a case where an error has clearly been made."*
>
> *12. The first (and still best-known) case in which a judge worked through a tender evaluation process to see whether or not manifest errors had been made was Letting International Ltd v London Borough of Newham [2008] EWHC 158 (QB). There, Silber J followed the approach of Morgan J in Lion Apparel as to the law, and went on to say:*
>
> > *"115. Third, I agree with Mr Anderson that it is not my task merely to embark on a remarking exercise and to substitute my own view but to ascertain if there is a manifest error, which is not established merely because on mature reflection a different mark might have been awarded. Fourth, the issue for me is to determine if the combination of manifest errors made by Newham in marking the tenders would have led to a different result."*
>
> *On the facts in that case, Silber J altered just two of the individual scores, in circumstances where the errors were either admitted or incapable of rational explanation."*

92. A case of "manifest error" is "*a case where an error has clearly been made*": *Energysolutions EU Ltd v Nuclear Decommissioning Authority* [2016] EWHC 1988 (TCC) *at* [273-277]. "Manifest error" is broadly equivalent to the domestic law concept of irrationality: see *Woods Building Services v Milton Keynes Council* [2015] EWHC 2011 (TCC) at [14]; *Energysolutions* at [312]. That in turn imports an obligation for the decision-maker to take reasonable steps to acquaint themselves with the relevant information to enable him to answer the question correctly: see *Secretary of State for Education and Science v Tameside MBC* [1977] AC 1014, 1065.

93. The limited scope for the Court to interfere was made clear by Coulson J in a different case, namely *BY Development Ltd and Others v Covent Garden Market Authority* [2012] EWHC 2546 (TCC) when he said:

> *"Under the 2006 Regulations as amended, the principal way in which an unsuccessful bidder, such as the Claimants, can challenge the proposed award of a contract to another bidder is to show that the public body's evaluation of the rival bids either involved a manifest error or was in some way unfair or arose out of unequal treatment. Accordingly, in deciding such claims, the court's function is a limited one. It is reviewing the decision solely to see whether or not there was a manifest error and/or whether the process was in some way unfair. The court is not undertaking a comprehensive review of the tender evaluation process; neither is it substituting its own view as to the merits or otherwise of the rival bids for that already reached by the public body."* [emphasis added]

(f) Ambiguous tender

94. The requirements of proportionality and good administration in that context are illustrated by Case T-211/02 *Tideland Signal v Commission* and Case T-195/08 *Antwerpse Bouwwerken NV v European Commission*. *Antwerpse* concerned a procurement in which the documentation set out the clear rule that '*Failure to state all the prices required in the take-off ["cost estimation summary"] will result in exclusion. That also applies where alterations are made to the [cost estimation summary] in response to comments submitted in good time by the tenderers*.' The Court of Justice of the EU ("CJEU") held that the European Commission was not only entitled but obliged to seek clarification of a clerical error, rather than exclude a tenderer:

> *"56 **That is the position, inter alia, where a tender has been drafted in ambiguous terms and the circumstances of the case, of which the Commission is aware, suggest that the ambiguity probably has a simple explanation and is capable of being easily resolved. In principle, it would be contrary to the requirements of sound administration for the Commission to reject the tender in such circumstances without exercising its power to seek clarification. It would be contrary to the principle of equal treatment to accept** that, in such circumstances, the Commission enjoys an unfettered discretion (see, to that effect, Case T-211/02 Tideland Signal v Commission [2002] ECR II-3781, paragraphs 37 and 38).*
>
> *57 In addition, the principle of proportionality requires that measures adopted by the institutions do not exceed the limits of what is appropriate and necessary in order to attain the objectives legitimately pursued, it being understood that, where there is a choice between several appropriate measures, recourse must be had to the least onerous and that the*

> *disadvantages caused must not be disproportionate to the aims pursued (Case C-157/96 National Farmers' Union and Others [1998] ECR I-2211, paragraph 60).* ***That principle requires that, when the contracting authority is faced with an ambiguous tender and a request for clarification of the terms of the tender would be capable of ensuring legal certainty in the same way as the immediate rejection of that tender, the contracting authority must seek clarification from the tenderer concerned rather than opt purely and simply to reject the tender*** *(see, to that effect, Tideland Signal v Commission, paragraph 56 above, paragraph 43)".* (emphasis added)

95. The CJEU took account of the purpose of the rule when rejecting a strict and literal application of the rule to "*clerical errors which are obvious and insignificant*":

> *"51 A condition laid down in the contract documents must be interpreted in the light of its subject-matter, broad logic and wording (see, to that effect, order in TEA-CEGOS and STG v Commission, paragraph 50 above, paragraph 46). Where there is doubt, the contracting authority concerned may gauge the applicability of such a condition by conducting an examination of each individual case, taking into account all the relevant factors (see, to that effect, order in TEA-CEGOS and STG v Commission, paragraph 50 above, paragraph 31).*
>
> *...*
>
> *65 In such a case, a purely literal and strict interpretation of the condition laid down in point 25 of the administrative annex to the contract documents, as proposed by the applicant, would lead to the rejection of economically advantageous tenders because of clerical errors which are obvious and insignificant, a course of action which – as the Commission rightly points out – cannot, in the long run, be reconciled with the 'principle of economy' referred to in Article 27 of the Financial Regulation".*

96. In*, R (on the application of Harrow Solicitors and Advocates) v The Legal Services Commission* [2011] EWHC 1087 (Admin), HH Judge Waksman QC (as he then was) reviewed the authorities and concluded, in the context of clear rules at [30-31] (emphasis added):

> *"(1) All tenderers must be treated equally;*
>
> *(2) <u>It would violate that principle and the principle of good administration in the tendering process if any tenderer were</u>*

> *permitted to change its bid after bidding had closed;*
>
> *(3) If the awarding authority had a discretion to seek clarification about a bid from the tenderer, the Court would not normally interfere with the exercise of that discretion unless (a) it was exercised unequally or unfairly across the relevant bidders or (b) it was not exercised, yet it appeared to the awarding authority that there was an ambiguity or obvious error which probably had a simple explanation and could be easily resolved; seeking clarification in the latter case was required in order that consideration of what might be an advantageous bid should not be excluded; it would be for the awarding authority to determine whether the clarification exercise would be simple or not;*
>
> *(4) But any purported clarification must not amount to a change in the bid.*
>
> *31. In my judgment, the critical factor which gives rise, or may give rise, to a duty to seek clarification is where the tender as it stands cannot be properly considered because it is ambiguous or incomplete or contains an obvious clerical error rendering suspect that part of the bid. If the inability to proceed with a bid, which may be an advantageous addition to the competitive process, can be resolved easily and quickly it should be done, assuming there is no change to the bid or risk of that happening. If there is an obvious error or ambiguity or gap, clarifying it does not change the bid because, objectively the bid never positively said otherwise." (emphasis added).*

97. It is illuminating to see the analysis of HH Judge Waksman QC of various cases at the end of the judgment. They are largely closer to the instance of a late bid rather than a deficient bid. Nevertheless, the Judge regarded the dicta as being broad enough to apply to a bid which was incorrectly filled out. It is not sensible to extend this case by citing the pages of citation of those cases, but some small parts are worthy of note.

98. HH Judge Waksman QC quoted from and approved a part of the judgment of HH Judge Purle QC in *JR Jones v Legal Service Commission* [2010] EWHC 3671 (Ch) who said the following at [67]:

> *"..although there is no element of potential abuse on the facts of this case, given the objectively verifiable nature of the mistake, if mistakes are allowed to be corrected after the deadline which are not evident on the face of the tender, that would give rise to the risk of tenderers having second thoughts, and portraying their original thoughts as erroneously recorded when there was in truth a change of position."*

99. The importance of this is that the awarding authority is in danger of too easily finding that a mistake can be corrected because of the danger not only that it might involve the change of a bid, but because it gives rise to the risk that a tenderer will use the opportunity to change their bid.

100. HH Judge Waksman QC also quoted from *Hoole & Co v Legal Services Commission* [2011] EWHC 886, a case where a part of the form was inadvertently submitted in blank. Blake J held at [30]:

> *"...Any general duty to give an applicant an opportunity to correct errors in the absence of fault by the defendant, yields to the duty to apply the rules of the competition consistently and fairly between all applicants, and not afford an individual applicant an opportunity to amend the bid and improve its prospects of success in the competition after the submission date had passed."*

101. Likewise, in *AAR v Legal Services Commission* [2011] EWHC 964, Davis J, considering another case, where one of the mandatory documents was transmitted in blank, said at [60]:

> *"Regrettably, as I have found, the mistake here was that of AAR and AAR alone. Under the terms of the Information for Applicants, it was obliged to gets its completed forms in before the deadline and failed to do so. There can be no good reason, under the principles of equality of treatment or proportionality, for permitting it to put in a complete TIF….after the deadline. Indeed to do so would run counter to the whole tender process and would be unjust to other tenderers, bound by the same terms and who had made no such mistake."*

102. HH Judge Waksman QC added at [52]:

> *"Hoole & Co and AAR both make clear that any proportionality review is not to focus exclusively on the particular consequences for the failed tenderer, severe though they may be. The wider principles of the good administration of competitive tenders and equal treatment come into play and act as a limiting factor. Absent a case to interfere along Tideland lines or the mistake being due to fault on the part of the awarding authority or possibly circumstances beyond the control of the tenderer, disproportionality is most unlikely to be established where the tenderer has made a mistake in the bid."*

(g) Exercising discretion and disqualifying a bidder from a procurement

103. A contracting authority is also required to act proportionately in exercising powers under the tender documentation. The appropriate test is whether the step taken was manifestly disproportionate: *R (Lumsdon) v Legal Services Board* [2016] AC 697 (at [73]). Any exercise of discretion must not be exercised on an unlimited, capricious or arbitrary basis*: Stagecoach East Midlands Trains Ltd and others v Secretary of State for Transport and others* [2020] EWHC 1568 (TCC) (at [44]).

