

**THE HIGH COURT**

**COMMERCIAL**

**[2024] IEHC 259**

**[2023 444 JR]**

**IN THE MATTER OF THE REVIEW OF THE AWARD OF A PUBLIC CONTRACT  
PURSUANT TO THE EUROPEAN COMMUNITIES (PUBLIC AUTHORITIES  
CONTRACTS) (REVIEW PROCEDURES) REGULATIONS 2010 (AS AMENDED)**

**AND**

**ORDER 84 A OF THE RULES OF THE SUPERIOR COURTS (AS AMENDED)**

**BETWEEN**

**WHITE MOUNTAIN QUARRIES LIMITED**

**T/A BREEDON**

**APPLICANT**

**AND**

**MAYO COUNTY COUNCIL**

**RESPONDENT**

**JUDGMENT of Mr. Justice Michael Quinn delivered on the 1<sup>st</sup> day of March 2024**

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**Redactions**

At the hearing of this application the court was informed that evidence adduced included information and documents provided through a confidential discovery process and in respect of which the parties are subject to obligations of confidentiality. The unredacted judgment delivered to the parties in advance of publication contains such confidential information. On the application of the parties and having regard to the public interest in the effectiveness and integrity of public contract award procedures (see *Varec SA v Etat Belge* Case C-450/06) monetary amounts and certain percentages have been redacted. Additional redaction was sought by the preferred tenderer, the joint venture of BAM Civil Limited and Killaree Lighting Services Limited, a non-party. This application was refused for reasons stated in the Addendum.

## **Introduction**

1. The Respondent is the lead authority on behalf of itself and six other county councils for the Public Lighting Energy Efficiency Project (“PLEEP”) for the North West region (the “Project”). The authorities for this region are the county councils of Mayo, Cavan, Donegal, Galway, Leitrim, Roscommon and Sligo.
2. The Project is to improve energy efficiency and cost effectiveness of the public lighting system by replacing existing public lighting with LEDs (light emitting diodes) across the seven counties of the North West region. The requirement for the Project is part of a public sector National Energy Efficiency Action Plan.
3. The Project will involve works on functional, heritage and contemporary lighting installations across the public lighting infrastructure. It will include luminaires on municipal underground and overground cable installations, ESB network underground and overhead cable installations, wall mounted luminaires, high mast luminaires, lighting on bridges, in housing complexes, parks, villages and lighting along walkways, cycleways and canals. It includes also luminaires on national roads, funded by Transport Infrastructure Ireland.
4. Across the seven counties, it is intended that works will be scheduled in each of 26 municipal districts. The Project envisages a condition survey of 73,948 public streetlights, 45,728 of which are expected to need to be retrofitted. It includes both decorative and functional streetlights.
5. The appointed contractor will be responsible for all of the following: -
  - Initial inspection of assets;
  - Asset condition survey for new and existing LEDs;
  - Design, supply, installation and testing of LED retrofit for luminaires mounted on local authority and ESB columns;

- Safe disposal and recycling of redundant lanterns and redundant ancillary supports and equipment;
- Replacement of defective network columns;
- Replacement of defective column doors;
- Replacement of defective brackets;
- Addition of new mini pillars and replacement of existing micro pillars;
- Addition of ESB cutouts;
- Replacement of decorative streetlights;
- Electrical and circuitry works;
- Associated civil works;
- Traffic management;
- Project supervision for both the design and construction stage.

**6.** A public tender process was announced for the Project, in July 2022. It was then stated that its estimated total value, excluding VAT, would be €23.5 million.

**7.** Following the tender process, the Respondent decided (the “Decision”) to award the contract for the Project to a consortium comprising BAM Civil Limited and Killaree Lighting Services Limited. I shall refer to this party as the “successful tenderer”, “the preferred tenderer” or “BAM/KLS”.

**8.** The Applicant is incorporated in Co. Antrim. It says that it is currently the largest public lighting contractor in Northern Ireland and has significant experience in delivering public lighting contracts. The Applicant was ranked third in the evaluation of tenders by the Respondent.

**9.** The Applicant seeks an order setting aside the decision of the Respondent to award the contract to BAM/KLS.

**10.** The Applicant seeks declarations that the Decision was made in breach of Regulations 18 and 69 of SI no. 284 of 2016, European Union (Award of Public Authority Contracts) Regulations 2016 (the “2016 Regulations”), and that it was unlawful, *ultra vires*, invalid and of no legal effect.

**11.** The principal ground relied on by the Applicant is that the Respondent failed to recognise and/or consider that the successful tenderer’s tender appeared abnormally low and failed to follow the procedures required by Regulation 69 before making a decision to award the contract, namely to perform an inquiry by requiring and obtaining explanations of the price or cost proposed in the tender.

### **Statement of Grounds**

**12.** In the original Statement of Grounds, delivered on 3 May 2023, the Applicant pleads the following: -

- The Respondent failed to determine that the successful tenderer’s tender appeared to be abnormally low;
- That the Respondent applied the wrong test in determining whether or not the successful tenderer’s tender appeared abnormally low and/or applied the test incorrectly;
- That the Respondent failed in its obligation to require the successful tenderer to explain the price and costs in its tender and failed to carry out any or any adequate investigation into the price or costs proposed;
- That the Respondent wrongfully accepted an abnormally low tender;
- That the Respondent failed to reject the successful tenderer’s tender on the grounds that it is abnormally low because it does not comply with obligations referred to in Regulation 18 (4) of the 2016 Regulations (being obligations in

the fields of environmental, social and labour law - a ground elaborated on in a later amendment of the Statement of Grounds);

- That the Respondent failed to provide a statement of reasons as to why it did not consider the tender of the successful tenderer to be abnormally low;
- That the decision to award the contract was vitiated by manifest error.

13. The Applicant alleges that the Respondent failed to treat all tenders equally and without discrimination, failed to act transparently, and took into account irrelevant considerations. Other broad allegations are made by reference to general principles of EU community law.

**Amended Statement of Grounds: Minimum Turnover Requirement**

14. On 14 August 2023, the Applicant delivered an amended Statement of Grounds. By this amendment, it introduced a complaint that a consortium referred to as the “*Le Chéile Consortium*” (“Le Chéile”), which was ranked second in the competition, did not meet the minimum requirements as to turnover stipulated in the suitability assessment criteria for the tender. The Applicant alleged that the Respondent had failed to verify that the Le Chéile Consortium satisfied the minimum turnover requirement and, therefore, wrongly failed to eliminate the Le Chéile Consortium at the initial qualification stage.

15. Under the rules of the tender, each tenderer is required to demonstrate a minimum overall average annual turnover of €25 million excluding VAT for each of the last three financial years prior to the tender. Where a tender is submitted by a consortium, at least one of the consortium parties must have an overall average annual turnover of €15 million for each of the last three years, with each of the remaining parties having an overall average turnover of €5 million. The maximum number of parties in any consortium is three (“the Minimum Turnover Requirement”). The Applicant claimed that although the Le Chéile bid

was submitted as a consortium, only one of the consortium parties was identified as the intended contracting party. Because its turnover as evidenced did not exceed €25m it would fail this requirement.

**16.** In its Amended Statement of Opposition, the Respondent maintained its position that on a proper application of the Minimum Turnover Requirement it had not erred in its determination that the LC bid met the selection criteria.

**17.** On 13 October 2023, six weeks before the hearing, the Respondent announced that it had decided to concede the minimum turnover grounds. It stated:

*“...having taken the time to consider the matter carefully and having taken advice on the issue, it took the view that White Mountain’s plea [in relation to the Minimum Turnover Grounds] was well founded and likely to succeed at full hearing.”*

**18.** Le Chéile objected to this concession, stating that the documents submitted illustrate that all three members of the consortium would be obligors, and that between them they satisfied the turnover criteria. It applied for and was granted an order joining it as a notice party in these proceedings for the purpose of objecting to this ground. In fact, Le Chéile did not participate in the hearing of this application to defend the validity of the tender.

**19.** Independently of this question, Le Chéile had itself already commenced its own judicial review of the Decision, which was listed for hearing on the same days as this case. The court was informed before the commencement of the hearing that those proceedings had been withdrawn and the court is, therefore, only concerned on this application with the Applicant’s claim.

**20.** In submissions, the Respondent sought to limit the significance of this concession for the Applicant’s claim. However, its concession that it admitted Le Chéile to the competition even though it did not satisfy the Minimum Turnover Requirement has an important consequence for this court’s decision which is explained later.



### **Second Amended Statement of Grounds delivered 17 October 2023**

21. The Applicant delivered a Second Amended Statement of Grounds, after discovery had been made.

22. In this Second Amended Statement of Grounds, the Applicant introduced specific allegations to the effect that BAM KLS had tendered rates, in respect of staff and labour which were not in compliance with SI No. 703/2021 – Sectoral Employment Order (Electrical Contracting Sector) 2021, in respect of electrical roles, and SI No. 598/2021 – Sectoral Employment Order (Construction Sector) 2021 in respect of non-electrical roles.

23. The Applicant alleged that the Respondent was obliged pursuant to Regulation 69(5) of the 2016 Regulations to reject the successful tenderer’s tender in circumstances where it was abnormally low by reason of non-compliance with applicable labour law obligations.

### **Application for leave to deliver Third Amended Statement of Grounds**

24. At the hearing of these proceedings the Applicant sought leave to amend its Statement of Grounds for a third time. The proposed third amendment concerned a question of the interpretation of the Instructions to Tenderers (“ITT”). It sought to make an alternative claim that the ITT was not cast in sufficiently clear terms with the result that it did not enable all tenderers to interpret its terms in the same way, rendering it non-compliant with the requirements of procurement law and invalid. For reasons which appear later in this judgment, it was not necessary to decide this application to amend.

### **Grounds of opposition**

25. The Respondent makes a preliminary objection that the proceedings are statute barred. It asserts that the Applicant knew or ought to have known of the alleged infringements of the Regulations when it received a “Regret” letter on 16 March 2023. The proceedings were issued on 03 May 2023, 48 days later and, the Respondent submits, outside the 30-day time

period specified in Regulation 7(2) of the European Communities (Public Authorities) Contracts (Review Procedures) 2010 (SI No. 130/2010) (the ‘Remedies Regulations’) and/or O.84A, r.4 of the Rules of the Superior Courts and should therefore be dismissed *in limine*.

**26.** Apart from the Minimum Turnover Requirement ground, the Respondent contests all of the other grounds relied on by the Applicant. It submits the following.

**27.** Firstly, rates and prices submitted by the successful tenderer were not abnormally low.

**28.** Secondly, that in the course of commercial clarifications the Respondent sought from the successful tenderer verification of rates and explanations were provided which were taken into account in the evaluation.

**29.** Thirdly, that the Respondent was under no obligation pursuant to Regulation 69 to perform a further inquiry into the prices or costs submitted by the successful tenderer.

**30.** Fourthly, a tender is neither unlawful or improper if it has been submitted on the basis of prices which are strategically low, significantly low or even in certain cases below cost in order to gain competitive advantage in a commercial tender.

**31.** Fifthly, the evaluation of the tenders was performed in full compliance with the 2016 Regulations and the general principles including appropriate evaluation of the pricing submitted by the successful tenderer.

**32.** Sixthly, insofar as any rates were quoted by the successful tenderer which were below rates provided for in Sectoral Employment Orders (“SEO’s) the following points are made:

(a) as a matter of construction of the rules of the competition and the proposed contract these were not rates which would govern the performance of the contract or payments to be made thereunder, save that they may have a relevance to price adjustments resulting from “Compensation Events” during the currency of the contract;

(b) that the Respondent was entitled to have regard to the use by the preferred tenderer of so called “blended rates”. That the effect of any particularly low or even abnormally low rates for persons such as rates below SEOs is offset by high rates for other aspects of the tender, notably, those included for plant and equipment. It is submitted that the effects of blending of rates, and of other aspects of the tender, including an otherwise apparently high Fee tendered are such as to leave sufficient “fat” in the contract for the tenderer that the Respondent is entitled to accept the tenderer’s assurances that Sectoral Employment Orders will be observed;

(c) the Respondent is entitled to assess the preferred tenderer’s tender having regard to its capacity to perform the contract, from a wider perspective having regard to its finances and resources, without violating sectoral employment orders or the provisions of Regulation 18 (discussed in more detail below);

(d) that the preferred bidder will be contractually and statutorily obliged to pay no less than SEO rates.