104. As explained by Stuart-Smith J (as he then was) in *Stagecoach,* the exercising of discretions at various stages in any public procurement is commonplace and is capable of engaging and infringing the principles of equal treatment and transparency [41]. The terms of any ITT and proposed contract may define (to a greater or lesser extent) the circumstances in which, and the principles according to which, a discretion may be exercised.

105. Sometimes the scale and extent of this definition may effectively preclude the exercising of an independent discretion as commonly understood and may instead mandate an outcome. At the extreme end of this process fall provisions decreeing automatic disqualification in certain circumstances. At the other end of the scale a discretion to disqualify may be stated in unqualified or general terms [42]. Where a discretion is not stated to be qualified, it remains subject to principled limits and may not be exercised on an unlimited, capricious or arbitrary basis [44].

106. A waiver of requirements which are stated as applying without exception is a departure from the terms of a procurement process and is therefore an exceptional course. A waiver of such terms carries the very risks of unequal treatment, discrimination and a lack of transparency which a contracting authority is required to avoid (*Leadbitter and Co Ltd v Devon County Council* [2010] ELR 61; [2009] EWHC 930 (Ch)) as cited with approval by the Court of Appeal in *Azam & Co Solicitors v Legal Services Commission* [2010] EWCA Civ 1194 at [26] and *Hoole & Co v Legal Services Commission* [2011] EWHC 886 per Blake J at [30] cited above.

107. Even if there is a discretion to accept late tenders, there is no requirement to do so particularly where the fault lies with the tenderer: see *Leadbitter v Devon County Council* [2009] EWHC 930. In that case, David Richards J (as he then was) recognised that it was inevitable that the application of the rules of a procurement process could exclude consideration of a tender that could otherwise have been successful. *Leadbitter* was a case where there was a mandatory requirement to file documents by a certain time, and the tenderer realised before the deadline that various case studies had been excluded, called the Council before the deadline, and submitted them by email 26 minutes late. That breach was characterised in *Energysolutions* at [885] as one which could not have given that tenderer the ability to perform more work on the tender than those who had lodged their tenders within the time limit. Therefore there was no or very limited risk of abuse or collusion. Further, there would have been negligible impact upon the Council by reason of the very slight delay in lodging the case studies. It was therefore the case that where there was a mandatory requirement, it was not the case that waiver was permissible unless it gives rise to a significant risk of unequal treatment.

108. In the judgment of David Richards J in *Leadbitter* at [56], he said the following, namely: *"Secondly, a waiver of terms which are stated as applying without exception is a departure from the terms of the procurement process and is therefore an exceptional course. A waiver of such terms carries the very risks of unequal treatment, discrimination and a lack of transparency which the contracting authority is required to avoid."*

109. He further stated at [66] that the relevant issue was whether the rules had been drawn and applied in ways that were transparent and ensured equal and non-discriminatory treatment that was proportionate. Provided those requirements were satisfied, there could be no objection to an exclusion from consideration. David Richards J concluded as follows at [68]:

> *"There may be circumstances where proportionality will, exceptionally, require the acceptance of the late submission of the whole or significant portions of a tender, most obviously where, as noted by Professor Arrowsmith, it results from fault on the part of the procuring authority. <u>But in general, even if there is discretion to accept late submissions, there is no requirement to do so, particularly where, as here, it results from a fault on the part of the tenderer</u>. In addition to the considerations already mentioned, the particular facts on which the claimant relies to characterise its case as exceptional would require investigation and determination by Devon CC and I do not see that it was required to undertake those tasks. In my judgment, the decision of Devon CC to reject the claimant's tender was well within the margin of discretion given to contracting authorities."*(emphasis added)

110. This approach was adopted by the Court of Appeal in *Azam v Legal Services Commission* [2010] EWCA Civ 1194. Although this was another time case, the general notion, which HH Judge Waksman QC in the *Harrow* case regarded as of application to a case where an in-time answer is given but not compliant[2], is to *"provide all competitors with an equal opportunity to make their case"*. The Court of Appeal affirmed the decision of the Judge in a case where there was a lack of fault on the part of the awarding authority and the absence of any circumstances beyond the control of the Claimant. In the instant case, for the reasons submitted on behalf of the Defendants, there was a lack of fault on the part of the Defendants and the absence of any circumstances beyond the control of Optima.

111. In *Harrow*, HH Judge Waksman QC raised the question as to whether actual prejudice was required in such a case for not waiving any non-compliance. He found that proof of actual prejudice was not required. By reference to the *Azam* case, the Judge said the following at [56-57]:

[2] At [39], HH Judge Waksman QC identified how difficult it could be to distinguish between a time case and an error case: for example, what if the error was detected soon after the deadline? In such a case, the problem was the same about the unequal treatment of the tenderers.

> *"56. Nor is the result disproportionate. The governing principles stated above are themselves a proper balance between the interests of individual tenderers and the tenderers collectively within the process to which they are subject….*
>
> *…*
>
> *57. It is said by Mr Clarke, however, that the result is still disproportionate because there is no real prejudice to the other tenderers even if Harrow is now allowed a contract….But in any event I do not consider that proof of actual prejudice is required so as to render proportionate a decision not to permit a correction. The principles set out above do not depend on it being shown and it is noteworthy that in paragraph 38 of his judgment in Azam Pill LJ states that while the grant of an extension of time may well adversely affect the position of other tenderers this was not essential to his conclusion. For his part Rimer LJ referred simply to the "potential" to affect other awards which the introduction of a late bidder would have – see paragraph 51."*

112. The reference to Pill LJ in Azam at [38] is to the following:

> *"The judge did not have regard to this aspect of the case. Acknowledgement of it appears to me to be a part of the duty to treat tenderers equally. A tenderer who is granted an extension of time, notwithstanding the terms of the tender, may well affect adversely the position of other tenderers. My comments in relation to bids and ranking are not, however, essential to the conclusion I have reached."*

113. In *Energysolutions* there was consideration of a submission that excluding a tenderer with a "trivial" failure or a failure with "no real impact" would be disproportionate. Having considered *Leadbitter* and *Azam*, the Judge said at [890]:

> *"In my judgment the correct approach is to characterise the failure, firstly, as one of either form or content. If form, then there is a second step. If the failure relates to content, in my judgment, the second step would not fall to be considered at all. That second step would be then to consider the scope and extent of the failure. If merely trivial, then the authority could potentially waive the failure, as long as doing so would not breach the obligations of transparency and equal treatment. Further, such waiver should only be permissible in the most exceptional of cases. It is also important to differentiate between cases where the rules of the competition entitle the authority to waive non-*

> *compliance, and those that do not. Those authorities engaged in competitions where the rules specifically do not permit this will rarely be entitled to act contrary to those rules, although of course the rules will differ in case to case."*

114. In *Inhealth Intelligence Ltd v NHS England* [2023] EWHC 352 (TCC), Mr Adam Constable KC (sitting as a Deputy Judge of the High Court, as he then was) summarised the relevant legal principles in the following way. He said at [29-30] the following:

> *"29….I have no hesitation in concluding that, however clear the wording of an ITT, there will at law always exist a residual discretion to waive non-compliance with the requirements of an ITT if it is necessary to do so to ensure equality, transparency and proportionality of the procedure as a whole, and doing so does not offend against those same principles. In this regard, I consider that the principles distilled by Humphries J in QMAC Construction Ltd v Northern Ireland Housing Executive [2021] NIQB 41 at [33] , having considered a number of the authorities to which I have also been referred in the course of argument, to be both correct and applicable to the present case:*
>
> *(1) The precise terms of the tender documents require close analysis in any given case. It is important to consider whether, for instance, a contracting authority has reserved to itself a wide discretion to admit late tenders or permit missing documents to be furnished after a deadline has expired or whether a bright line exclusionary rule has been adopted.*
>
> *(2) Even where a bright line rule appears, a contracting authority must consider the principle of proportionality. There may be exceptional circumstances, such as the fault of the authority, which justify the admission of a late tender or missing document.*
>
> *(3) Where the contracting authority does have a discretion, it must only exercise it in accordance with the principle of equal treatment. One element of this requires that any missing documents or information must objectively be shown to pre-date the tender deadline.*
>
> *(4) The starting point is that deadlines are to be respected and only exceptionally should a contracting authority permit the submission of late or missing information.*

> *30. Thus, however clear the terms of an ITT, I consider that according to regulation 18 it will always be necessary for a contracting authority to satisfy itself on the facts of a given case that strictly applying the stated rules is the appropriate course in order to satisfy the overall requirements of equality, transparency and proportionality."*

115. At [34], Mr Constable KC distilled the following from *Leadbitter* and added the following:

> *(a) "the exercise of discretionary powers necessarily involves judgement on the part of the contracting authority. The court must respect this area of judgement and will not intervene unless the decision is unjustifiable. This is the proper meaning of a manifest error in this context (paragraph 55);*
>
> *(b) exercising a discretion to waive terms which are stated as applying without exception is a departure from the terms of the procurement process and is therefore an exceptional course. This is because a waiver of such terms carries the very risks of unequal treatment, discrimination and a lack of transparency which the contracting authority is required to avoid (paragraph 56);*
>
> *(c) there may be circumstances where proportionality will, exceptionally, require the acceptance of the late submission of the whole or significant portions of a tender, most obviously where it results from fault on the part of the procuring authority (paragraph 68);*
>
> *(d) in general, even if there is discretion to accept late submissions, there is no requirement to do so, particularly where it results from a fault on the part of the tenderer (paragraph 68)".*

(h) Seeking clarification from a tenderer

116. In some circumstances when faced with a bid that contains ambiguities or obvious errors it may be appropriate for the authority to seek clarification. That does not apply, however, where the effect of that clarification process would be to give the tenderer concerned an opportunity to amend its bid: such an outcome would be in breach of the principle of equal treatment. To that end, the important question is not whether the error is obvious, but whether it is obvious from the tender what the bidder in fact meant to submit. See, to that effect:

(i) *Adia Interim SA v Commission* 1996 II-00321 at [47]: having detected a systematic error in the claimant's price calculation, the Commission was not required to seek clarification because the underlying reasons for the error were unclear and adjusting it might have led to a real change in its price, in breach of the principle of equal treatment.

(ii) *Case T-195/08 Antwerpse Bouwwerken NV v Commission* 2009 II-04439. The claimant was originally the successful tenderer but subsequently lost out to another tenderer that had been given the opportunity to correct an omission in its bid. The Court held that the Commission was entitled to allow the other tenderer to clarify its bid in circumstances where the relevant information was already stated elsewhere in its bid, so there was no amendment to its tender. See [59] : "*Lastly, it is ultimately for the Court to determine whether a tenderer's replies to requests from the contracting authority for clarification can be regarded as explanations of the terms of the tender or whether those replies go beyond clarification and modify the substantive terms of the tender in relation to the conditions laid down in the contract documents*"

(iii) In *Tideland Signal v Commission* above, there was a duty to correct errors in a tender based on proportionality which contained a reference to the period of the tender. It was held that there was an ambiguity in the tender which *"probably has a simple explanation and is easily resolved."* The power should be exercised to seek clarification of the ambiguity. In the view of Arrowsmith on the Law of Public and Utilities Procurement para. 7-283 and approved by Fraser J in *Energysolutions* at [886], that was in a case about an issue of conformity with the tender (the identification of the period for which it was open) rather than the merits of the tender. In other words, it was about form and not the substance of the bid (such as the price or quality features used in the comparison of tenders): see the quotation above from *Energysolutions* at [890].

(i) Proof of reasons and reasoning

117. In *Healthcare at Home Limited v The Common Services Agency* [2014] UKSC 49, Lord Reed JSC stated at §17:

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

> *advantages of the successful tenderer and the name of the successful tenderer. The court continued (para 55):*
>
> > *"The reasoning followed by the authority which adopted the measure must be disclosed in a clear and unequivocal fashion so as, on the one hand, to make the persons concerned aware of the reasons for the measure and thereby enable them to defend their rights and, on the other, to enable the court to exercise its supervisory Jurisdiction."*

118. As held in *Stagecoach* the level of detail which must be given in order to satisfy this duty will inevitably be context and fact specific (at [75]). There is no requirement that the reasons and reasoning must all be contained in one document (whether that be the document conveying the decision or otherwise) (at [76]).

119. Having considered the relevant law, it is necessary to consider the application of the law to the instant facts. The two central areas which contain several dimensions discussed below are as follows. Did the tender documentation clearly and transparently set out the consequences of exceeding the Framework Pricing Schedule? Did the Defendants act unlawfully in rejecting the bid of Optima due to exceeding the Framework Pricing Schedule rather than taking alternative action, such as reducing the prices or seeking clarification?

V Findings: Did the tender documentation clearly and transparently set out the consequences of exceeding the Framework Pricing Schedule?

(i) Submissions of Optima

120. It is common ground that the requirement was clear, namely, not to exceed the Framework Pricing Schedule. Optima submits that the lack of clarity in the procurement documentation was about the consequences of failing to meet that requirement. The submission is that the case is analogous to *MLS*, namely that the tender documentation must clearly and transparently set out the consequences of a failure to comply with a particular criterion or requirement of the process. The submission is that the ITT documentation does not do so. It did not say that failure to meet the requirement would render the tender non-compliant.

121. Optima submits that in the event that two RWIND tenderers might come to a view of different constructions and both acting in a reasonable and well-informed manner, then the clause relied upon lacks the clarity and transparency required in order to justify the exclusion for breach. Optima submitted that the views of a particular tenderer might assist the Court in arriving at the conclusion as to whether the tender was sufficiently clear and transparent, but it does not necessarily have an effect one way or the other. It is simply a matter to be taken into account.

122. Optima recognised that there is a danger in simply accepting the view even of a conscientious and honest tenderer of what they did or did not take into account and of

what they might have done if the provisions were clearer. The reason for this is that following the rejection of the tender, the parties pore over documents for many months prior to the case being heard, which can be far more extensive consideration than was possible or realistic during real time at the time when the documents were considered. The Court has to be vigilant against ascribing more than is likely to have been considered at the time.

123. Nevertheless, Optima submitted that the ITT documentation did not make clear to the RWIND tenderer that a "clerical error" in transposing prices such that a cell exceeded Framework Maximum Prices would automatically render the tender non-compliant and would be automatically disqualified nor that there would be a discretion on the part of the Defendants to disqualify. On the contrary, Optima attribute importance to the statement that *"the maximum contract value is governed by the CCS Framework Occupational Health, Employee Assistance Programmes and Eye Care Services RM6182 Lot 1, any bids for any service line submitted to the Framework by invited bidders in excess of this will be discounted."* (emphasis added)

124. The ITT documentation did not state that failure to meet the requirement would lead to disqualification. In the internal appraisal of what to do dated 3 May 2023, there was acknowledgement by DWP that

(i) the reference to bids being "discounted" gives "rise to some ambiguity which may be open to interpretation" (the word used is "discounted" and not "excluded" or "disqualified"); and
(ii) the reference to reserving "the right to exclude you if you submit a non-compliant bid" is not explicit in what circumstances this remedy is used.

125. Optima submitted that a plausible and reasonable interpretation of the wording is that any bid for any service line in excess of the Framework will be discounted to the maximum sum, that is that the amount of the bid in excess of the service line maximum price will be disregarded. Alternatively, it is submitted that it could be understood that the maximum value of the contract (in total) had to be below the Framework Agreement Pricing Schedule. It is submitted by Optima that *"excluding the entirety of the bid for an inadvertent failure to meet the requirement in relation to a single line is draconian and does not have a rational connection to the purpose of the rule."*

126. Optima also submitted that there are some failings which "will" be deemed non-compliant and will lead to exclusion e.g. a deadline for returned templates, after which they *"will be deemed non-compliant and will be excluded from this process."* Instead, the documentation identifies failings which "may" be deemed non-compliant and could lead to exclusion e.g. *"Failure by bidder to complete all the required cells and/or to provide cost, FTE or other information (whether evaluated or not) requested by DWP as part of this tender process, may result in the bidders tender being deemed non-compliant."* It is said that this is not sufficiently clear and transparent to found a basis for excluding the whole bid due to such an error.

127. Optima submitted that just as in the case of *MLS*, the RWIND tenderer would not anticipate whether or how exceeding the Framework Agreement Pricing Schedule would, or could, result in a rejection of the tender. Optima submits that there has

been a breach of obligations of transparency and equal treatment, and that the criteria have not been sufficiently clear to result in exclusion of Optima's bid on that ground.

(ii) Submissions of DWP

128. DWP does not accept that the consequences of non-compliance were not spelt out or that there was a breach of the principles of transparency and equal treatment.

129. DWP pointed to the ITT documents which showed that bid prices in excess of framework maximum prices were not permitted. They showed that bidders who failed to comply with this requirement of the competition were liable to disqualification. In particular:

(i) Framework Schedule 3 (paragraph 1.1.1) stated that the Framework Maximum Prices would be *"used as the basis for the charges (and are maximums that the Supplier may charge) under each Call Off Contract."*

(ii) All versions of the pricing schedule (it was para. 1.8 of the Instructions of the Revised Pricing Schedule) contained a specific instruction that *"Pricing must take account of the requirement, under Framework RM6182, not to exceed the current Framework pricing for any individual item priced"* (or equivalent)

(iii) Instruction 5.2 of instructions for the Revised Pricing Schedule stated: *"For the Pricing Schedules to be considered compliant, the requested prices and information Base Costs, Overhead, profit expectation and FTE numbers must be supplied where requested. The check sheet tab provides an overview of the completed document."* (emphasis added)

(iv) Paragraph 6.3.1 of Attachment 1 of the ITT stated: *"You must comply with the rules in this Bid Pack and any other instructions given by us."*

(v) DWP had an express right to exclude a bidder which submitted a non-compliant bid under paragraph 6.9.2 of Attachment 1 of the ITT. There was also an express right to revert to the bidder and seek to verify information or seek clarification or require evidence of further information about the bid, but that did not remove the option to exclude the non-compliant bid. There is a curious syntactical matter which is that the exact words say: *"Our rights… exclude you if you submit a non-complaint bid"*. In context that is shorthand and has an obvious meaning of *"to exclude you"*. It is also a right rather than the only course available to DWP. In the alternative, there was the right to verify the information or to seek clarification or require evidence or further information about the bid. The existence of not only a discretion to do something or not to do something, but also to do something else or not to do something else is not unclear. There is simply more than one discretion.

130. In this context, the reference in paragraph 2.2 of Attachment 1 of the ITT to *"any bids for any service line submitted to the Framework by invited bidders in excess of this*

will be discounted" must mean that the entire bid would be disqualified, bearing in mind the following:

(i) The context of the other references to the requirement not to exceed Framework Maximum Prices and the need to comply with the rules in the ITT, failing which there was a right to exclude the bid.

(ii) The RWIND tenderers would have understood that there must be a consequence of a non-compliant bid and in that context, at least a possible right would to be to exclude the bid.

(iii) There was no suggestion in the ITT that DWP would adjust the bidder's pricing for the relevant individual line item.

(iv) If 'discounted' meant 'reduced'. there was nothing to suggest the extent of the discount. There was nothing to indicate that it meant reduced to the maximum sum. Likewise, there was nothing to show that it meant a specific price which the bidder had in mind between nothing and the maximum sum.

131. It was clear to the RWIND tenderer that when price was referred to in the various pricing schedules, that price was made up of two components, namely the actual price for the service line and the overall Maximum Framework Price. Mrs Newey understood the price in both senses: see D2/169/14-16 of the transcript. Optima accepts that it was well aware of this requirement: see Newey WS [43].

(iii) Discussion

132. I am satisfied that the tender was clear, transparent and providing equal treatment to the tenderers. It was common ground that it was important to see the documents relied upon as part of a process in order to evaluate whether there was sufficient clarity and transparency.

133. The convoluted history of the process ought to make the Court more careful before being satisfied that the clarity/transparency requirement was satisfied. There is the danger of confusion, the more elaborate or protracted the process was.