### **This judgment**

**33.** In this judgment I consider the following:

(a) EU and domestic legislation governing the tender process and “abnormally low tenderer”;

(b) case law relating to abnormally low tenders,

(c) the chronology of events, including the correspondence arising from the Decision, which is significant for the objection that the claim is statute barred;

(d) The evidence adduced including key features such as the terms of the ITT, the form of the contract proposed for the Project and evidence of the manner in which the Respondent evaluated the tenders.

34. There has not been put into evidence any minutes of meetings of the Respondent's Tender Assessment Panel ("TAP"). No evidence has been given by any member of the Tender Assessment Panel, or other officer of the Respondent directly addressing the manner in which the tenders were evaluated, apart from affidavits sworn by a Mr Dolan, Roads Manager of the Respondent, verifying the Statements of Opposition.

35. The Respondent was supported in the tender process by two consulting firms, namely RPS, project management consultants, and Arup, Consulting Engineering. Affidavits were sworn by Mr. Christy O'Sullivan, a Chartered Civil Engineer and Water/ Environment Manager and a director of RPS.

36. Key exhibits include the Respondent's Tender Assessment Report dated 21 February 2023 ("TAR"), a report entitled "Project Review 7", dated 27 February 2023 and a document described as a Tender Analysis Document, with tabs, dated 11 December 2022 ("TAD").

37. The court heard evidence from expert quantity surveyors, a Mr Colin Loughran on behalf of the Applicant and a Mr Mark Wearen on behalf of the Respondent, each of whom made expert reports and was cross-examined.

**The Public Procurement Directive (2014/24/EU) (the "Directive")**

38. Two of the recitals in this Directive are of assistance. Recital 40 states as follows:

*“Control of the observance of the environmental, social and labour law provisions should be performed at the relevant stages of the procurement procedure, when applying the general principles governing choice of participants and the award of contracts, when applying the exclusion criteria and when applying for provisions concerning abnormally low tenders. The necessary verification for that purpose*

*should be carried out in accordance with the relevant provisions of this Directive, in particular those governing means of proof and self declarations.”*

**39.** Recital 103 states as follows:

*“Tenders that appear abnormally low in relation to the works, supplies or services might be based on technically, economically or legally unsound assumptions or practices. Where the tenderer cannot provide a sufficient explanation, the contracting authority should be entitled to reject the tender. Rejection should be mandatory in cases where the contracting authority has established that the abnormally low price or costs proposed (emphasis added) results from non-compliance with mandatory Union law or national law compatible with it in the fields of social, labour or environmental law or international labour law provisions.”*

**40.** Articles 18, 67 and 69 of the Directive are of direct importance for this case.

***“Article 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. Member States shall take appropriate measures to ensure that in the performance of public contracts economic operators comply with applicable obligations in the fields of environmental, social and labour law established by Union law, national law, collective agreements or by the international environmental, social and labour law provisions listed in Annex X.”*

**41. Article 67**

***Contract award criteria***

*1. Without prejudice to national laws, regulations or administrative provisions concerning the price of certain supplies or the remuneration of certain services, contracting authorities shall base the award of public contracts on the most economically advantageous tender”*

**42.** Article 69 governs “abnormally low tenders” and provides as follows:

*“1. Contracting authorities shall require economic operators to explain the price or costs proposed in the tender where tenders appear to be abnormally low in relation to the works, supplies or services.*

*2. The explanations referred to in paragraph 1 may in particular relate to:*

*(a) the economics of the manufacturing process, of the services provided or of the construction method;*

*(b) the technical solutions chosen or any exceptionally favourable conditions available to the tenderer for the supply of the products or services or for the execution of the work;*

*(c) the originality of the work, supplies or services proposed by the tenderer;*

*(d) compliance with obligations referred to in Article 18(2);*

*(e) compliance with obligations referred to in Article 71 (which concerns contracting);*

*(f) the possibility of the tenderer obtaining State aid.*

*3. The contracting authority shall assess the information provided by consulting the tenderer. It may only reject the tender where the evidence supplied does not satisfactorily account for the low level of price or costs proposed, taking into account the elements referred to in paragraph 2.*

*Contracting authorities shall reject the tender, where they have established that the tender is abnormally low because it does not comply with applicable obligations referred to in Article 18(2).”*

**The Public Procurement Regulations (S.I. No.284 of 2016) (the Regulations)**

**43.** Regulation 18 of the Regulations transposes Article 18.2 of the Directive. In particular Regulation 18.4 provides as follows:

*“4(a) In the performance of a public contract, an economic operator shall comply with applicable obligations in the fields of environmental, social and labour law that apply at the place where the works are carried out or the services provided that have been established by European Union law, national law, collective agreements or by international, environmental, social and labour law listed in Schedule 7.*

*(b) A contracting authority shall ensure that public contracts entered into by it require that the obligations referred to in subparagraph (a) are complied with.”*

**44.** Regulation 69 transposes Article 69 of the Directive. Sub paragraphs 1 and 2 of Regulation 69 repeat verbatim the contents of paragraphs 1 and 2 of Article 69, but I shall quote the Regulation again here (with emphasis added):

*“69. (1) A contracting authority shall require economic operators to explain the price or costs proposed in a tender which appear to be abnormally low in relation to the works, supplies or services.*

*(2) The explanations given in accordance with paragraph (1) may relate to, amongst other things, the following:*

*(a) the economics of the manufacturing process, of the services provided or of the construction method;*

*(b) the technical solutions chosen or any exceptionally favourable conditions available to the tenderer for the supply of the products or services or for the execution of the work;*

*(c) the originality of the work, supplies or services proposed by the tenderer;*

*(d) compliance with applicable obligations referred to in Regulation 18(4);*

*(e) compliance with obligations referred to in Regulation 71;*

*(f) the possibility of the tenderer obtaining State aid.*

*(3). The contracting authority shall assess the information provided by consulting the tenderer.*

*(4). A contracting authority may only reject a tender where the evidence supplied under this Regulation does not satisfactorily account for the low level of price or costs proposed, taking into account the elements referred to in paragraph (2).*

*(5). A contracting authority shall reject a tender, where it has been established that the tender is abnormally low because it does not comply with applicable obligations referred to in Regulation 18(4) (namely applicable obligations regarding environmental, social and labour law) (emphasis added).*

**45.** Subparagraph 69(4) means that an authority may only reject a tender as abnormally low after performing a Regulation 69 Inquiry and determining that evidence provided is unsatisfactory, apart from cases to which 69(5) applies, namely tenders which do not comply with applicable legal obligations, where the authority is obliged to reject.

**46.** A Regulation 69 Inquiry is a process which complies with this Regulation. It engages the following steps:

(i) identifying a tender which appears to be abnormally low. As appears from the case law and discussion later in this judgment, this includes a prima facie consideration of



whether a tender is abnormally low, even in a case where it is only suspected to be such.

(ii) where a tender appears abnormally low, the authority must request information, including such of the information identified in Regulation 69(2) as may be appropriate.

(iii) assessing information provided by consulting the tenderer.

(iv) determining whether the evidence supplied satisfactorily accounts for the low level of price or costs proposed.

**47.** When it comes to interpreting and applying the Directive and Regulations two preliminary questions arise which are relevant to this case. Firstly, neither the Directive nor the Regulations contain a definition of the term “abnormally low”. Secondly, there is controversy, discussed extensively in case law of the European Court of Justice and English case law as to the parameters and extent of the obligations of a contracting authority where a tender price or costs “appears to be abnormally low”. No Irish cases were cited on this subject.

**48.** On the first of these questions one item of guidance can be taken from the text of the Regulation (and from Article 69 of the Directive) where Regulation 69(5) states that:

*“A contracting authority shall reject a tender where it has established that the tender is abnormally low because it does not comply with applicable obligations referred to in Regulation 18(4).”*

The use of the word “because” (appearing both in Regulation 69 and Article 69) means that the Regulation and the Directive require that a tender which does not comply with applicable obligations such as those relating to labour law be treated as an abnormally low tender.

**49.** It is important not to confuse this with the particular provision in Regulation 18(4)(b) which imposes on the authority the obligation to “ensure that public contracts entered into by

it require that the obligations referred to in subparagraph (a) are complied with”. That obligation on the authority was complied with in this case by a clause, Z6, in the proposed form of contract which requires the contractor to ensure that rates of pay and conditions comply with applicable law (see paragraphs 188 and 189 below). But Regulation 69 imposes two separate obligations on an authority. Firstly, to reject a tender which does not comply with applicable obligations (Reg. 69(5)). Secondly, to perform a Regulation 69 Inquiry where a tender appears abnormally low. I have found (described later) that a tender which quotes rates below industry standard, albeit that they are said to be offset when blended with other rates in the tender, is at best a tender which arouses suspicion and ought to have triggered a Regulation 69 Inquiry. That is not cured by the insertion of clause Z6, which does no more than fulfil the contracting authority’s Regulation 18(4)(b) obligation, not its Regulation 69 obligation.

**50.** The Directive leaves it to individual member states, if they see fit, to introduce definitions or criteria to apply in determining whether a tender is abnormally low. Certain states have enacted legislation or regulations establishing criteria, but the Regulations do not do so.

### **Relevant Cases**

**51.** Most of the commentary and discussion in the cases opened to this court, particularly in the English cases discussed below, relates to the extent of the contracting authority’s obligation in circumstances where a tender appears abnormally low. I shall return to this subject later but the first question is whether any assistance can be obtained from the cases regarding the definition of “abnormally low”.

**52.** In *European Dynamics Luxembourg SA and Others v. European Union Agency for Railways* Case T392/15 the court made the following observations.

*“83. The concept of ‘abnormally low tender’ is not defined either in the provisions of the Financial Regulation of those or the Implementing Regulation. However, it has been held that the abnormally low nature of a tender must be assessed by reference to the composition of the tender and the services at issue.*

*....*

*85. ... the contracting authority’s obligation to check the seriousness of a tender arises where there are doubts beforehand as to its reliability, bearing in mind that the main purpose of that article is to enable a tenderer not to be excluded from the procedure without having had an opportunity to explain the terms of its tender which appears abnormally low. Thus, it is only where such doubts exist that the evaluation committee is required to request relevant information on the composition of the tender, before, if necessary, rejecting it.*

*86. In particular, such doubts may exist if it does not appear certain whether, first, a tender complies with the legislation of the country in which the services are to be supplied, regarding the remuneration of staff, contribution to the social security scheme and compliance with occupational safety and health standards, selling at a loss and, second, that the price proposed includes all the costs generated by technical aspect of the tender.”*

**53.** The court continued at para. 91:

*“The Court has already had the opportunity to rule on the contracting authority’s duty to state reasons where, in the evaluation of the tenders, it had doubts as to the abnormally low character of a tender and that it held, after hearing the tenderer concerned and carrying out a more detailed analysis, that that tender was not abnormally low (citing an earlier judgment concerning *European Dynamics Belgium and Others* ). In particular, it held that, in order to provide sufficient reasons as to*

*why the tender accepted was not abnormally low, the contracting authority had to set out the reasoning at the end of which, first, it concluded that, by its mainly financial characteristics, such a tender complied in particular with the legislation of the country in which the services were to be supplied, regarding the remuneration of staff, contribution to the social security scheme and compliance with occupational safety and health standards and, second, it had to check that the price proposed included all the costs generated by the technical aspects of the tender”.*

**54.** The court continued (at para. 93) by stating that where a contracting authority accepts a tender, it is not required to state explicitly in response to any request for a statement of reasons submitted to it the reasons for which the tender does not appear to it to be abnormally low. However, the court continued:

*“such reasons must be brought to the attention of an unsuccessful tenderer which has expressly requested them.”*

**55.** At first pass, these statements appear contradictory. However, paragraph 93 is a clear statement that where an unsuccessful tenderer expressly requests reasons for deciding that a tender is not abnormally low the reasons should be provided.