134. In the event, I am satisfied that there were clear explanations at each stage which left the RWIND tenderer in no doubt as to the importance of complying with requirements and the possibility of being disqualified. There was sufficient clarity in the ITT, but the clarity was enhanced during the process, and especially by the Instructions to the Revised Pricing Schedule. For example, when each of the tenderers had made non-compliant bids, and the tender process was recommenced with a further Pricing Schedule, it was made clear to them that there was a right to exclude non-compliant bids, and this was spelt out more and more.

135. There had to be a compliant bid. There was a right to exclude for a non-compliant bid: see Clause 6.9.2 of Attachment 1 of the ITT. Compliance was used as a clear term, meaning that there had to be compliance with the rules in the Bid Pack and any

other instructions provided: see Clause 6.3.1. It was clear that the rules or instructions included that all unit prices must not be greater than the prices under Framework RM6182: see para. 1.4 of the Instructions Section in the Price Schedule. The information on offer price, direct costs indirect costs and FTE numbers had to be supplied for the ITT documentation to be considered complete: see para. 5.2 of the Instructions Section in the Price Schedule. It must have been obvious to the RWIND tenderer that the information was required for the evaluation of the respective bids. As noted above, there was a clarity in the instructions provided.

136. It is correct that there were certain requirements where failure to follow the same was disqualification e.g. various questions in the Key Participation Requirements in Questionnaire 1 of Attachment 2 (consequence of not answering some pass/fail questions being rejection), disregarding pages in excess of the 30-page limit in Attachment 2.

137. Instead of the length of the process causing confusion, the clarity was enhanced especially by the Revised Pricing Schedule which preceded the bid that was rejected. That was not because of what was written on the package, namely that it was to enable the bidders to provide the most accurate information and to ensure a transparent process. It was because it spelt out the requirement to *"ensure that your revised pricing takes into account the requirement, under Framework RM6182, not to exceed the current Framework pricing for any individual item priced."*

138. I am satisfied that the DWP case is correct that the Revised Pricing Schedule was substantively different in that it was designed only to cover the service lines and delivery methods required by DWP and seeking prices for different delivery methods separately. That which was required in order to render the Pricing Schedule compliant was specified in para. 5.2 of the Instructions, as set out above. Further, as set out above, para. 1.4 of the Instructions contained new emphasis that all unit prices must **not** be greater than the prices under Framework RM6182. This point was reiterated in para. 1.8 of the Instructions as set out above and in an answer to a previous clarification price on 1 February 2023.

139. I reject the notion that a RWIND in these circumstances did not know that the consequence of exceeding a price from Framework RM6182 might be disqualification. That consequence was spelt out by the terms of the ITT and in particular at 6.9.2. There was a constancy about the requirement that the prices must not be exceeded. The wording is shorthand in the sense that it says, "exclude you if you submit a non-compliant bid", but it is clear enough to mean that there is discretionary right to exclude the bid. This is on the basis of considering the words without considering the impact of the word "discounted" in paragraph 2.2 of Attachment 1 of the ITT.

140. It is of course simply a building block in the reasoning to consider the wording without an integral term. The wording has to be considered as a whole. The submission of Optima is that if a RWIND tenderer might think that the wording of paragraph 2.2 of Attachment of the ITT might mean that the amount bid would be reduced, then that is inconsistent with a right to disqualify, and that it should prevail over the discretionary right in Clause 6.9.2: alternatively, its submission is that there was a lack of transparency and clarity as a result of which their bid could not be

excluded. The need for transparency was particularly intense in respect of a requirement, breach of which might entail disqualification of the bid.

141. I reject the submission of Optima about the meaning and effect of the reference to discounting of bids, and I accept the submission of DWP to contrary effect. Although there was an internal note about an ambiguity, in context, it was not ambiguous, but it only sensibly had the meaning about it being excluded. The reasons for that were set out in the summary of DWP's submissions at para. 130 above. In context, it makes no sense that there would be a discount (meaning a reduction) when it would not have been possible to have divined what the reduction ought to have been between nought and the amount of the maximum sum for the service line submitted. It was not a neat solution to discount the bid to the maximum sum: that is not what it said. The witnesses were at one in saying that there was no way without more that Optima could understand whether the discount was to be the maximum line sum or to a lesser amount. In those circumstances, and for the reasons submitted by DWP, in context the natural meaning of the word "discounted" was that the bid as a whole would be "disqualified" or "excluded".

142. If, contrary to the foregoing, there was a potential ambiguity about the meaning of the word "discounted", there was on looking at the process as a whole no ambiguity. The matter is well summarised at para. 4 of the concluding submission of the Defendants in the following terms, which I accept:

> *"It was clear from elsewhere in the ITT that bidders needed to comply with the tender instructions and that non-compliant bids could be excluded. The tender documentation needs to be assessed in its commercial context; the RWIND tenderer would have understood that bids containing prices for service lines in excess of Framework Maximum Prices could not be contractualised, hence would need to be excluded from the competition."*

143. Further, and in any event, even if there was a potential ambiguity, which is not accepted, this does not limit the general powers at Clause 6.9 including the power to exclude the bid altogether for non-compliance by quoting for a line price above the maximum. It should be added that in this analysis the Court has well in mind that an ambiguity might infringe the principles of clarity and transparency.

144. The above is all supported by the fact that there was no mechanism in the ITT allowing DWP to discount prices in excess of Framework Maximum Prices down to Framework Maximum Prices (or any other price). There was an attempt in the evidence to say that sometime in the past, there had been such a unilateral reduction. This was not backed up by specific evidence, such that the parties might have had in mind how it operated and such as to provide a factual matrix against which the tender documentation was to be understood. In all the circumstances, there is no basis for to find that a RWIND tenderer might have found that there was a power unilaterally to reduce a non-compliant tender sum.

145. In the circumstances, a RWIND tenderer would have recognised that disqualification of the bid as a whole could follow either as a mandatory matter (on the preferred reading and understanding of Clause 2.2 of Attachment 1) or a discretionary matter (from Clause 6.9.2 of Attachment 1) from the failure to comply with the requirements regarding exceeding the maximum pricing regarding service lines. There was no scope for two reasonable and well-informed tenderers to come to different conclusions about this.

146. Although it is not conclusive by itself because it is the objective meaning of the bidding process which is important as would be perceived by the hypothetical RWIND tenderer, some assistance is derived from the evidence of Mrs Newey. It was apparent from the evidence of Mrs Newey that she understood from the procurement instructions that it was a clear rule that prices could not exceed the maximum framework rates: see D2/138/17-25. Although she repeated in her evidence that there was no stated consequence of rejection of the bid for non-compliance, she did not know when this first occurred to her. It seems probable in all the circumstances that this theme of her evidence first arose and was augmented when she prepared for trial and when the parties joined issue through the pleadings and the witness statements.

147. Mrs Newey accepted that when "price" was being referred to in the three different sets of Instructions (First Pricing Schedule, Fourth Pricing Schedule and Revised Pricing Schedule) that that price was made up two components: (1) the actual price for the service line; and (2) that the price did not exceed a Maximum Framework Price [D2/143/24]; [D2/166-167/25-17] "*Q. so you understood an offer price to be one that is filling out [the] service line and one that was not exceeding the framework maximum price? A. My Lord, yes, that is correct."*; [D2/169/14-16] *"A. So my Lord, yes, it is asking for requested prices. We know that the unit prices at 1.4 does state that they must be in line with the maximum framework rates."*

148. If the tenderer understood that the prices could not exceed maximum framework rates, it is to be inferred that the RWIND tenderer would realise that there must be a consequence for this. That was spelt out in Clause 6.9.2 of Attachment 1 of the ITT. That suffices. If, contrary to the above, Clause 2.2 might not be interpreted as meaning that the bid was to be excluded, it was apparent to a RWIND tenderer that DWP would have a discretion to exclude. The provision did not emasculate or affect the more general words of Clause 6.9.2. The terms as a whole were sufficiently clear to the RWIND tenderer. There has been no breach of the principles of transparency and equality.

VI Findings: whether the Defendants acted unlawfully by excluding Optima rather than by taking other alternative action such as reducing the prices or seeking clarification

(i) Submissions of Optima

149. Optima submits that the Defendants failed to exercise a discretion. This contention arises from para. 4.5 in the Defendants' letter dated 22 June 2023 which read as follows:

> *"You also seek to argue that DWP should have sought to clarify the position with your client. In reality there was nothing to clarify. Prices had been submitted and what your client really seeks is a second chance to correct its errors in its pricing submission in order to make it compliant with the requirements of the procurement. The winning bidder submitted a compliant bid and simply allowing a bidder a second chance to change its pricing would offend the equal treatment and transparency requirements under Regulations 56(4) and/or Regulation 18(1) of the PCR. It would simply not be a fair and transparent process to allow one bidder to correct pricing errors in its bid in order to make it compliant and avoid disqualification when another bidder has correctly complied with the rules of the competition. Other than allowing your client to change its bid or evaluating the bid based on a price other than what was submitted, both of which would be unacceptable under a regulated procurement process, we do not see what proportionate alternative your client believes should have been followed. The procurement documents set out very clearly that pricing above the framework prices was not permitted and there was no discretion around disqualification if that requirement was breached. There is also a separate right to disqualify non-compliant bids under clause 6.9.2."*

150. The submission of Optima is that the Defendants misinterpreted the tender documents as not allowing a discretion not to exclude the bid. The submission is that Optima was excluded because the bid was discounted, that is to say automatically rejected. Optima says that this is a misunderstanding of the meaning of the word "discounted". There has been a discussion above about this. The essential point of Optima at this stage of the argument is that in the event that the power at Clause 6.9.2 remained to allow exclusion of the bid for non-compliance, this was a discretionary power only, and the evidence appears to have been that DWP were treating it as mandatory and therefore not exercising their discretion to exclude.

151. Even if there was a mandatory exclusion, the Defendants still had a discretion not to exclude, but they failed to exercise such discretion. In any event, if and insofar as the Defendants set out their options internally, Optima submits that there is no relevant record of the reasons of the Defendants for exercising its discretion, if that is what they did, and thus a claim cannot be defended for breach of transparency. Insofar as there is a record, it is so redacted for privilege that it is not possible to discern the reasons, if any, for not reverting to the tenderer. The position cannot be improved by an assumption that in the event that there had been no redaction, it would have been found that a discretion was exercised.