**56.** In *Tim SPA v. Consip SPA* Case 395/18 the court observed as follows:

*“38 ...by providing in para. 2 of that Article (18) that economic operators must comply, in the performance of the contract, with obligations relating to environmental, social and labour law, the union legislature sought to establish that requirement as a principle, like the other principles referred to in para. 1 of that Article, namely the principles of equal treatment, non-discrimination, transparency, proportionality and prohibiting the exclusion of a contract from the scope of directive 2014/24 or artificially narrowing competition. It follows that such a requirement constitutes in the general scheme of that Directive a cardinal value with which the*

*member state must ensure compliance pursuant to the wording of Article 18(2) of that Directive.*

*“39....The contracting authority may legitimately claim to award the contract only to economic operators who, at the stage of contract award procedure, demonstrate their capacity to ensure in an appropriate manner, during the performance of the contract that those obligations are fulfilled, where appropriate by having recourse to subcontractors who themselves comply with those obligations”.*

**57.** It is very clear from Regulation 69 that the obligation to perform an investigation seeking explanations *inter alia* of the things identified in Regulation 69(2) only arises where a tender “appears to be abnormally low”. There is no suggestion in the Regulation that an investigation of this nature must be performed in every case.

**58.** It is also clear that there is no general duty to reject a tender which is abnormally low unless it violates applicable laws such as labour laws. The effect of Regulation 69(4) is that the authority may only reject such a tender, albeit abnormally low, after it has sought the information identified in Regulation 69(2), assessed it by consulting the tenderer, as provided for in Regulation 69(3), and determined that the evidence supplied does not satisfactorily account for the low level of price or costs proposed.

**59.** The first question which all of this presents is the extent of an authority’s obligation to establish in the first place whether a tender is or “appears to be” abnormally low.

**60.** In *Veridos GmbH* (Case 669/20), the court referred again to the facility, not obligation, of Member States to fix a formula for identifying an abnormally low tender. Having noted that the existing EU law does not define the concept of an “*abnormally low tender*”, the court continued:-

*“34. ...it is for the Member States and, in particular, the contracting authorities to determine the method of calculating an anomaly threshold constituting an*

*abnormally 'low' tender... or to set its value, provided that an objective and non-discriminatory method is used. It has also held that the contracting authority is under an obligation 'to identify suspect tenders'...*

**61.** In Veridos, the Court said:

*“ 37. . . the contracting authority has to identify tenders which appear suspect and are therefore subject to the inter partes examination procedure provided for in Article 49 of Directive 2009/81, in the light of all the features of the subject matter of the invitation to tender concerned. Comparison with other, competing tenders, however useful it may be in certain cases for the purpose of identifying any anomalies, cannot constitute the sole criterion used by the contracting authority in that regard.*

*38. The examination of all the components relating to the invitation to tender and the contract documents concerned must enable the contracting authority to determine whether, despite the existence of distance between the suspect tender and the tenders submitted by the other tenderers, that tender is sufficiently genuine. In that regard, the contracting authority may rely on national rules which define a particular method for identifying abnormally low tenders.*

*...*

*40. It follows from the foregoing that Articles 38 and 49 of Directive 2009/81 must be interpreted as meaning that a contracting authority, where there is suspicion that a tender is of an abnormally low nature, is required to verify whether this is actually the case by taking account of all the relevant components of the invitation to tender and the contract documents, without the impossibility of applying the criteria laid down for that purpose by a piece of national legislation or the number of tenders submitted being relevant in that regard.*

**62.** Finally, in Veridos, the court observed at para. 48: -

“ . . . where a contracting authority has failed to initiate a procedure to verify whether a tender might be of an abnormally low nature, on the ground that it considered that none of the tenders submitted to it was of such a nature, its assessment may be subject to judicial review in the context of proceedings against the decision to award the contract at issue”.

**63.** In *Veridos*, the court made it clear that it is only where there is suspicion that a tender is of an abnormally low nature and following an inter partes examination procedure, that the contracting authority must formally adopt a reasoned decision admitting or rejecting the tender in question.

**64.** The case of *Sopra Steria Benelux v. European Commission*, Case no. C 101/22 P concerned the application of Regulation 2018/1046 on financial rules applicable to the general budget of the Union, Annex 1 of which included paragraphs relating to the treatment of abnormally low tenders corresponding to Article 69 of the Directive, namely a case where a tender “appears to be abnormally low”. The court said: -

*“71. . . . The use of the verb ‘appear’ in paragraph 23.1 of Annex I to the Financial Regulation requires the contracting authority to carry out a prima facie assessment of the abnormally low nature of a tender and not to carry out, on its own initiative, a detailed analysis of the composition of each tender in order to establish that it does not constitute an abnormally low tender.*

*72. Thus, during that first stage, the contracting authority need only determine whether the tenders submitted contain evidence that they might be abnormally low. That is the case, in particular, where the price proposed in a tender is considerably lower than that of the other tenders or the normal market price. If there is no such evidence in the tenders submitted and they therefore do not appear to be abnormally*

*low, the contracting authority may continue the evaluation and the award procedure for the contract.*

*73. In the second stage, if there is evidence that a tender might be abnormally low, the contracting authority must check the composition of that tender in order to ensure that it is not abnormally low. To that end, it must allow the tenderer concerned to state the reasons why it considers that its tender is not abnormally low.*

*74. The contracting authority must then assess the explanations provided and determine whether the tender concerned is abnormally low, in which case it must be rejected. In order to provide an adequate statement of reasons for the fact that, after an in-depth analysis, the successful tender is not abnormally low, the contracting authority must set out the reasoning on the basis of which, first, it concluded that, on account primarily of its financial characteristics, that tender complies, inter alia, with the legislation of the country in which the services are to be carried out in respect of the remuneration of staff, contribution to the social security scheme and compliance with occupational safety and health standards, and, second, that it has verified that the proposed price included all the costs arising from the technical aspects of that tender.*

...

*80. It follows that, where an unsuccessful tenderer, who is not in an exclusion situation and satisfies the selection criteria, asks the contracting authority, in a written reasoned request, to set out the reasons why it did not consider the successful tender to be abnormally low, that authority is required to provide a detailed response.*

*83. Any other interpretation would deprive the unsuccessful tenderer of its right to an effective remedy guaranteed in Article 47 of the Charter of Fundamental Rights of the European Union ('the Charter'). It would be impossible for a tenderer to assess the*



*merits of the contracting authority's decision that the successful tender is not abnormally low, if that contracting authority could merely state peremptorily and without putting forward any justification to that effect that that tender appeared to it to comply with the market conditions of the countries from which the services in question are to be carried out by the contractors and their subcontractors or that the price of the successful tender was not abnormally low.*

*88. The fact that the Commission provided the reasons for the decision at issue in the course of the proceedings cannot compensate for the inadequacy of the initial statement of reasons for that decision. The reasons for a decision may not be explained for the first time ex post facto before the Court, save in exceptional circumstances which, failing any urgency, are not present in this case ....*

*89. To allow the institution concerned to defer its duty to state reasons for its decision finding that the successful tender is not abnormally low would affect the right of unsuccessful tenderers to effective judicial protection, in so far as they must know the reasons for a measure, not only in order to defend their rights in the best possible conditions, but also in order to decide in full knowledge of the circumstances whether it is worthwhile to bring an action before the competent court . . .*

**65.** Much time was taken in the hearing of this case to demonstrate why the tender was not regarded as abnormally low, but it is clear from *Sopra* that such reasons “cannot be explained for the first time before the court”. Later in this judgment I examine the correspondence which followed the ‘Regrets’ letter. The subject is addressed in pre-emptory fashion in one letter of 5 April 2023 and never expanded upon, until the Statement of Opposition and in evidence. That letter put forward certain reasons, but the justifications put

forward in evidence and submissions in these proceedings go far beyond the contents of the letter.

**66.** Two decisions of the High Court of England and Wales (Fraser J.) were opened in submissions. For the most part, these decisions concern the question of the extent of the contracting authority's obligations where an abnormally low tender is identified.

**67.** In *SRCL Limited v The National Health Service Commissioning Board (NHS)* [2018] EWHC 1985 (TCC), Fraser J quoted extensively from the judgment of Flaux J in *J Varney & Sons v Hertfordshire County Council* [2010] EWHC 1404 (QB) where Flaux J had stated the following:

*“Either way there is nothing in either provision to support the contention that there is a general duty owed by the authority to investigate so called ‘suspect’ tenders which appear abnormally low. Nothing in the European Court decisions to which Arnold J refers dictates a different conclusion. Having heard full argument on the point at trial I am quite satisfied that neither the Directive nor the regulations impose a duty to investigate so called suspect tenders generally”.*

**68.** This passage is difficult to reconcile with the passages I have quoted earlier from four judgments of the ECJ which clearly state that there is an obligation to investigate a suspect tender.

**69.** Flaux J in *J Varney & Sons* went on to express the view that the obligation to perform an investigation only arose in a case where the relevant authority was contemplating rejecting the tender. He found that the Council in that case had no duty generally to investigate a so called “suspect” tender in circumstances where the Council had no intention of rejecting the tenderer. Again, this is inconsistent with the approach adopted by the ECJ.

**70.** Fraser J considered extensive case law on the subject and the writings of the noted academic Professor Arrowsmith.

*“185. The regulations exist in order to give effect to the EC principles of equivalent treatment, fairness and transparency and to encourage open competition for the supply of services by contracting authorities in Member State, which benefit society by leading to economic provision of those services. A tender cannot be the most economically advantageous (what is sometimes referred to as a MEAT tender) if it is abnormally low. It is not economically advantageous to have a tender price so low that there is a realistic and substantial risk of non-performance by the tenderer (or unlawful performance, in the sense that the tenderer can only comply with terms contracted for by breaching other legal obligations such as payment of the minimum wage or observance of other regulations) or that low price is achieved as a result of unlawful State aid. The concepts of a tender being ‘economically advantageous’ or ‘abnormally low’ are mutually exclusive.*

**71.** At para. 191 Fraser J continued:

*“It is axiomatic that the contracting authority must treat all tenderers equally. There is a general duty to reject, but this duty only exists as expressly stated in Article 69, namely non-compliance with certain legislation and the specified field of environmental and social legislation. The lack of express statement of such a duty in respect of all abnormally low tenders is telling and in my judgment it justifies the conclusion that there is no such general rule.”*

**72.** The statement that there is no general duty to reject abnormally low tenders is uncontroversial. The only circumstance in which such a general duty arises is where questions of noncompliance with legislation in specified fields arise. However, Fraser J continued by stating the following:

*“193. I consider that there is no basis for imposing a general duty to investigate such tenders in all cases. If in any particular competition the contracting authority*

*considers that a particular tender has the appearance of being abnormally low and (emphasis added) the contracting authority considers that the tender should be rejected for that reason, there is a duty upon the contracting authority to require the tenderer to explain its prices”.*

**73.** The second part of the second sentence quoted above, after the word “and”, namely the additional requirement that the authority has considered that the tender should be rejected as abnormally low, is inconsistent with the language of Article 69 of the Directive and Regulation 69. Those provisions state that where a tender appears to be abnormally low the authority is obliged to perform the inquiry. It would be inimical to the performance of an authority’s inquiry function as mandated by Regulation 69(1) if as a precondition to the obligation to inquire the authority had first formed a view that the tender should be rejected. The scheme of the Regulation is that where there is an appearance of abnormality the interparty inquiry should be undertaken, affording the tenderer the opportunity to provide explanations and clarifications, before a decision is made as to whether to accept or reject the tender.