152. If the Defendants did exercise a discretion, Optima submits that the Defendants failed to take into account relevant considerations and/or failed to act rationally and proportionately. In particular, they submit that:

(i) The pricing schedule disclosed a clerical error in that Optima had agreed not to exceed the terms and conditions of the Framework Agreement, and so it was obvious to the Defendants that Optima had made a clerical error.

(ii) The size of the error relative to the value of the bid as a whole was miniscule. The one cell for which there was a volume was £600 per annum relative to a total contract value of £3,000,000 per annum.

(iii) The error made no difference to the price evaluation because it was incapable of affecting the position of Optima as the most economically advantageous tenderer on quality and price.

(iv) The nature of the error: it was difficult to comply with the requirement even for a RWIND tenderer, and indeed all of them had failed to comply with it during the procurement. Even the Defendants had failed to notice one of the errors of Optima in the checking process.

(v) There were other ways of dealing with the problem consistent with the rules e.g. discounting to the maximum sum or seeking clarification with Optima which does not render the tender automatically unfair to other bidders.

(vi) The Defendants had caused or contributed to the difficulties by using a pricing schedule which did not align with the Framework Agreement Pricing Schedule, repeatedly reissuing the pricing schedule with changes to instructions and formats and failing to inform bidders that they had exceeded the pricing schedule in earlier submissions. The bidders ought to have been given a chance to resubmit as had happened in the past.

(vii) The wording of the ITT could have been clearer which gave rise to ambiguity in respect of the word "discounted".

153. Optima also submitted that there is no principle that a bid cannot be changed. That might be a usual incident of the rules about transparency and equality, but it does not mean that there is a further rule that a bid cannot be changed. Insofar as the *Harrow* case had elevated it into a rule, it was not to be read as such. Further, there was no further rule that it was prima facie wrong to seek clarification. There was nothing wrong *per se* about seeking clarification. It is expressly permitted subject to a proviso in the Regulation "*that such requests are made in full compliance with the principles of equal treatment and transparency."*

154. The problem was what would happen in the event that clarification had been sought, and there was no easy fix. That ought not to preclude seeking clarification. First, if it is not sought, then the awarding authority may not know how easy it is to fix the problem. Second, by having a principle of not seeking clarification, the danger was that the awarding authority might end up having to pay more public money for a contract than was necessary, and when this could have been avoided by clarification.

(ii) Submissions of the Defendants

155. The Defendants did exercise a discretion. It is apparent from the documents referred to above that the Defendants took into account relevant factors including that the extent to which the maximum sums were exceeded was minimal and that the indicative volumes for two of the service lines was zero. As noted above, there was a number of different options which were considered including inviting bidders to resubmit their prices, to "discount" the relevant service line prices to the Framework Maximum Prices or to remove that service line entirely. Ultimately, the Defendants took the view that where one bidder had submitted pricing that was compliant, it had to award the Contract to that bidder. That did not mean that there was no exercise of a discretion: that was a way of saying that having considered the various options, the compelling option was to award the contract to the compliant bidder, namely PAM.

155. Whilst there was some redaction for privilege, the extent of the redaction was not such as to remove the identification of the options and the broad reasoning for choosing the option of accepting the tender of the compliant tenderer. The redactions were not so extensive that it was not possible to judge the evaluation that had taken place.

156. The evidence of both Mr Birch and Mr McPherson makes it clear that alternative options were considered. That formed part of the basis for the recommendation to the Commercial Assurance Board to award the contract to PAM, and the final ministerial approval.

157. There was a submission that it was not obvious that there had been an error at all. However, if there had been an error in the tender, it was not apparent from the face of the bid or from documents within the possession of the Defendants what the error was. The reason for this is that it was not apparent what the prices were intended to have been, whether it was intended to have been the maximum sum or a smaller sum, and, if so, what sum. In another case, the intended price might have been apparent by something else on the face of the bid e.g. where the maximum sum had always been used or where the sum chosen was always say 90% or some other consistent percentage of the maximum sum for each service line. This was not a case where this could be derived from the face of the tender or from other documents then in the possession of the Defendants.

158. In respect of the allegation that the problems had been caused or contributed to by the Defendants, the Defendants have provided detailed refutation of this point. There are two points, namely that (1) Optima were responsible for errors in completing their pricing schedules, and (2) DWP was not responsible for pricing non-compliances. Optima was responsible for errors in completing their pricing schedules, and these were repeated through a lack of a proper internal assurance process. DWP was not responsible for Optima's pricing non-compliances. The Revised Pricing Schedule was substantially different from previous versions, and bidders should not have assumed that they could transpose across prices from their previous submissions (McPherson WS (2)[15]). The Court will return to the detailed evidence in support of these two points below.

(iii) The parties' submissions on material adjustment to the bid

159. The law as stated above was that there were dangers attendant to inviting a new bid from a tenderer or even if such an approach might invite a new bid. Optima submits that it would not have been a material adjustment to the bid. That could be because it was insignificant given the small amounts involved. In the alternative, it could be because there was an obvious way of dealing with it, namely either reducing the sum of the tender to the maximum sum or removing it from the tender.

160. DWP's case is that it would have been a clear breach of the principle of equal treatment to permit Optima to correct the pricing errors in its bid. As the above authorities show, a contracting authority can only ask for clarification where that would not result in a change in the relevant tenderer's bid. DWP submits that giving Optima a chance to amend its pricing would have amounted to a material adjustment to its bid.

(iv) Discussion

(a)The Defendants exercised a discretion to disqualify

161. Optima submitted that the Defendants did not exercise a discretion, but instead felt compelled to disqualify the bid due to their understanding of the expression "discounted". This led to the words being used in paragraph 4.5 of the 22 June 2023 letter that "*there was no discretion around disqualification if that requirement was breached"*. Two points, therefore, followed. First, the Defendants therefore ruled out the bid of Optima not due to an exercise of discretion, but due to a construction about the meaning and effect of the words "discounted", which is said to be wrong at least to the extent that it might mean something else to a RWIND tenderer. Second, even if the meaning was correct, the Defendants did not consider waiving the right to disqualify for non-compliance.

162. In my judgment, those arguments must fail. The Defendants did exercise the discretion in favour of proceeding with the disqualification. That can be demonstrated in a number of ways.

163. The way that the Defendants arrived at that construction was by showing that the other meanings of the word "discounted" did not stand up to examination for the reasons given and referred to in para. 130 above. In particular, there was no reason why it should be interpreted as a reduction to the maximum line sum, nor was there any contractual machinery for reducing to some other price between nought and the maximum line sum. That was not an exercise in statutory or contractual construction which is not the correct test, but it was a consideration as to whether a RWIND tenderer might think that there was another possible construction. Whilst Optima refers to an acknowledged ambiguity by reference to the internal note of the Defendants of 3 May 2023, when the matter was considered further, there was in fact no ambiguity at all or in the mind of an RWIND tenderer. It was this that led to the

words being used in paragraph 4.5 of the 22 June 2023 letter were that "*there was no discretion around disqualification if that requirement was breached"*.

164. It did not follow from those words, that no discretion was exercised. The same paragraph of the letter identified the discretion, referring expressly to Clause 6.9.2. In context, this was identifying that there was an alternative basis for disqualifying, which itself is a contractual power rather than an obligation to disqualify. The letter does not confine itself to the absence of discretion but considers whether there would be a breach of obligations of transparency and equality of treatment by giving a second chance, which is an ability to a tenderer to change the bid. The answer is clearly that it would involve breaches of those obligations. Properly read, the letter at paragraphs 4.5 and 4.6 of the letter dated 22 June 2023 indicates that alternative options to exclusion were considered but rejected.

165. Further and in any event, the evidence of Mr Birch is that the Defendants considered the other options and decided that there were reasons for not adopting them, namely the infringements of the transparency and equality of treatment principles.

166. The suggestion of Optima is that since the Defendants decided to exclude the bids and formed a view that the reference to discounting the bids meant in context that they were compelled to reject the bids, then the other options were not considered. Having seen the documents in which the options were set out and having heard the evidence on behalf of the Defendants, I am satisfied that other options were considered and ruled out. In other words, there was an exercise of discretion preceding the disqualification.

167. If it had been the case that there was simply a construction that there was a contractual obligation to disqualify, then the other options would not have been identified or considered other than in order to assess the meaning of the word "discounted". The evidence is clear that each of the options were considered and rejected. The documents referred to above show that the Defendants did identify and evaluate the options available to them in the face of the non-compliance on pricing on the part of Optima. The internal document of 3 May 2023 referred to the other options. Further, this was confirmed in Birch WS at [37-38]. The decision was to exclude the bid.

168. In my judgment, the Defendants took into account reasons for rejecting other options e.g. that (a) to allow other bidders to resubmit their bids would be unfair where there had been a compliant bidder, namely PAM; (b) to take out of the consideration the non-compliant parts of the bids would skew the evaluation since not all of the required services would have been priced; (c) the reduction of the prices to the Framework Maximum Prices or some other sum would not be right because there was no mechanism in the ITT to do this. This involved an overall evaluation in which not only was the disqualification of Optima regarded as the right decision, but the other options were rejected.

169. I am satisfied that the Defendants considered the other options including but not limited to whether or not to seek clarification, whether or not to reduce the unit prices to the maximum prices or to some other price or to have another round of tendering. They also considered whether or not to disqualify at all. In my judgment, which is evidenced by contemporaneous documents, and in any event, I accept the evidence of

the Defendants' witnesses that there was a consideration of how to exercise the discretion.

170. DWP took into account all relevant factors, including that the indicative volumes for two of the service line items were zero and the significance of the non-compliances to the pricing evaluation. It considered whether alternative options were available, and arrived at the view that they were not for the reasons set out above. It considered that Optima was responsible for the pricing errors. In this regard, Optima's pricing had been consistently non-compliant throughout the Procurement. It went on to complete the Revised Pricing Schedule without adequate quality control checks or processes.

(b) Ability to test the reasons of the Defendants for refusing the bid of Optima

171. I reject the case of Optima to the effect that there was a failure to evidence the decision in writing in a way that it could be tested whether the discretion was exercised. Its case is that the extent of the redaction for legal professional privilege is that it was not possible to identify the basis for accepting one option and rejecting the others.

172. I have considered the submissions of Optima and the Defendants about whether there were adequate reasons given by the Defendants for Optima to be able to evaluate the basis for the rejection of the bids. A relevant question is whether the effect of the redaction was to prevent the Court and Optima from understanding the considerations taken into account.

173. In my judgment, there was adequate evidence to evaluate the basis for the rejection of the bids. First, it is possible to identify the options by reference to the contemporaneous documents. Second, it is possible to see within the documents the outline reasons for rejecting the options. Third, there was oral evidence of Mr Birch, supplementing the documents but consistent with them, to explain why the Defendants chose to exclude the bid of Optima. For the reasons given by the Defendants, that evidence is admissible, and it is consistent with the contemporaneous documents disclosed. The reasons given by the Defendants make Optima aware of the reasons for refusing the bid and enable Optima to defend its rights and to enable the Court to review the position.

174. Having had the opportunity to review the documents as a whole without the redacted parts which have not been seen, the Court is satisfied that the redactions for legal advice privilege do not prevent a broad understanding of why the other options were not exercised. The Court takes into account the fact that there was an entitlement to claim legal professional privilege. No inference is to be drawn against the Defendants from the fact that they did not waive legal professional privilege. Nor is there an inference that the true reasons for the decision taken must or may have been in the redacted passages. In other words, it does not hinder the Defendants that they have redacted for privilege, but nor does it help them, and it is for the Defendants to explain the basis for their excluding Optima.

175. The Court adopts the reasoning of Fraser J in *Energysolutions EU Ltd v Nuclear Decommissioning Authority* [2016] EWHC 1988 (TCC) at [231-232] who said:

> *"231. It is therefore not the case that the obligation of transparency, and the principle of legal professional privilege, conflict. Rather it is that the two principals have to be considered consistently with each other. In my judgment, compliance by the NDA with its obligations of transparency has to be considered consistently with the fundamental right the NDA has to keep the contents of the Burges Salmon Review privileged, such that neither Energy Solutions nor the court are entitled to consider its contents.*
>
> *232. The NDA could, had it wished, have waived privilege in that review and the other documents, but chose not to do so, as Akenhead J found was its fundamental right. The fact that the NDA did not do so does not fall to be weighed by the court at all. Accordingly, no adverse inferences can be drawn from the absence of any detail of that review, and to be entirely fair to Energy Solutions, the court is not invited to do so."*

176. The basis on which the Defendants acted is apparent from the letters of 22 June 2023 and 29 June 2023 from the Defendants' lawyers to Optima's lawyers. It is also apparent from the other contemporaneous documents including the internal documents preceding the notification as well as from the evidence of Mr Birch referred to above.

177. Accordingly, there is, therefore, nothing in Optima's complaint about a lack of reasoning for DWP's Decision. DWP accepts that in the documents prepared for the Commercial Assurance Board, the options which DWP had considered up to that point are not set out on the face of those documents. However, the evidence of both Mr Birch and Mr McPherson is clear that alternative options were considered. That formed part of the basis for the recommendation to the Commercial Assurance Board to award the contract to PAM, and the final ministerial approval.

178. The slides prepared for the CAB meeting on 5 May 2023 refer to alternative options being considered, indicating that they would also have been discussed at the meeting. Mr Birch's evidence was that prior to the CAB meeting, the options available were discussed with wider stakeholders, including finance and the operational division of DWP: "*it was not a case of one, two or three people putting their heads together to come up with a decision*" [D2/227/10-12].

179. Prior to ministerial approval being granted, Mr Birch briefed DWP's Chief Commercial Officer (Matthew Bradley) on the options available . Mr Bradley in turn then briefed the Minister before ministerial approval was granted.

180. The Court is not restricted in what it can consider to the briefing and the decision in order to understand the basis of the decision. This is apparent from the decision in

Stagecoach, where there had been extensive redaction of the briefing documents for legal professional privilege. Stuart-Smith J at [74] said the following:

> *"…While I do not suggest that it is or need be the norm for the actual decision-maker to attend court to give evidence about their reasons and reasoning, I do not accept that the combination of a briefing plus a decision will always be sufficient evidence to substantiate what were the reasons in a particular case. Nor do I accept that the briefing and decision are the only sources of evidence that may be available and admissible. The questions of inference and proof are to be resolved on the basis of all relevant and admissible evidence."*

181. In this regard, the submissions of the Defendants are accepted. There has been sufficient evidence on which to identify and evaluate the reasons for the decision to disqualify.

(c) No obvious mistake or ambiguity

182. There were issues in the case is whether there was a mistake at all or an ambiguity, and if so, what its nature was, and whether it ought to have been clarified and corrected. There was no agreement between the parties on any of these points.

183. A central issue in the instant case has been what is an ambiguity and what is an obvious mistake. Ms Sloane KC emphasised that this was not an exercise in contractual or statutory construction, but the exercise referred to above of working out what meaning or meanings may have been understood by an RWIND tenderer. Nevertheless, it was obvious that there had been some mistake in this case because there was no reason for Optima to have exceeded a maximum line price.

184. Mr Suterwalla said that if there had been a mistake (something not accepted by the Defendants), then the mistake was not obvious because it was not known what sums were intended instead of the non-compliant sums. Mr Suterwalla submitted that it could have meant anything between nothing and the maximum line sum. It was not apparent from something within the bid what it was in that range. The line sum had in each instance been filled in, and it was not in each case the maximum sum. Nor was it apparent from other documents or other information within the possession of DWP such as to obviate any need for clarification. In the circumstances of this case, the exercise of clarification would not have been simple and with that came an obvious difficulty of failing in the duties of equality and transparency as the awarding authority drilled down into the inner workings of the tenderer.

185. Ms Sloane KC submitted that it was more nuanced than that. It all depended on what was the question, and the ease of clarification depended on how the question was asked. The question might be simply *"did you make an error in inserting a figure over the maximum sum?"* If the answer was yes, one need do no more and then insert the maximum sum. There was an inherent logic in supposing that that was the

mistake because the maximum sum was the closest permissible sum to the sum inserted in error. That would suit the other tenderers because there would be no greater advantage to the errant tenderer beyond the insertion of the maximum sum.

186. This was countered by the argument of Mr Suterwalla. There was no reason to infer that the error was not to insert the maximum sum. That is the way that it had been suggested to be the case by Optima, but there was no way of knowing what it ought to have been. It could have been anything in a scale from nought to the maximum line sum. Without evidence elsewhere in the bid or otherwise within the knowledge of DWP, there was no way of establishing easily what the bid ought to have been. It therefore followed that this was no case for seeking clarification because of the likely danger of infringing the principles of equality of treatment and transparency.

187. The contrary was suggested in the *Harrow* case by Mr Clarke, counsel for the tenderer, namely that it might be easy to verify the error by reference to a contemporaneous document. At [34], this submission was rejected because (a) it was not an obvious error if it required considering other documents, and in any event, (b) it involved a change of a bid after the bids had closed. As HH Judge Waksman QC said in *Harrow*: *"…it is a change in the terms of the bid. The bid clearly said one thing and now it says something different. The fact that the bidder did not intend it to be thus is irrelevant in my view."*

188. I do not accept the approach of Optima. It is far too nuanced to ask a question which might have as its answer that the maximum sum was intended. Another way of putting the objection to Optima's suggested approach, said to be a practical suggestion, is that the question is a leading self-serving question rather than one intended to get to the truth of what actually occurred. Mr Suterwalla commended what he called a common-sense approach. That was that the mistake was not simply inserting a higher sum than the maximum line sum but was a mistake of inserting a higher sum than intended in circumstances where that which was intended was not known to the awarding authority. The inquiry does not end at the figure being assumed to be the maximum line sum, and there was no reason to make that assumption in this case.

189. This is an important distinction from the one-sided question posed by Optima, namely was it in excess of the maximum? This point is important because if the figure is to be corrected, it can be said that there was no reason why the tenderer should obtain what might be a figure above that which was intended. By ignoring the second part of the mistake, which is to say not defining and recording what was actually intended, the tenderer might be getting a sum in excess of that which was the truly intended figure. That would or could be more advantageous to the tenderer in terms of providing them with a higher sum than the intended sum. It would also be changing the bid by ending up with a higher sum than the intended sum.

190. Unlike *Antwerpse*, this was not a case where missing pricing information was already contained in Optima's bid. Although Optima now says that for these line items it intended to bid its Framework Maximum Prices, it accepts that this is not something DWP could have known from the tender as submitted. That this was the case is especially so from the fact that for other line items, Optima had sometimes bid at the level of its Framework Maximum Prices and sometimes at a level considerably below

them. It therefore was not obvious to DWP what the erroneous prices should in fact have been or that these prices were inherent in the Revised Pricing Schedule.

191. That it was not apparent what prices Optima had intended to bid instead was confirmed in the evidence as follows:

(i) Mrs Newey confirmed that Optima was entitled to put forward any rate for OH58, OH229 and OH230 between zero and the Framework Maximum Price [D2/184/21];

(ii) The price for OH58 was below the Framework Maximum Price in the third schedule in October 2022 [D2/185/13];

(iii) Mrs Newey accepted that at the point Optima submitted its bid on OH58, OH229 and OH230, DWP could not have known whether, had Optima not exceeded Framework Maximum Prices, its intention was to submit a price below the Framework Maximum Price [D2/188/923].

(iv) There was no expectation that in the event that the maximum price was exceeded that they would be adjusted downwards [D2/140/7-17] and Mrs Newey accepted that she had no experience of this being undertaken in other procurements [D2/141/5-D2/142/12].