**74.** At para. 203, Fraser J said:

*“The regulations do not require the contracting authorities to determine whether each tender it receives has the appearance of being abnormally low”.*

**75.** At para. 202 Fraser J said the following:

*“SRCL submitted that the PCR 2015 imposes a duty upon contracting authorities to investigate and consider whether a tender may be abnormally low before accepting it (my emphasis). That was said to require the seeking of explanations for its tender price from the bidder in question where, upon initial examination, a tender appears abnormally low. I reject that interpretation of the Regulation for the reasons explained above”.*

**76.** If Regulation 69 were read as meaning that a contracting authority is not required to at least consider whether a tender appeared abnormally low, it is difficult to see how the Regulation can have meaningful effect.

**77.** The effect of the judgments of the ECJ is that if there is so much as a suspicion that a tenderer is abnormally low an obligation arises to perform the interparty investigation contemplated by Article 69. This does not mean that in every case an authority is obliged to perform such an inquiry before making a decision. But the initial question which must be asked is whether the tender has an appearance of being abnormally low or arouses a suspicion of being such. If an authority were under no obligation to at least consider at a *prima facie* level whether a tender was abnormally low, the provisions of Article 69 and Regulation 69 would be wholly ineffective. It seems to me that where a question arises as to whether rates proposed are below statutory or industry standard rates such as in Sectoral Employment Orders, there must at least be a suspicion aroused.

**78.** In *Bechtel Limited v High Speed 1 (HS2 Limited)* [2021] EWHC 458 (TCC) Fraser J summarised the principles as follows:

*“(a) There is no basis for imposing a general duty on authorities (here HS2) to investigate whether a tender is abnormally low.*

*(b) If the authority considers that a particular tender is abnormally low and considers that it should reject the tender for that reason there is a duty on the authority to require the tenderer to explain its prices.*

*(c) Absent a satisfactory explanation the authority ‘shall reject the tender’ in the circumstances expressly set out in Regulation 69 and 56, namely noncompliance with specified fields of environmental and social legislation. UCR 2016 is different and Regulation 76 states that the ‘utility may decide not to award a contract to the tenderer if it does not comply with specified fields of environmental social and labour*

*law legislation. This is rather different wording than used in Regulation 56 to PCR 2015.*

*(d) Otherwise the authority is entitled to reject the tender if the evidence does not satisfactorily account for the low level of price, but it is not required to do so.*

*(e) The court's function is not to substitute its own view for that of the contracting authority on whether a tender has the appearance of being abnormally low. The correct approach is only to interfere in cases where the contracting authority has been manifestly erroneous.*

*(f) There is no definition of the words 'abnormally low'. However, the expression must encompass a bid which is low (almost invariably lower than the other tenders) and the bid must be beyond and below the range of anything which might legitimately be considered to be normal in the context of the particular procurement.*

*(g) A contracting authority has a discretion as to what test it uses for identifying what may be an abnormally low tender and an 'anomaly threshold' is a perfectly permissible approach as a matter of EU law."*

**79.** Paragraph (b) above is correct as far as it goes. If an authority considers a tender abnormally low and considers that it should reject it for that reason, it must perform the inter partes inquiry. But that does not mean that the obligation to conduct the inquiry arises only if it is contemplating rejection. This again is clear from all the judgments of the CJEU.

**80.** Paragraph (f) above is one of the few places where any court has attempted to define "abnormally low". If a bid has the characteristics of being "beyond and below the range of anything which might not legitimately be considered to be normal in the context of the particular procurement" then it is obviously abnormally low. But none of these considerations

absolve an authority from the basic duty to consider prima facie whether a tender has the appearance of being abnormally low.

**81.** No specific rules have been identified in our implementing legislation or, of course, by the contents of the ITT in this case, to assist in the definition of an abnormally low tender, save for the reference in Regulation 69(5) to a tender being abnormally low “because” it violates Regulation 18.

### **OECD/EU Sigma Programme**

**82.** The court was referred to a publication by the OECD in a joint initiative with the EU described as “Brief 35 Public Procurement – Abnormally Low Tenders”, published September 2016.

**83.** This Brief refers to the fact that the Directive does not define the phrase “*abnormally low tender*” and continuous as follows:-

*“This concept is nevertheless generally recognised as referring to the situation where the price offered by an economic operator raises doubts as to whether the offer is economically sustainable and can be performed properly.”*

**84.** The Brief continues: -

*“In practice, the following methods are often used for the identification of tenders that appear to be abnormally low:*

- *An analysis of the price (costs) proposed by an economic operator is made in comparison with the object of the procurement.*
- *A comparison is launched of the tender price with the value of the procurement, as estimated by the contracting authority prior to the procedure. The contracting authority assesses the proportion of deviation of the price from the estimated value.*

- *A comparison is made of the tender price where the prices proposed in all of the other compliant (emphasis added) tenders. The contracting authority assesses either the deviation from the mean price or verifies the extent of the difference between the tenders, or it applies both methods.*
- *A combination of all or some of the above mentioned methods is applied.”*

**85.** The Brief then refers to the Directive and cites the CJEU as having made clear two things:

1. that the authority which receives a bid that it suspects is abnormally low must request an explanation.
2. that the tenderer must have the opportunity to explain its tender and cannot be excluded without being afforded that opportunity.

**86.** There are two separate propositions. Therefore, even if an authority is not, at least initially, contemplating exclusion of a tender suspected to be abnormally low, it must perform the inquiry.

**87.** On the question of defining the phrase “abnormally low tender” there is a limited amount that can be gleaned from the reported case law. I have nonetheless summarised below the principles which derive from those cases and which are applicable to this case. There are two parts to this. The first is the principles which are relevant to the definition of abnormally low. The second is the principles governing the obligations of contracting authorities where there is a suspicion of an abnormally low tender.

#### **Definition of abnormally low tender**

**88.** Firstly, no statutory definition has been provided for the term abnormally low tender, either in the Directive, the Regulations or elsewhere.

**89.** Secondly, a tender which does not comply with applicable statutory obligations, including such matters as the payment of wages, must be treated as abnormally low



(Regulation 69(5) and 18(4)). The requirement to comply with obligations relating to environmental, social and labour law is a cardinal value in the general scheme of public procurement law (Tim SPA, Case no. 395/18).

**90.** Fourthly, the ‘expression abnormally low tender’ encompasses a bid which is low (almost invariably lower than the other tenders) and “beyond and below the range of anything which might legitimately be considered to be normal in the context of the particular procurement” (per Fraser J. in *SRCL v. NHS* [2018] EWHC 1985 (TCC)).

**91.** Fifthly, where a price proposed in a tender is considerably lower than that of the other tenders or the normal market price, this is evidence that the tender might be abnormally low (*Sopra Steria*, op cit).

**92.** Sixthly, methods which are frequently used for identification of tenders that appear to be abnormally low include the following (per OECD Sigma Brief):

- i. Analysis of the price or cost proposed in comparison with the subject of the procurement.
- ii. Comparison of the tender price with the pre-tender estimate and assessment of the proportion of deviation of the tender price from that estimate.
- iii. Comparison with prices proposed in all other compliant tenders and assessment of the deviation from the mean price tendered and/or verification of the extent of differences between tenders.

### **Obligations of contracting authorities**

**93.** Firstly, the purpose of the Directive is to encourage competition and competitiveness in identifying the most economically advantageous tender. In this respect price is a key aspect subject to

- i. The lowest tender being sufficiently robust in financial/economic terms to provide the services tendered for. Most contracting authorities will

“foreseeably be delighted to place the contract with such a tender” and there is nothing objectionable in this (per Fraser J. in *SRCL*) and

- ii. The tender not breaching national laws regarding environmental, social or labour laws. (Regulation 69(5)).

**94.** Secondly, the use of the word “appears” in Regulation 69(1) requires the contracting authority not, in every case, to carry out, on its own initiative, a detailed analysis of the composition of each tender in order to establish that it does not constitute an abnormally low tender but in every case to carry out a prima facie assessment of whether the tender is or arouses suspicion of being abnormally low (*Sopra Steria Benelux*, Case 101/22 and Regulation 69(1)).

**95.** Thirdly, the contracting authority is under an obligation to identify suspect tenders (*Veridos GMBH*, Case No. 669/20).

**96.** Fourthly, where a tender has the appearance of being abnormally low, including a suspicious tender, the contracting authority must perform the inter partes inquiry mandated by Regulation 69 namely the following:

- (a) Require the tenderer to explain the price or cost, including as appropriate by provision of the information identified in Reg. 69(2).
- (b) Assess the information provided,
- (c) Consult with the tenderer and
- (d) Make a decision to admit or reject the tender (see *Veridos* and Regulation 69).

**97.** Fifthly, this examination must enable the authority to determine whether, despite the existence of distance between the tenders, the tender is sufficiently genuine (*Veridos*, op cit).

**98.** Sixthly, there is no obligation to perform this inquiry, in respect of every tender. The obligation only applies where a suspicion arises and the tender is prima facie doubtful (*Veridos*).

**99.** Seventhly, there is no general obligation on the contracting authority to adopt or express a reasoned decision finding that there are no abnormally low tenders (*Veridos*) but where an unsuccessful tenderer requests reasons for a determination that a tender is not abnormally low the authority is required to provide a detailed response. This must be more than a pre-emptory statement which does not put forward any justification (*Sopra Steria*).

**100.** Eighthly, where a Regulation 69 Inquiry is performed the contracting authority must then formally adopt a reasoned decision admitting or rejecting the tender in question. (This does not arise in this case).

**101.** Ninthly, apart from cases where the tender breaches national legislation regarding such matters as payment of wages, there is no general duty to reject tenders even where they are abnormally low. The duty conferred by the Regulation is that the contracting authority may only reject such a tender on the grounds that it is abnormally low after performing the Article 69 inquiry, including consultation with the tenderer. This obligation affords a measure of protection to the tenderer who may be excluded after an inquiry. That is not its only purpose. It also enshrines the integrity of the process as a whole. In its terms it is not confined to the protection of the rights of the tenderer rejected following the inquiry.

**102.** Tenthly, the obligation to conduct the Regulation 69 Inquiry arises where a tender has the appearance of being abnormally low or where a suspicion is aroused to that effect. I reject the proposition that the obligation to conduct such an inquiry arises only where the tender has the appearance of being abnormally low and where the authority considers that the tender should be rejected for that reason. Insofar as the judgment in *SRCL Ltd* at para. 193 (paragraph 72 above) is relied on for such a proposition it is inconsistent with the plain language of Article 69 and the judgments of the ECJ discussed earlier.

**103.** Eleventhly, the court's function in these cases is not to substitute its own view for that of the contracting authority on whether a tender has the appearance of being abnormally low,

or for that matter on other evaluative decisions of the authority. The correct approach is to intervene only in cases where manifest error has occurred (per Fraser J. in *SRCL Ltd*). This general principle of judicial review applies as much to procurement cases as to other forms of judicial review. See also *Word Perfect Translation Services Ltd v. Minister for Public Expenditure and Reform* [2019] IESC 38 and [2021] IR page 698).

### **Chronology**

**104.** The chronology of events is important, not least to the objection made by the Respondent that the proceedings are statute barred.

**105.** On 21 July 2022, the Respondent published notice of the intended contract for the Project in the Official Journal of the European Union, and it issued instructions to tenderers (“the ITT”).

**106.** Three tenders were submitted which the Respondent deemed qualified, namely those of BAM/KLS, which was the successful tenderer, Le Chéile, which was ranked second in the competition, and the Applicant, which was ranked third.

**107.** On 2 December 2022, the Respondent issued a request for clarifications to each of the tenderers. In the case of the preferred tenderer, 61 clarifications were sought.

**108.** On 8 December 2022, the preferred tenderer furnished its replies to the first request for clarifications.

**109.** On 13 December 2022 a meeting was held of the Tender Assessment Panel. This is the only meeting of the panel referred to in the evidence.

**110.** On 23 January 2023, the Respondent issued to the preferred tenderer a second request for clarifications in respect of three items.

**111.** On 27 January 2023, the preferred tenderer furnished its replies to the second request for clarification.

**112.** On 21 February 2023, the members of the Tender Assessment Panel signed a Tender Assessment Report. This records in its summary that three compliant tenders had been received and that the Tender Board’s assessment of price and quality revealed that BAM/KLS had submitted the most economically advantageous tender and had achieved the highest overall mark as seen in a Table referred to in the Report.

**113.** The Report records that Arup agrees with the findings of the Tender Assessment Panel and recommends that the Respondent accept the BAM/KLS tender of €[REDACTED] excluding VAT.

**114.** On 16 March 2023, the Respondent wrote to the Applicant informing it that its tender had not been identified as the successful tenderer (“the Regrets Letter”). The letter confirmed that the name of the successful tenderer was BAM/KLS and provided details of the scores achieved by the successful tenderer and by the Applicant. I shall refer to this and subsequent correspondence in more detail in the context of the consideration of the Respondent’s objection concerning time.

**115.** The Regrets Letter informed the Applicant that the mandatory standstill period would apply for a period of 14 days following the date of that letter, ending on 31 March 2023.

**116.** On 31 March 2023, the Respondent announced that the standstill period would be maintained until 5 p.m. on Thursday 6 April 2023.

**117.** On 31 March 2023, the Applicant wrote to the Respondent. It stated that it believed based on the scoring information provided in the Regrets Letter, that the bid submitted by the successful tenderer was in parts abnormally low and in respect of the successful tenderer’s Fee, was abnormally high. It requested confirmation that a robust and vigorous investigation had been undertaken in accordance with Regulation 69. It requested that the standstill period be extended to allow time to consider and address the concerns raised by it.

**118.** By letter undated, but received by the Applicant on 5 April 2023, the Respondent stated that it did not accept that there were any errors in the procurement process or any abnormally low or high amounts in the successful tenderer's bid.

**119.** On 6 April 2023, the Applicant wrote again stating that it was maintaining its objections and requesting a further extension of the standstill period to 17 April 2023 to allow a proper level of responses to be provided.

**120.** The Applicant wrote further letters on 18 April 2023 and 20 April 2023 following up its letter of 6 April 2023, requesting confirmation that no contract would be concluded with the successful tenderer within seven days of receipt of a response to its letter of 6 April 2023.

**121.** On 6 April 2023, the Le Chéile consortium issued judicial review proceedings seeking to set aside the Decision to award the contract to BAM/KLS. Those proceedings were listed for full hearing at the same time as these proceedings, but were withdrawn in the week before the hearing. Le Chéile were joined as a Notice Party in these proceedings but did not participate in the hearing.

**122.** On 20 April 2023, the Respondent wrote to the Applicant informing it that a contract had not been concluded and that legal proceedings had been commenced in relation to the Decision, being a reference to the Le Chéile proceedings, and therefore that the award process had been automatically suspended. The Respondent stated that in view of those proceedings it did not intend to enter into any further correspondence in relation to the matters raised by the Applicant.

**123.** On 3 May 2023, Messrs Eversheds Sutherland, solicitors for the Applicant, wrote to the Respondent identifying its concerns about the manner in which the procurement of the contract had been conducted by the Respondent and stating that it considered that the Respondent had accepted "what is clearly an abnormally low tender from the successful

tenderer and has failed to comply with its legal obligations in this regard including Regulation 69 of the Regulations”.

**124.** On 3 May 2023, these proceedings were commenced.

**125.** On 15 September 2023, discovery of documents was made by the Respondent into a confidentiality ring. Following the making of discovery, the Applicant delivered an amended Statement of Grounds introducing the allegation that the Respondent had erred in admitting the Le Chéile consortium for not qualifying under the Minimum Turnover Requirement.

**126.** On 13 October 2023, the Respondent’s solicitors RDJ informed the parties that the Respondent would be conceding the “Minimum Turnover” ground.

**127.** On 3 November 2023, the Le Chéile consortium applied to be joined to these proceedings for the purpose of enabling them to maintain their opposition to the Minimum Turnover Ground. An order was made joining Le Chéile, but subject to the reservations of the parties as to the entitlement of Le Chéile to maintain that opposition in circumstances where the Minimum Turnover Ground had been conceded by the Respondent.

**128.** Immediately before the commencement of the hearing of these proceedings, the court was informed that the Le Chéile proceedings were withdrawn and an order for costs was made against the Respondent. At the commencement of the hearing, the court was informed that despite having been joined as a notice party, Le Chéile did not intend to participate in the substantive hearing of these proceedings.

### **The preliminary objection as to time**

**129.** To consider the objection made by the Respondent that the claim has been initiated out of time, it is necessary to examine in full the correspondence which followed the Decision.

**130.** The letter of 16 March 2023, referred to as the Regrets Letter, contained details of the scores achieved in the evaluation by the successful tenderer and by the Applicant.

**131.** In respect of the Quality Criteria, the maximum marks available were 400 and in respect of the Price Criterion, the maximum marks available were 600.

**132.** Under Quality, the sub – criteria included such matters as Energy Efficiency and Public Lighting Design, Resourcing, Project Delivery Programme and Methodology, Collation, Public Lighting Installation, Interfacing with ESB, Achievement of NEC target Cost, Opportunities with Target Cost and Contract Data Part 2. A number of these terms are explained later.

**133.** Applying the formula stipulated in the ITT, the Applicant achieved the highest score in respect of Quality Criterion, namely [REDACTED] marks, and the successful tenderer a sum of [REDACTED] marks.

**134.** The sub – categories within the Price criterion related to Activity Schedule, Contractor’s Fee, and Schedule of Costs Components (terms which I explain later). The score awarded to the Applicant was [REDACTED] marks and to the successful tenderer, [REDACTED] marks.

**135.** The effect of the scoring was that for the combined quality and price scoring, the Applicant scored [REDACTED] marks and the successful tenderer scored [REDACTED] marks.

**136.** Under the rules of the tender the Respondent is required to give to an unsuccessful tenderer a reason only in respect of any element of the Quality Criteria where it was marked lower than the successful tenderer. The Applicant achieved a lower mark than the successful tenderer in respect of one Quality Criterion, namely “Opportunities with Target Cost”. The reason given in the feedback in the Regrets Letter for this was as follows: -

*“A satisfactory response which demonstrates a reasonable understanding of the requirements and gives reasonable assurance of delivery of the tender requirements to an adequate standard but does not provide sufficiently convincing assurance to*



*award a higher mark. The submission would benefit from further detail on target price. It would also benefit from further details on risk and opportunity management procedures”.*

### **Correspondence after the Regrets Letter**

**137.** Because of the nature of the Respondent’s time objection, it is, necessary to quote almost the entire of the Applicant’s letter of 31 March 2023. It first recited the Decision and asserted that its own tender was “a competitive commercial offer”. It continued: -

3. *In relation to the scores awarded to the Price Criterion, it is our position that the Activity Schedule bid submitted by the successful tenderer is abnormally low, the Contractor’s Fee submitted by the successful tenderer is abnormally high and the Schedule of Cost Components Value submitted by the successful tenderer is abnormally low.*
4. *By taking the scores in the evaluation table (included with the notification letter of 16 March 2023) through the formula provided in clause 7.6.2 of the Instructions to Tender, we believe that we have accurately established the Tendered Total of the Prices (Activity Schedule) submitted by the successful tenderer. Their Activity Schedule Value is almost [REDACTED] of the value tendered by Breedon (the Applicant’s trading name). As an experienced public lighting contractor, who is presently the largest public lighting contractor in Northern Ireland, with an extensive knowledge of programme outputs and prices, we can only conclude that the variation in the tendered prices is extreme and does not reflect the results of a normal procurement process in terms of equal treatment, transparency and fairness. We can provide several examples throughout both the tender documents, particularly the preliminaries, requirements and lantern specification, and quantities dictated in the Volume A scope document to prove that the tendered*

*total of the prices submitted by the winning tenderer is significantly below market prices, and the bid is therefore unsustainable.*

5. *By taking the scores in the evaluation table (included with the notification letter of 16 March 2023 through the formula provided in clause 7.6.2 of the Instructions to Tenderer we believe that we have accurately established the Contractor's Fee submitted by the successful tenderer. The Fee they have tendered is significantly above the standard rates in the construction industry and would be difficult to substantiate in any contract situation, considering that the items to be included in the Fee are clearly defined in the NEC4 contract. This will have a detrimental effect on the value of Compensation Events for you, the client, and has the potential to distort the outturn cost of the Project and subsequent value for money in accordance with the Public Spending Code.*

6. *By taking the scores in the evaluation table (included with the notification letter of 16 March 2023) through the formula provided in clause 7.6.2 of the instructions to tender, we believe that we have accurately established the Schedule of Cost Components Value submitted by the successful tenderer. The total value of the rates they have tendered are significantly below those submitted by Breedon. In consideration of the competitive rates we offered in our Schedule of Cost Components, we can only conclude that several rates within the successful tenderer's Schedule of Cost Components were priced at low or minimum values to reduce the total value of the Schedule.*

*In consideration of the abnormally low and abnormally high pricing in the successful tenderer's submission, and in accordance with clause 7.7.1 of the Instructions to Tender, please confirm that a robust and rigorous investigation was undertaken.*

*Please also confirm the following:*

- *Was the information provided, without limitation, deemed to be in accordance with the requirements of Regulation 69 of the EU (Award of Public Authority Contracts’) Regulations 2016?*
- *Was there a detailed breakdown of costs and proposed fee provided by the successful tenderer to prove that prices provided were indeed market rates, and sustainable?*
- *Did the labour rates provided both in the Tender Total of the Prices and in the Schedule of Cost Components meet or exceed those set out in the relevant Sectoral Employment Orders?*
- *Were the material prices verified through bona fide quotations provided by reputable suppliers of lanterns, electrical equipment, and civil engineering materials? We would point out that as one of the main purchasers of this equipment on the island of Ireland, Breedon are familiar with current market rates for public lighting materials.*
- *Did the responses received from the successful tenderer as part of the investigation process at any time qualify the tenderer’s submission?*
- *What are the names, position and qualifications of the assessment panel who would have conducted the ‘Abnormally Low’ and ‘Abnormally High’ investigation?*
- *Are the investigation notes, tender report and communications (in writing) available for assessment by Breedon or its legal representative?*

*We note that the standstill will end at midnight on 31 March 2023. Considering the significance of the issues that we have raised in this letter, please confirm by 3pm on Friday, 31 March 2023 that you will agree to extend the standstill period to allow sufficient time to consider and fully address the concerns raised.*

*Yours faithfully”*

**138.** On 05 April 2023 the Applicant received a letter undated from the Respondent replying to its letter of 31 March 2023. Again it is necessary to quote extensively from this letter.

*“First we note your observations about your tender but we do not accept that there were any errors in the procurement process and/or the decision to award the tender to BAM JLSKV (‘the Preferred Tenderer’) which said decision was conveyed on 16 March 2023 (‘the Standstill Letter’). Furthermore, we do not accept that the Activity Schedule bid in the tender submitted by the Preferred Tenderer was abnormally low or that the Contractor’s Fee submitted by the Preferred Tenderer was abnormally high, or that the Schedule of Cost Component value submitted was abnormally low as stated in your letter.*

*We note the references to the scores in the evaluation table and clause 7.6.2 in the Instructions to Tenderer (‘ITT’) in your letter, but we do not accept that the Activity Schedule Value in the Preferred Tenderer’s bid does not reflect the results of a normal procurement process in terms of equal treatment, transparency and fairness or is “unsustainable”.*

*The tender submitted by the Preferred Tenderer was permitted by the NEC Contract identified in the ITT and Volume B in the Contract Data, taking account of the inherent risk structure in NEC. The conditions of contract for this project are NEC 4 (New Engineering Contract) EEC (Engineering and Construction Contract) Option C – Target Contract with Activity Schedule which uses actual costs as a basis for establishing value for money and incentivises both client and contractor to manage risk openly and proactively. For the avoidance of doubt the fee structure in the*

*Preferred Tenderer's bid was not considered to be abnormal or necessitate an investigation as to whether the bid was a genuine one, within the context of Article 69 of the Procurement Directive.*

*As part of the standard due diligence, the Tender Evaluation panel sought clarifications from all tenderers who had submitted bids. The Tender Evaluation Panel considered the overall tendered target costs submitted by the Preferred Tenderer and found this to be comparable with other similar contracts. Although the Contracting Authority sought assurances from the Preferred Tenderer in respect of the Activity Schedules, this was merely to verify components of the Preferred Tenderer's bid. The Contracting Authority was satisfied with the response received and, as a result did not consider that there was any basis for carrying out an investigation on whether the Preferred Tenderer's bid was a genuine bid.*

*In relation to the labour rates provided in the Tender Total of the Prices and Schedule of Cost Components we are satisfied that the Contractor has allowed for the relevant Sectoral Employment Order rates of payment in its tender.*

*We do not propose to provide the names, positions and qualifications of the assessment panel or to make available notes, tender report and communications (in writing).” (Emphasis added).*

**139.** Mr. Sean Brennan is the Contracts Director of the Applicant. He says that he was not aware of the infringements the subject matter of the proceedings until receipt of this letter of 5 April, 2023. He said that it was only on that date that the Respondents notified the Applicant that the successful tenders bid was not considered by the Respondent to be abnormally low and did not necessitate an investigation and therefore that this was the first

occasion on which he was aware of the infringement of failure to perform an Article 69 inquiry.