192. It follows that whilst it appears to have been a mistake to have bid above the maximum, there was no obvious mistake where the intended price was not within the knowledge of the Defendants. Nor was it a mistake which could be easily resolved by reference to documents within the tender itself or documents within the possession of the Defendants. The mistake could not be resolved by an assumption that the maximum line sum had been intended, when there was no basis to infer that this was the case. It therefore followed that any question would have to be one which inquired of the actual intended sum. On the authorities, that would be objectionable because it opened up a change of bid or at least the opportunity for a change of bid. That infringed the principles of equality of treatment and of transparency or gave rise to a serious risk of infringing these principles.

193. Ms Sloane KC submitted in the alternative to there being an obvious mistake that there was an ambiguity because at the same time Optima was certifying that it was complying with the requirements, but that it was providing prices which were not in accordance with the requirements. In my judgment, that does not lead to an ambiguity. It leads to a conclusion that Optima failed to provide a compliant bid and to make an accurate statement that it was providing a compliant bid. If, contrary to the foregoing, there was an ambiguity, the same objections exist about seeking to find out what was intended as set out in the last two sentences of paragraph 191 above.

(d) Failure to clarify or to resubmit to the tenderers

194. Optima claims that instead of disqualifying Optima, DWP ought to have given Optima a chance to clarify and/or resubmit their tender. That would then be the time to decide whether the process of clarification had not been simple.

195. In circumstances where DWP had received a compliant bid from PAM, that was potentially a breach of the principle of equal treatment, as it could only have benefited Optima and the other non-compliant tenderers to the detriment of PAM. Further, and in any event, unless the other non-compliant tenderers were also given the opportunity to revise their bids, for this reason also, it could have been a breach of the principle of equality of treatment. The failure or refusal to seek the clarification is supported by the above-mentioned decision of *Adia Interim SA v Commission* where the awarding authority was not required to seek clarification because the underlying reasons for the error were unclear and adjusting it might have led to a real change in its price, in breach of the principle of equal treatment.

196. Nor could DWP have reduced the relevant line items as Optima now suggests it should have done. That is because there was no way of knowing what the true price was between nought and the maximum service line price. The only way in which that could have been done would be by inviting Optima to bid again at least in respect of those items which had exceeded the maximum line prices, thereby opening the door to other tenderers to bid again, and to the detriment of PAM as a compliant bidder. It would have opened up the change of a bid by providing a price not previously provided. No clarification was sought because DWP took the view that it would be wrong to give Optima the opportunity to change the bid or to evaluate the bid on a price other than that which was submitted, either of which would be wrong: see the quotation from the letter of 22 June 2023 at para. 149 above.

197. Likewise, the effect of opening up matters in this way might require an approach to another non-compliant bidder. That would have opened up the real possibility of the other non-compliant bidder changing its bid. Here too, the change of bid would have been by providing a new bid in the sense of one which had not been made before or of changing its bid to a different price not previously intended.

(e) Changing the bid

198. I also reject the submission of Optima that there was nothing wrong per se in a tenderer changing the bid provided that it did not infringe equality of treatment and transparency. The case law is that it generally does lead to an infringement if the clarification is about the merits of the tender such as price or quality features on which tenders are compared because prior to the clarification, there was no effective bid for the item in question. After the clarification, there is for the first time a potentially effective bid for the item in question to the detriment of the compliant tenderer at least. Further, there is the real danger that the price provided might be a change of bid in a different sense, namely departing from what had been originally intended in order to give the tenderer the best opportunity to win the bid.

199. It is apparent from the judgment in *Harrow,* and from many of the cases cited that HH Judge Waksman QC (as he then was) was applying established principles in regarding a change of bid as something inimical to the principles of equality of treatment and

transparency. By way of example only, this appeared from the language used by HH Judge Purle QC quoted in *JR Jones v Legal Service Commission* above at [67] of giving rise "*to the risk of tenderers having second thoughts, and portraying their original thoughts as erroneously recorded when there was in truth a change of position."* It was described by Blake J quoted in *Hoole & Co v Legal Services Commission* above at [30] of affording "*an individual applicant an opportunity to amend the bid and improve its prospects of success in the competition after the submission date had passed."*

200. In my judgment, on the facts of this case, this was not one, where to use and apply the words of HH Judge Waksman QC, there was an ambiguity or obvious error which probably had a simple explanation and could be easily resolved. Contrary to the submission on behalf of Optima, it was not an ambiguity that it conflicted with the maximum sum by exceeding it. The bid was clear, and it involved an unambiguous non-compliance. To the extent that it was an error, it was not obvious in the sense that it was known what it ought to have been based on other parts of the tender or other documents which the awarding authority had. It was only if it was obvious in that sense that the matter could be easily resolved by clarification. DWP was entitled to conclude that clarification was not possible or likely in this case without an infringement of the principles of equality of treatment or transparency. That was a judgment which the awarding authority is entitled to make. Contrary to the submission on behalf of Optima, there is not an obligation to seek the clarification and then appraise at that stage whether the clarification had been easy. This itself would have involved dangers of infringement of the principles of equality of treatment and transparency.

(f) The responsibility for the deficiencies in the bidding process was that of Optima and not the Defendants

201. I also accept the submission of the Defendants that the failure to make a compliant bid was that of Optima. Likewise, I accept the further submission of the Defendants that they were not responsible for the deficiencies in the bidding process. The attempt to say that the Defendants caused or contributed to any failure of the process is misconceived. Mrs Newey accepted that the errors of Optima were not caused or contributed to by the Defendants [D2/121/4-5]. It therefore follows that there is no reason to pray this in aid in that Optima alone was responsible for the defects in and the non-compliant nature of its bid. If the contrary had been the case, this would have been relevant to waive a non-compliance or to exercise a discretion not to disqualify.

202. The evidence that Optima was responsible for errors in completing their pricing schedules was evident as follows:

(i) It was accepted that Optima would deploy the appropriate level of resource felt necessary to support a procurement bid [D2/116/21-25]. Mr Dunwoodie did two reviews of the rates that went into the First Pricing Schedule [D2/131/22-25], although the Court has very limited evidence as to the nature of those reviews. He was the only one who did these checks [D2/132/17-19].

(ii) There were errors in Optima's First Pricing Schedule. Mrs Newey accepted that there were a number of errors (OH12, OH22, OH23, OH84, OH85, OH86 and OH87) in the first pricing schedule [D2/149/17] [D2/150/1-21] [D2/150/12]. Mrs Newey did not believe that a check had been undertaken at the point of the Second Pricing Schedule being submitted to see if prices exceeded Framework Maximum Prices [D2/156/2-3];

(iii) Mrs Newey believed there would have been such a check at the point of the Third Pricing Schedule being submitted, but it was difficult to know what Optima exactly "*thought and did*" [D2/156/9] and she could not "*answer definitely*" on Mr Dunwoodie's behalf [D2/156/22-24];

(iv) After 1 February 2023, and in respect of the final Revised Pricing Schedule, it was Ms Newey's evidence that she did not know for certain whether Mr Dunwoodie had carried out a check to ensure that individual service lines did not exceed Framework Maximum Prices, but it was her belief that he had [D2/160/2-6];

(v) As a result of their acknowledged errors in this Procurement, Optima conducted a 'lessons learned' review, following which a second person in their commercial team now checks bid prices against Framework Maximum Prices prior to bid submissions [D2/133-134/21-4].

203. Likewise, the evidence that the Defendants were not responsible for pricing non-compliances was evident from the following:

(i) The RWIND tenderer would have understood from the communication to bidders sent on 24 February 2023 that the Revised Pricing Schedule would include new/revised service delivery methods. Mrs Newey accepted there were lots of changes between this Schedule and the previous template [D2/181/23];

(ii) Mrs Newey's position is that on receipt of the new Schedule she believed that she and Mr Dunwoodie went through each of the service lines [D2/173/15-23] individually [D2/175/20-25], and they looked at the Schedule "*afresh*" [D2/182/16]. Mr Dunwoodie would have been aware of the changes in the Schedule [D2/180/6]. Optima was aware of all the changes in the Revised Pricing Schedule [D2/180/18].

(iii) Optima's claim that DWP did not alert it to all the changes in the Revised Pricing Schedule is therefore irrelevant where its positive evidence to the Court was that it in fact went through each of the service lines in the Revised Pricing Schedule before completing it.

204. The related submission of Optima was to the effect that the Defendants were at fault by imposing conditions which were so onerous that it was not possible reasonably to make a compliant bid. The scope for a mistake was evidenced by the fact that (a) all of the tenders save for the compliant bid of PAM made mistakes, (b) even whilst

checking what had occurred, the Defendants did not notice a further instance of non-compliance in addition to the identified instances of non-compliance, (c) the mistakes of Optima occurred despite having at least four persons checking the bids. As was stated by McCloskey J in the case of *William Clinton* above referred to the standards applied being terrestrial and not celestial. That is a useful reminder that the standards required should be capable of application, and not restricted to what was unachievable by ordinary, competent potential contractors.

205. I have considered this submission in the context of the evidence as a whole. I make the following findings, namely:

(i) The requirements were not complex, or not as a complex as that suggested by Mrs Newey in her evidence. At an early stage in her evidence, Mrs Newey said that the CCS pricing framework was *"extremely complex as was the DWP pricing schedules…So there is a high probability of errors…"* [D2//4/119]. They were readily applicable, but it was a long and tedious process, requiring a safe method and rigorous checking.

(ii) It is evident that the system of Optima was inadequate, as they embarked upon a copy and paste method, which was clearly unsatisfactory.

(iii) There was insufficient attention to checking. Despite calling evidence, there was nobody called by Optima who proved that the standard was unrealistically high.

(iv) The evidence of Mrs Newey realistically recognised that the failure in compliance was due to human error. In the context of compliance having been spelt out so clearly, it was necessary for a more rigorous system to have been adopted.

(v) There was no reason why, like PAM, Optima could not have achieved a compliant bid. PAM's bid proved that a compliant bid was possible.

(vi) There is a differentiation between the awarding authority checking the accuracy and compliance of the bids and the bidder themselves ensuring that their own bid was accurate and compliant. It is not the same process, and the ultimate responsibility is that of the tenderer as the tender documentation indicated.