**140.** On 06 April 2023 the Applicant replied and again it is necessary to quote this letter extensively. It said that the Respondent's queries had not been addressed and requested a further extension of the standstill period, and continued:-

*“We did not state in our letter of 31 March 2023 that we felt there were any errors in the procurement process. Our queries are focussed entirely on whether or not a robust and rigorous investigation was undertaken in accordance with Clause 7.7.1 of the Instructions to Tender, to establish the potential for an abnormally low or abnormally high pricing in the tenderer's submission provided by the successful tenderer.*

*Unfortunately your response does not provide any evidence to confirm that any reasonable level of investigation took place. It therefore remains our position that the successful tenderer's Activity Schedule bid is abnormally low, the Contractor's Fee submitted by the successful tenderer is abnormally high and the Schedule of Costs Components Value submitted by the successful is abnormally low.*

*In response to paragraph 4 of your letter we can confirm (emphasis added) that the value of the successful tenderer's Activity Schedule is abnormally low, given the Scope provided in the tender documents. Only a significant variation to the Scope in terms of volume, survey requirements, design requirements, or lantern specification would change this position. That is why we stated in our letter of 31 March that the “variation in the tendered prices is extreme and does not reflect the results of a normal procurement process in terms of equal treatment, transparency and fairness.”*

*In response to paragraph 5 of your letter, we can confirm that we are experienced NEC Contractors, including the management of risk and the delivery of the contract. As such we are alarmed that the fee percentage of the successful tenderer is not considered by yourselves to be abnormally high or necessitate further investigation, considering its significance in the delivery of an NEC 4 Option C Contract. It is our position that the Contracting Authority has not considered the total amounts payable for actual or defined costs plus fee, both in terms of compensation event values, price for work done to date or final assessment.*

*In response to paragraph 5 of your letter we are surprised to learn that the assessment of the “tendered target cost” appears to have been considered comparable to other similar contracts. The only similar contracts in terms of scope, scale and complexity that Breedon are aware of are the current Public Lighting Energy Efficiency Contracts for the Southern and Eastern regions. Please note that it is our understanding that no lanterns have been supplied or fitted to date on either contract, therefore they are at too early a point in delivery to be used for comparison purposes as the Final Assessment Value is unknown. We would expect a much more robust assessment process to have been undertaken, given the size and complexity of this contract, therefore require further substantiation in this regard”.*

**141.** No substantive reply was made to this letter. A follow up letter was written on 18 April 2023 and a further follow up on 20 April 2023. In this letter the Applicant repeated its concerns about the nature of the tender submitted by the successful tenderer and added the following:

*“We are quite surprised to learn from the letter we received on 05 April 2023 that the pricing did not appear to be abnormally low or high in these respects, that no investigation was carried out and that no explanation of any pricing was sought from*

*the successful tenderer in accordance with Regulation 69 of the European Union (Award of Public Contracts) Regulations 2016.*

*We would request that you provide us with the following information by close of business on 21 April 2023.*

*(1) The Successful Tenderer's total cost for each of (i) Activity Schedule, (ii) Schedule of Costs and (iii) Contractor's Fee (which will presumably be made public in due course anyway).*

*(2) An explanation as to why (a) the Activity Schedule total and the Schedule of Costs Components total (or any elements thereof) did not appear to the Council to be abnormally low and (b) the Contractor's Fee did not appear to the Council to be abnormally high – particularly considering other tenders submitted and the total estimated costs of €23.5m stipulated in the Council's own procurement documentation.*

*(3) What 'similar contracts' the Council compared the Successful Tenderer's submission against."*

**142.** On the same day 20 April 2023, the Respondent wrote to the Applicant referring to the Applicant's letters of 06 and 18 April 2023 informing the Applicant that legal proceedings had been brought in relation to the competition (being a reference to the Le Chéile proceedings commenced on 06 April 2023) and that they did not intend to enter into any correspondence in relation to the matters raised. None of the explanations or reasons requested by the Applicant on 20 April 2023 were provided.

**143.** These proceedings were issued on 03 May 2023.



**144.** The European Communities (Public Authorities Contracts) (Review Procedures) Regulations 2010, SI No. 130 of 2010 provide in Regulation 7(2) that an application for review of a decision made and to which the Procurement Regulations apply

“Shall be made within 30 days after the Applicant was notified of the decision, or knew or ought to have known of the infringement alleged in the application”.

**145.** When writing its letter of 31 March 2003, the Applicant had clearly equipped itself with sufficient information from the Regrets Letter to not only make enquiries in relation to the competition but also to make very specific assertions regarding aspects of the preferred tenderer’s bid which it claimed were abnormally low and abnormally high and to enquire whether an investigation had been undertaken pursuant to the requirements of Regulation 69.

**146.** The analysis in paras. 4, 5 and 6 of that letter shows the Applicant was in a position to extrapolate from the scoring provided in the Regrets Letter sufficient information to state its belief that it had “accurately established” the abnormalities alleged in that letter.

**147.** The issues identified in the letter of 31 March 2023 are expanded upon in the Statement of Grounds and verifying affidavit delivered on 03 May 2023. In those documents the allegations are made in a more detailed and comprehensive format but no new information had been provided between the time of the Regrets Letter and the commencement of the proceedings on 03 May 2023 which would explain whether or how the Applicant had come into possession of any more information since the receipt of the Regrets Letter and since making the very specific allegations contained in its letter of 31 March 2023.

**148.** The Applicant submits that it was only the letter of 05 April 2023 which contained the statement that the Respondent had not identified that the preferred tenderer’s bid was abnormally low and that no Regulation 69 Inquiry had been undertaken. The Applicant submits that it is the failure to hold a Regulation 69 Inquiry which is the core infringement alleged in these proceedings and that it was not until 05 April 2023 that it learned that no

such inquiry had been made. If that submission were correct, the proceedings would not be out of time.

**149.** The Respondent submits that it is clear from the letter of 31 March 2023 that the Applicant had sufficient information or knowledge to ground very specific allegations that there were abnormalities both low and high which on the Applicant's assertions required further investigation. The Respondent submits that when Le Chéile commenced its proceedings on 06 April 2023 it was in possession of no more information than the Applicant and yet it was in a position to commence its proceedings.

**150.** The Respondent submits that time in this matter ran from the Regrets Letter issued on 16 March 2023 and therefore that these proceedings issued on 03 May 2023 were issued 48 days later and therefore outside the time provided by Regulation 7.

**151.** The importance of time limits in proceedings of this nature has been emphasised in numerous reported cases including *Re Dekra Eireann Teoranta v the Minister for the Environment* [2003] 2 IR 270, *Copymoore Limited v Commissioners of Public Works of Ireland* [2014] IESC 63, *Forum Connemara Limited v Galway County Local Community Development Committee* [2016] IECA 59, *Newbridge Tyre & Battery Company Limited T/A Fleet Service Centre v Commissioner of An Garda Síochána* [2018] IEHC 365 and *Baxter Health Care Limited v Health Services Executive* [2013] IEHC 413.

**152.** In *Baxter*, Peart J considered the question of when time starts to run and stated the following:

*“This Court must decide at what point did the present applicant possess sufficient knowledge of facts to enable it to consider that it had reasonable grounds to challenge the decision that Beacon Dialysis Services Limited had qualified in the competition. As soon as it had sufficient facts at its disposal to commence its challenge, an effective remedy was available to it, and therefore the clock started to*

*run against it. From that point on, it could not sit on its hands and hold the point over until it saw the final decision on the award of the contract. It was obliged to act immediately”.*

**153.** It is clear from this and other decisions that it is not open to an applicant to wait until it has secured perfect information as to its grounds but simply that it possesses sufficient information to consider that it has reasonable grounds to commence a challenge.

**154.** In *Newbridge* Baker J observed that time does not necessarily begin to run on the date in which an applicant is informed of the decision by the contracting authority. She said that this approach is justified by the clear language of Regulation 7(2) of the Remedies Regulation which fixes one possible start date as the date of notification but does not confine the choice of date. This is a reference to the words in Regulation 7(2) referring to any date on which an applicant “knew or ought to have known of the infringement alleged”.

**155.** Baker J continued:

*“The general purpose of effectiveness and certainty and that litigation in the procurement area be resolved with expedition may, on occasion, require to be reconciled. Litigation efficiency is not to be achieved by the commencement of proceedings before a proper evaluation is carried out as to whether they are justified or reasonably likely to succeed. Litigation chaos, the commencement of poorly pleaded, unjustifiable, or unstateable proceedings are not desirable in the interests of the proper administration of justice, and while procedures exist for the bringing of an application to strike out proceedings which do not meet the necessary standard, such applications engage court time and are costly for the parties. It is in general not desirable that proceedings be instituted in circumstances where an applicant or plaintiff has not sufficiently assessed the nature of the claim or the prospects of success, or does not have requisite information to adequately plead”.*

**156.** Baker J undertook an examination of the correspondence in that case and found that the Applicant had moved with expedition, and that its correspondence was sufficiently focussed from its commencement and not merely a device to extend time.

**157.** Baker also considered the important question of prejudice. She found that on the facts of that particular case “time had run a mere eleven days before the proceedings were commenced”. She was not satisfied that any real prejudice had occurred as a result of the short delay in that case.

**158.** There was some discussion in the course of submissions as to the connection between the time limit contained in Regulation 7 and the relevance of information coming to light at a later stage in the proceedings, in this case through discovery. Such revelations may be a justification for permitting late amendments to a Statement of Grounds, as in this case, up to a point. But if proceedings are out of time in the first place then such a bar is not cured by those later developments.

**159.** The relevance of information obtained in discovery is that it reveals the centrally important fact that rates of pay below industry standard informed the scoring used in the evaluation of tenders. This aspect is a central feature of the case and of my judgment. Whilst a question is raised about SEOs in the letter of 31 March 2023, it is by no means clear that there could be extrapolated from the scoring information provided in the Regrets Letter information regarding this particular ground, let alone of the decision not to perform a Regulation 69 inquiry.

**160.** I do not fault the Respondent for not stating in its Regrets Letter that it had concluded that the preferred tenderer’s bid was not abnormally low and that it had not performed an Article 69 inquiry. That statement was first made in the letter of 05 April 2023 and is so central to the infringement alleged by the Applicant it seems to me that this is the first date on which it can be said that the Applicant knew or ought to have known of the infringement.

**161.** I can understand why following the commencement of the Le Chéile proceedings on 06 April 2023, the Respondent adopted the position that it could not correspond any further in relation to the matters complained of, a subject to which I return later. But this does not excuse the fact that the reasons and information requests in the Applicant’s letter of 6 April 2023 remained unanswered in the correspondence.

**162.** The Respondent relies on the fact that Le Chéile commenced its proceedings on 06 April 2023, comfortably within 30 days from the date of the Regrets Letter. I agree with the Respondent’s submission that it cannot be the case that if one party commences proceedings within time and the standstill period comes into effect, thereby suspending the award of the contract, it then becomes “open season” for other parties who have sat on their hands to travel or to “piggyback” on those proceedings and commence their own proceedings however late they may do so. Clearly such an approach would disregard the importance of such time limits. But the Applicant did not “sit on its hands”. Instead, it persisted in its enquiry of the Respondent, and moved these proceedings within 30 days of learning that no Regulation 69 Inquiry had been performed.

**163.** The Respondent further submits that since the Le Chéile proceedings are now discontinued the suspension would by now have been lifted and the Respondent would be free to award the contract were it not for these proceedings which it says are out of time. Those proceedings were discontinued only in the week prior to the substantive hearing of the case, and in the wake of the Respondent’s concession of the Minimum Turnover Grounds on 13 October 2023.

**164.** The reason for the time limit in Regulation 7(2) is of course the importance that such contracts should not be delayed by late challenges. Once the Le Chéile proceedings had commenced the standstill continued and the Respondent was unable to proceed with the award pending determination of those proceedings. The two actions were listed for full

hearing together. Those proceedings were discontinued only in the week immediately before the hearing. The delay of 18 days in the commencement of these proceedings did not therefore extend the effect of the standstill, apart from the very late happenstance of Le Chéile discontinuing and these proceedings continuing thereafter to hearing and now judgment. The all-important purpose of the time limit, namely to avoid undue delay in relation to the award of such contracts, is not compromised by the interval between the Le Chéile discontinuance and the hearing and disposal of this case.

**165.** In *Newbridge Baker J* was willing to focus on the question of whether any prejudice arose from what in that case was described as a short delay of 11 days after the expiry of the time limit. In this case the proceedings were commenced 48 days after the date of the Regrets Letter, 18 days after the date on which the Respondent submits that the time had expired. When the overall timetable is taken into account, I am not persuaded that this period caused the prejudice which the time limit is designed to avoid.

### **Conclusion on the time objection**

**166.** Although the Applicant when writing its letter of 31 March 2023 had sufficient information to assert that the successful tenderer's pricing was "abnormally low" the critical fact about which it complains in these proceedings, and which I find to be of central importance, namely the infringement of failure to perform an Regulation 69 Inquiry, only became known on 05 April 2023 when the Respondent stated that no Regulation 69 Inquiry had been undertaken. That is the date when time began to run, and the proceedings were commenced within 30 days thereafter.

**167.** If I am incorrect in this conclusion, these proceedings were commenced 18 days after the date the Respondent says they became barred. The Le Chéile proceedings had commenced and had the effect of suspending the award of the contract pending their determination. Those proceedings were listed for hearing at the same time as these

proceedings. Therefore, the delay of 18 days did not cause prejudice to the Respondent or other parties.

**168.** For all these reasons the proceedings are not barred by the operation of Regulation 7(7) of the Remedies Regulation.

### **The NEC 4 Option C contract**

**169.** The Instructions to Tenderers (“ITT”) specified that the form of contract for the Project would be NEC 4 Option C. The NEC 4 is a form of contract which has come into usage in public projects in the last 20 years. It is not a traditional fixed price contract, but a “target cost” contract. It applies actual cost as the basis for establishing value for money. The contractor is paid during the course of the contract by reference to costs incurred plus a percentage fee. For the purpose of tendering, tenderers are required to price an “Activity Schedule” which is broken down into items which reflect the programme of works. The sum of the items priced becomes the “Tendered Total of Prices”, and when a contract is awarded, this is referred to as the Target Cost.

**170.** The Activity Schedule includes values for all costs, being Preliminaries, Labour, Plant, Materials, Fees, Bonds, and Insurance.

**171.** The tenderer also quotes its Fee, which encapsulates both head office overheads and profit.

**172.** As the works progress, assessments are made of the costs actually incurred to arrive at the “Price for Work Done to Date” (PWDD). The PWDD is established through defined costs incurred plus the Fee. Cost is vouched by invoices received for materials, supplies, subcontractors, plant hire, design consultancies, and other costs, less “Disallowed costs”, and by reference to items included in a Schedule of Costs Components. The contractor is paid by reference to the PWDD, subject to the application of a control mechanism, described in the contract as the “Contractor’s Share”, and otherwise referred to as a “pain/gain” mechanism.

**173.** The Contractor's Share is a mechanism to incentivise management of cost during the performance of the contract. Where the assessed PWDD (price for works done), is below 100% of the Target Cost, the contractor shares in the gain with the client. The contract contains a table to govern the gain, or pain as the case may be. In this case it provides that where the saving achieved against Target is between 85% and 90% the Contractor's Share of the gain will be 25%. Where the cost is between 90% and 100% of the Target, the Contractor's Share percentage is 40%.

**174.** If the PWDD is above 100% of the Target, the contractor shares in the "pain". Between 100% and 110% the contractor shares 50% of the pain with the client. Where the PWDD exceeds 110% of the Target, the contractor bears all of the pain and receives no additional payment.

**175.** Because the Target Cost informs the operation of the "pain/gain" mechanism, the contractor is incentivised to achieve efficiencies throughout the performance of the contract.

**176.** The Target Cost can only be adjusted during the currency of the contract after a change of scope or agreement on the occurrence of a Compensation Event, defined largely by reference to changes, external events or delays not caused by the contractor.

**177.** The version of the NEC 4 contract intended to be applied in this case is referred to as the NEC 4 Option C, which is described as a "Target Contract with Activity Schedule".

**178.** Clause 5 governs the assessment and payment of amounts due from time to time during the contract and contains provisions for assessment and payment on a periodic basis by reference to the Price for Work Done to Date.

**179.** Option C contains amendments which are particular to the "Target Contract with Activity Schedule".

**180.** Clause 52 obliges the contractor to keep accounts of payments of defined cost, proof of payments, communications about assessment, compensation events and other records.



**181.** Clause 54 governs the Contractor's Share for the purpose of operating the "pain/gain" mechanism.

**182.** The contract defines the contents of a Schedule of Cost Components, broken down among the following headings, namely People, Equipment, Plant and Materials, Subcontractors, Charges, Manufacture and Fabrication, Design, and Insurance.

**183.** Annexed to the contract are forms referred to as "Contract Data – Part 1" and "Contract Data – Part 2". Part 1 is data provided by the client and Part 2 is data provided by the contractor.

**184.** The Contract Data Part 1 completed by the Respondent and which issued with the Instructions to Tenderers was populated with core information in relation to the Project such as the starting date, provisions concerning quality management and concerning payment and the detail of the Contractors Share to be applied, compensation events, insurance and retention.

**185.** The Contract Data Part 2 contains provision for insertion by the tenderer/contractor of details of its identity, the proposed fee percentage, and identity of key persons. Section 5 relates to payment and includes provision for completion of an Activity Schedule and inserting the Tendered Total of the Prices.

**186.** A section headed "Data for the Schedule of Cost Components" contains provision for including rates incurred in association with equipment, special equipment and rates for the defined costs of persons employed "outside the working areas by the contractor". This requires the insertion of what are referred to as "people rates".

**187.** Under the heading "Additional Conditions of Contract" an important amendment is made to the standard contract by Clause Z6 which relates to "*pay and conditions of employment*".

**188.** This includes the following clause: -

*“The contractor shall ensure that the rates of pay and the conditions of employment, including pension contributions, comply with all applicable law and that those rates and conditions are at least as favourable as those for the relevant category of worker in any sectoral employment orders, employment regulation orders or registered employment agreements implemented under the Industrial Relations Acts, 1946 to 2015 (including agreements registered thereunder)... The obligations in this clause Z6 apply regardless of what rates the contractor has tendered for adjustments to the prices.”*

**189.** The Contract Data - Part 2 as completed by BAM/KLS contained as required the following key information namely,

- (1) The Fee percentage, stated at [REDACTED]%
- (2) It referred to an Activity Schedule dated 7 October 2022 (to which I shall refer later), and to the Tendered Total of Prices in the amount of €[REDACTED].

**190.** Volume C is the Activity Schedule which formed part of the suite of documents issued with the form of the contract accompanying the Instructions to Tenderers. The preamble to the Activity Schedule contains the following statement: -

*“The Activity Schedule is a list of activities that are expected to be carried out in providing the works. The total of all the activities in the Activity Schedule will be the total of the prices in Contract Data Part 2 and will form part of the tender price evaluation. The Activity Schedule will not be used to determine the amount due to the contractor except in the assessment of the Contractor’s Share.”*

**191.** The preamble also contains a statement that *“all items must be priced”*.

**192.** The preamble continues: -

*“The prices entered in the Activity Schedule shall be deemed to be the full inclusive value of the works covered including the following: -*

- *All general obligations, requirements and liabilities involved in the execution of the works as set forth in the contract.*
- *Establishment charges, overheads and profit.*
- *Provide for all necessary insurances as indicated under this contract.*
- *Provide for all travelling to the sites as necessary in accordance with the Scope.*
- *All costs associated with the location, supporting and protection of all services and their effect on the design and construction.*

*The rates entered in the Schedule of Cost Components are fixed for the duration of the contract.”*

**193.** The Activity Schedule is divided into four parts, namely (1) Preliminaries, (2) Lighting and Ancillary Works, (3) Contractor’s Fee and (4) Schedule of Costs Components.

**194.** Preliminaries includes such matters as “mobilisation, site staff and accommodation, temporary plant equipment and vehicles, progress reporting and contract administration, stakeholder engagement, and site records, drawings and compliance with safety health and welfare at work requirements, insurances, provision for a parent company guarantee, performance bond”.

**195.** Under the heading Lighting and Ancillary Works, for each of the 26 municipal districts throughout the 7 counties there are separate headings for the following: -

- (1) Initial condition survey and site inspection.
- (2) Design documentation and energy savings and costings.
- (3) Implementation/construction of luminaire replacements.

- (4) Implementation construction of column replacements.
- (5) Condition survey of retrofitted assets and existing assets.
- (6) Measurement and verification.

**196.** Part 3 is short and requires simply the insertion of a contractor's Fee, which in the case of BAM KLS was [REDACTED]% and a breakdown of the fee percentage. This typically involves a breakdown as between the contractor's head office and other overheads and its profit.

**197.** Finally, Part 4 is the Schedule of Cost Components. The preamble to this is important and provides as follows: -

- “(1) The rates and percentages shall be the same as entered in Contract Data Part 2 where applicable.*
- (2) The total and notional quantities in the Schedule are for evaluation purposes only (emphasis added).*
- (3) The amount of net invoice for materials and charges are fixed for a valuation and are not to be amended by the tenderer.*
- (4) Rates are to be inserted in Euro and in two decimal places.*
- (5) All costs are to be totalled and carried forward.*
- (6) Rates are to be exclusive of VAT.*
- (7) Tenderer to fill in cells highlighted in green (i.e., the rate being proposed).*
- (8) Components are to be included as per any C4 Schedule of Costs Components.”*

**198.** In this schedule the Respondent has inserted notional quantities in respect of the headings for people, equipment, plant and materials, subcontractors, charges, manufacture and fabrication, design and insurance.

**199.** I shall return later to the data which was inserted by the preferred tenderer in respect of the Activities Schedule and the Schedule of Costs Components.

**200.** The Respondent submitted that the SCC populated by the preferred tenderer did not form part of the contract or have binding effect on the rates of payments to be made under the contract and cites paragraph (2) quoted in paragraph 197 above, which states that quantities in the Schedule are for evaluation purposes only. This case concerns the performance by the Respondent of its evaluation function, not the effect of the SCC on rates of payment under the contract.