(vii) The point that the requirements were unrealistic or celestial is not accepted. This is especially so following the changes of the Revised Pricing Schedule, and the fact that PAM managed to provide a compliant bid is evidence that the standards were realistic and terrestrial.

(g) Consideration of the small size of the over-pricing, prejudice to other bidders and proportionality

206. There was also consideration of proportionality including the extent of the over-pricing and the fact that it was minor relative to the size of the bid as a whole. This was taken into account, although the non-compliances might have been greater. The letter of 29 June 2023 stated that the £600 figure was on the basis that the Framework

Maximum Sum had been intended, but that was not the correct sum. There was no way of knowing what the intended offer price would have been between nothing and the maximum line sum. Further, in respect of the two cases where there were no quantities indicated and no pricing inserted, there could in fact be a call off subsequently, and so that too could be relevant to the impact of the excessive price. In any event, in the letter dated 29 June 2023, the Defendants' legal advisers referred to the "slippery slope" point quoted above as to how and when the line would be drawn between one non-compliant bid and 4, 6 or 10, giving rise to a breach (or at least an argument about breach) of the obligation to treat all bidders equally.

207. Related to this is the submission that there would be no prejudice to any other bidder because the prices of Optima would be the cheapest even if maximum sums were adopted on the non-compliant lines. On this basis, the non-compliance would be said to have no real impact or that it would be trivial in the context of the bid as a whole. This raises the question of law as to whether prejudice has to be shown in this sense. That submission does not hold good in the light of the analysis of the law at paragraphs 103 above and following. In particular, there are the citations of law above including:

(1) In these cases, actual prejudice need not be shown: the principles of equal treatment and transparency give rise to other considerations: see *Harrow* at para. 111 above.

(2) A waiver of a mandatory term, even if the non-compliance was trivial or having no real impact in a matter of content and not form, would be likely to infringe these principles: see *Leadbitter* at para. 108 above, *Azam* at para. 112 above and *Energysolutions* and especially at [890] quoted at para. 113 above. *Leadbitter*, where the bid was 26 minutes late, and despite notification of a problem before the deadline, is a case in point.

(3) Even if it is not mandatory, but discretionary, there is generally no requirement to accept a late bid for the same reasons: see *Leadbitter* at para.109 above.

(4) Whilst many of the cases are about late bids, for the reasons given in *Harrow* at [39], there is usually the same problem about non-compliance and lateness, namely conforming with the principle of equal treatment to tenderers: see the footnote to para. 110 above.

208. Applying the law as set out above, there was a provision for the disqualification of the bid as a whole as a result of a tenderer exceeding maximum sums: see Attachment 1 para. 2.2. The particular mistakes did not relate to a matter of form, but to a matter of substance on which the bid would be judged. In those circumstances, the issue of whether the result would or might have been different if a correct bid had been submitted does not arise for consideration. The Defendants were concerned in line with the *Leadbitter* and *Azam* cases that a waiver of such terms carries the very risks of unequal treatment, discrimination and a lack of transparency which the contracting authority is required to avoid.

209. In the alternative if there was only a discretion to exclude, there were nonetheless powerful reasons still to exclude. There was no reason to require the Defendants to consider how the mistake arose or what was the intended amount of the bid when that could not be ascertained from the bid or from the information available to the Defendants. That again would be opening up the risks of unequal treatment, discrimination and lack of transparency.

210. Further, when considering the matter on the basis of a discretion to exclude, similar considerations applied. The Defendants were entitled to treat the possibility of allowing the breach to be corrected by amending the bid as as giving rise to a breach or potential breach of principles of equal treatment and transparency. There was nothing exceptional in this case to justify allowing a tenderer to change their bid after the bids had closed. It would amount to a change of a bid.

211. As set out above, there is no difference at least in this instance between a case of a non-compliant bid and a late bid for the reasons set out above. In both cases, irrespective of whether actual prejudice can be proven, the governing principles involve a balance between the interests of individual tenderers and the tenderers collectively within the process to which they are subject. To prefer a late or non-compliant tenderer to a prompt and compliant tenderer is to infringe those principles and actually or potentially to infringe the principles of equal treatment and transparency.

212. The instant breach is a breach as to content rather than as to form because it is a part of the pricing. In the judgment in *Energysolutions*, in such a case, the question of triviality or whether it had a real impact does not arise. Even where it did, waiver for non-compliance was only available in the most exceptional of cases. The usual such case is one where the awarding authority caused or contributed the non-compliance, but for the reasons given above, this was not such a case. Even if the matter is to be considered on the basis that disqualification is discretionary rather than mandatory, the conclusion is to the same effect. The Defendants were entitled to conclude that they should not revert to Optima to give them the opportunity to deal with their own mistakes and thereby change the bid.

(h) A need to conclude the process

213. There was another problem for DWP. This bidding procurement had been beset by problems, such that more than a year after the first tender, the matter had not been resolved. Time was going by, and an important factor by this point was finality. That was a factor in favour of not allowing a further tendering process.

(i) The Defendants took into account relevant considerations

214. DWP did consider whether to exercise its discretion to exclude Optima from the Procurement. A number of alternative options were considered and rejected. DWP took into account all relevant factors, including that the indicative volumes for two of the service line items were zero and the significance of the non-compliances to the

pricing evaluation was minimal. It considered whether alternative options were available, and arrived at the view that they were not for the reasons set out above. It considered that Optima was responsible for the pricing errors. In this regard, Optima's pricing had been consistently non-compliant throughout the Procurement. It went on to complete the Revised Pricing Schedule without adequate quality control checks or processes.

215. In my judgment, the Defendants took into account all relevant considerations. They were entitled to consider that it was not a safe option to deal with the matter between Optima and the Defendants without involving the other tenderers. Once the matter was proceeding with the other tenderers, there was a serious risk of litigation either by the compliant tenderer PAM or by another non-compliant tenderer insisting on equality of treatment with Optima. Even if the price of disqualifying Optima was severe given its more favourable bid to the other tenderers, the uncertainty caused by such challenges was very unsettling. It was not unreasonable or arbitrary to have a heavy emphasis on finality of the bid by allowing the only compliant bidder to finalise the contract, particularly when there was a need to have closure. Nor was it an error or an obvious error on the part of the DWP to exercise its discretion by closing the deal with the only compliant tenderer, namely PAM.

VII Did the Defendants act irrationally or arbitrarily or disproportionately or unreasonably in rejecting the bid of Optima?

216. As noted above and in the citations of decisions of Coulson J as he then was in *Woods Building Services v Milton Keynes Council* and in *BY Development Ltd and others v Covent Garden Market Authority*, the court's function is not substituting its own view for the awarding authority or undertaking the tender evaluation again. It is considering whether an error has clearly been made. In my judgment, the Defendants did not act irrationally or arbitrarily or unreasonably or disproportionately in rejecting the bid of Optima. DWP was entitled to reach the views which it did. In particular, it was entitled to reach the following views, namely:

(i) The tender was clear and transparent for the reasons set out above.

(ii) There was a danger of infringement of equality of treatment to have allowed Optima to change its bid in circumstances where PAM had made a compliant bid.

(iii) This was not a case where it was obvious what the intended bid of Optima was. In particular, it was not obvious that the maximum line price was intended, and it could have been lower.

(iv) In particular, it was not obvious that it would be a quick and easily verifiable process to adopt what the true intention of Optima had been as regards the non-compliant parts of its bids.

(v) There was a danger that allowing Optima to change from a non-compliant bid to a compliant bid was in breach of the requirement that a party should not be

allowed to change its bid or to act in a manner which made it likely that it would or might change its bid.

(vi) If a change could be allowed in respect of Optima, then equality of treatment would have required that the other non-compliant bidder or bidders be allowed also to reconsider their bids in the same manner and/or that PAM be allowed to reconsider their bid in the interests of equality of treatment.

(vii) This would have added to the likelihood that this would be interpreted as a change in the bids or acting in a manner which made it likely that they would or might change their bids. This would exacerbate the concerns about the need for equality of treatment.

217. The Defendants were entitled to form the view, which they did, that the actions on their part had been clear and transparent, and that they had not caused any ambiguity or error. On the contrary, any fault on the part of the non-compliant tender was that of Optima who would have been alive to the risk of disqualification.

218. In considering rationality, arbitrariness, unreasonableness and proportionality, the same conclusion applies whichever way the matter is analysed. It can be analysed on the basis that not exceeding the maximum line prices was a condition of the bid and that rejecting a non-compliant tender was mandated under the terms of the tender. For the reasons set out above, that was a term of the tender and a RWIND tenderer would regard it as such. The observance of the terms of the tender were intended to provide what was described as "*a proper balance between the interests of individual tenderers and the tenderers collectively within the process to which they are subject"*. Whilst there could be a case for waiver or departure in an exceptional case, and the paradigm that is given is one where the awarding authority caused or contributed to the non-compliance, this was not such a case. The Defendants were entitled as they did to regard any waiver as giving rise to a risk of a challenge and to amount to a breach of the principles of equal treatment and transparency.

219. Further, insofar as the Defendants acted in the exercise of a discretion either in refusing to waive or under Clause 6.9.2, the same applies. The Defendants were entitled to take the view that the importance of compliance especially in connection with not exceeding the maximum price was clear and transparent. It was not irrational, arbitrary or unreasonable for the Defendants to be concerned about being in breach of the principles of equal treatment and transparency and the real risk of challenge. The way in which they considered and rejected other options was also not irrational, arbitrary or unreasonable. For the reasons set out above, the decision made was not disproportionate and one which the Defendants were entitled to make in the exercise of their discretion.

VIII Disposal and final remarks

220. In all the circumstances, Optima's challenge on all grounds must fail, and the claim must be dismissed.

221. This is a case which has been presented with conspicuous ability both in writing and orally. It is a case where Counsel have demonstrated their expertise in answering every question posed of them by the Court in a way which was always helpful and illuminating. The Court thanks all Counsel and their teams including the solicitors for the Claimants who have prepared bundles which have been exemplary.

222. The parties are asked to seek to agree an order and to provide to the Court either an agreed order, or to the extent that matters are not agreed, a statement of what is and what is not agreed.