### **Instructions to Tenderers (“ITT”)**

**201.** Section 1.2 of the ITT identifies the documents which are made available to all tenderers. It states as follows (emphasis added in a number of places below):-

*“The documents at i and ii below are being made available to all the Tenderers.*

*(i) Documents (when fully completed by the relevant parties) to be included in the contract.*

- *Volume A: Scope (this includes a reference to the scope, technical specifications and model forms of agreement to be used).*
- *Volume B: Form of Tender and Contract Data*
  - *Volume B1: Contract data part 1*
  - *Volume B2: Contract data part 2*
  - *Volume B3: Form of tender*
- *Volume C: Activity Schedule”*

**202.** Further items include volumes relating to site information, lighting specification, safety and health plans, site drawings, and a summary of agreements between ESB and local authorities.

**203.** Section 1.2(ii) contains a description of “Documents not to be included in the contract”. These documents are the invitation to tender letter, the Instructions to Tenderers, the ESPD (European Single Procurement Document), and other documents. The significance of Section 1.2(i) is that the Respondent submitted that the Activity Schedule, including the Schedule of Costs Components comprised therein, was not a contractual document. This is clearly not the case having regard to the terms quoted above.

**204.** This is repeated in Section 5.2 which identifies the Requirements for Tenders.

*“The contract, if formed, will consist of the documents as set out in Section 1.2 (i) along with the Tenderer’s submission, the Parent Company Guarantee (where required) and Letter of Acceptance/ Tender Acceptance”.*

**205.** Section 5.3 provides, under the heading “Format” the following: -

*“Tender submission will consist of:*

- *Completed ESPD (European Single Procurement Document)*
- *Works proposals in response to quality criteria*
- *Volume B: Completed Form of Tender and Contract Data Part 2*
- *Volume C: Completed Activity Schedule*

*Scanned copies of originals of Volume B and C must be returned with the required fields filled in. Completed Volume C must also be returned in MS Excel format”.*

**206.** Para 5.6 is headed “Pricing” and states as follows: -

*“Tenderers are required to complete the Activity Schedule. Unless otherwise stated, all sums given in Tenders must be in Euro, to two decimal places.*

*Pricing must be completed in accordance with the preamble requirements stated in the Activity Schedule. All items must be priced. Tenderers must not use negative rates or prices, or omit rates, or use zero rates in the Activity Schedule or Schedule of Cost Components”.*

**207.** Section 6.1 “Estimated Value of Project” provides as follows: -

*“The competition consists of two elements as follows:*

*1. ESPD and Invitation to Tender.*

*2. Appointment of the most economically advantageous Tenderer to establish an NEC 4 Engineering and Construction Contract for the Project in accordance with the conditions of the contract”.*

**208.** Section 7 is headed “Assessment of Tenderers” and describes the award criteria and marking system.

**209.** The total marks available is 1000. 400 relate to Quality, and 600 relate to Price.

**210.** Under “Quality” the 400 is divided as to 50 marks for QC1 Energy Efficiency in Public Lighting Design, 200 marks for QC 2, Resourcing and Project Delivery Programme. 50 marks for QC 3, Management of ESB interfaces, and 100 marks for QC NEC Target Costs and Development of Rates. These are further broken down in detailed paragraphs describing the operation of each of these criteria and the methodology for marking and scoring.

**211.** The 600 marks for price are broken down as to 450 marks for “Activity Schedule Subtotal”, 50 marks for Fee Percentage and 100 marks for Notional Total Schedule of Cost Components.

**212.** Section 7.6.1 expands on the requirements as follows: -

*“The tendered total of prices shall be the amount included in Contract Data Part 2 by the tenderers. The tenderers shall populate the Schedule of Cost Components and include this in Contract Data Part 2.*

The populated Schedule of Cost Components along with the notional quantities shall be used to calculate the notional total schedule of cost components amount included in Contract Data Part 2 by the Tenderers. The price marks for each tender shall be calculated as per s. 7.6.2.

*Tenderers should ensure in their tenders that they provide detailed information in respect of all aspects of the award criteria as stated above.*

*The Project will be carried out using the NEC 4 Option C conditions of contract. In accordance with the NEC 4 Option C the contractor provides a tendered total of the Prices for the execution of the works. This will become the Contractor's tendered total of Prices.*

*The contractor is then paid the Defined Cost of the Contract which is the actual cost (less Disallowed Cost) to the contractor plus a fee.*

*The Tender Activity Schedule (Volume C) is the document which tenderers must complete to submit their prices. When the contract has been entered into, the prices within the Tender Activity Schedule will be used to determine the target for each Municipal District and also provide a basis for pricing compensation events (CEs)*

*The Tender Activity Schedule is split into the following sections: -*

- *Preliminaries*
- *Lighting and Ancillaries*
- *Schedule of Cost Components*
- *Risk*
- *Fee*
- *Summary.*



**213.** Section 7.6.2 of the ITT, headed ‘Methodology for Calculating Price Score’, states as follows: -

*“Using the Activity Schedule in Volume C the tenderer’s Activity Schedule subtotal, Fee Percentage and Notional Total Schedule of Cost Components will be used for the purpose of this assessment.*

*The tender with the lowest overall notional tender price following the assessment of the Activity Schedule Subtotal (450 marks), Fee Percentage (50 marks), Notional Total Schedule of Cost Components (100 marks) will be awarded the maximum marks available for price in each sub-category. Other tenders eligible for appointment will then be scored by deducting one half of one percent (0.5%) of the total marks available for price for every one percentage point’s difference between the lowest eligible price and that of the Tenderer under consideration.”*

**214.** It is clear from this provision that the marking and scoring system under each of the criteria incorporates marks awarded for the SCC and applies relativity as between the eligible tenderers, of which in this case there were three, including Le Chéile, at the time deemed qualified for ranking.

**215.** Section 7.7.1 governs “Clarification of Abnormally Low Tenders” follows: -

*“If, in the Client’s opinion, the tendered total of the Prices is abnormally low or any tendered amounts (emphasis added) (including the rates tendered in the Activity Schedule) are abnormally low or abnormally high, the Client may require the Tenderer to provide details of the constituent elements of the tendered total of the Prices or the tendered amounts. This may include (without limitation) the information listed in Regulation 69 of the European Union (Award of Public Authority Contracts) Regulations 2016. Any failure to*

*provide such information, when requested, may exclude the tender from further consideration. If, having considered the information provided, the client is of the view that either the total of the prices is abnormally low, or any tendered amounts are abnormally low or abnormally high, the client may reject the tender". (emphasis added)*

**216.** Section 7.7.1. cites Regulation 69(1) but in two respects deviates from it.

**217.** Firstly, it refers to the "client's opinion" that tendered prices are abnormally low, whereas the Regulation refers to a tender "which appears to be abnormally low". That deviation is not material, unlike the next.

**218.** Secondly, and more importantly, the first sentence says that where the client's opinion is that a tender is abnormally low "it may require the Tenderer to provide details of the constituent elements of the tendered total of the Prices or the tendered amounts and this may include (without limitation) the information listed in Reg. 69...". Reg. 69 provides that where a tender appears abnormally low the authority shall, not may, require "the explanations".

**219.** The word "may", which confers discretion, only applies to the restriction in Reg. 69(4) on rejecting a tender in cases where evidence is sought and found to be unsatisfactory. In Reg. 69(1) the obligation to perform an investigation of an apparently abnormally low tender is mandatory. Either way, in this case the Respondent says that it did not form the opinion that the successful tenderer's tender was abnormally low, which is why it did not perform the Inquiry, either by reference to paragraph 7.7.1 of the ITT or by reference to Regulation 69.

### **Assessment of the tenders**

**220.** Evidence as to the manner in which the tenders were assessed is sourced from documents exhibited by the parties and affidavits. A remarkable feature is the absence of any

minutes of meetings of the Tender Assessment Panel or any affidavit or other evidence by any member of that panel.

**221.** Affidavits were sworn by Mr. Christy O’Sullivan, a director of RPS Consulting Engineers Limited. Mr O’Sullivan describes the tender, clarification and evaluation process performed by him and the consultant team in support of the TAP. He says that they reported to the TAP, and the TAP decided on commercial queries to be referred to the tenderers. He refers to a document described as the Tender Analysis Document (TAD), which I consider in detail below. Affidavits are sworn by Mr. Paul Dolan, Head of Roads in the Respondent. His affidavits are limited to verifying the Statements of Opposition.

**Tender Analysis Document, 11 December 2022 (“TAD”)**

**222.** This is a spreadsheet exhibited firstly by Mr. John Donaghy, on behalf of the Applicant in his affidavit of 18 October 2023. Mr Donaghy says that this document was made available in the course of discovery. The Applicant questions whether this in fact was a document considered at any meeting of the Tender Assessment Panel. Nonetheless, both parties place extensive reliance on its content. It is therefore necessary to describe this document in some detail.

**223.** Extracts from this document are exhibited by Mr. O’Sullivan in his affidavit sworn on 3 November 2023. Mr. O’Sullivan says that the consultant team developed this working spreadsheet *“to collate the tender submissions and analyse the submitted tenders”*.

**224.** The Tender Analysis Document (“TAD”) is dated 11 December 2022, two days before the date on which it is said that the Tender Assessment Panel met. An A3 version presented to court at the hearing has 20 pages of Tabs annexed, containing breakdown and further analysis of information summarised in the first page.

**225.** The first page is headed *“Tender Analysis - Public Lighting Energy Efficiency Project - North West Region”*. It is a table of figures showing the amounts tendered by each of the

preferred tenderer, the Applicant and Le Chéile. The line described as “*Grand Summary*” shows the total of tendered prices for the preferred tenderer at €[REDACTED], Le Chéile at €[REDACTED] and the Applicant at €[REDACTED]. Opposite each of these figures is stated a percentage which is said to be a comparison between the amount tendered by the named party and the amount which is the average of the other two bids. This is described as the “*percentage Comparison of Rate*”. In the case of the preferred tenderer its bid of €[REDACTED] is stated to be 49% of the average of the other two bids. The Le Chéile bid of €[REDACTED] is stated to be 96% of the average of the other two and the Applicant’s bid of €[REDACTED] is stated to be 184% of the average of the other two.

**226.** In each case the Total of Tendered Prices is the aggregate of the amount tendered in respect of Preliminaries, Lighting and Ancillary and the Contractor’s Fee. It does not include the SCC total (Schedule of Costs Components), although those totals appear also in the Table.

**227.** The front page contains also a reference to what is described as the “cost per lantern” of the three bids for this project. The cost per lantern including the fee, of the preferred tenderer’s bid is €[REDACTED], by contrast with Le Chéile’s €[REDACTED] and the Applicant’s cost per lantern of €[REDACTED]. The table then compares these costs with the costs per lantern on two other public lighting energy efficient projects in the State namely, the South Project and the East Project

**228.** In the case of the South Project the cost per lantern including fee associated with the successful bid, that of SSE Airtricity Solution Limited, was €[REDACTED]. In the case of the East Project, it is said that the cost per lantern in the successful bid of Killaree Lighting Services, was €[REDACTED]. This comparison is relied on by the Respondent to show that the preferred tenderer’s cost per lantern of €[REDACTED], being higher than the cost of all bids on the other projects, is not abnormally low.

**229.** The narrative on the first page entitled “Summary” reads as follows: -

- *“Due to the large spread of prices tendered, a direct comparison between the three tenderers was deemed insufficient when assessing rates and total prices tendered.*
- *While BAM appears low in direct comparison with Enevero (Le Chéile) and White Mountain further investigation comparing BAM’s tendered total against the pre – tender estimate and previous PLEEP projects (being a reference to the East project and the South project) totals tendered were found to be reasonable.*
- *Refer to Tab ‘PTE v. Tender’ for comparison with pre – tender estimate for comparison, note the main elements of scope were compared as pre – tender estimate, not in the same format as tender direct like for like with remaining elements not possible.*
- *A direct comparison with PLEEP projects in the South and East on a cost per lantern basis confirmed BAM costs reasonable, refer to Tab ‘Tender Price Comparison’ for detailed breakdown: a summary is provided in the snippet below.*

**230.** The “snippet below” is the information containing a “per lantern” comparison which I have quoted above (paragraphs 227 and 228).

**231.** The first bullet point above illustrates that the Respondent recognised that the competition could not be determined by relying on direct comparison between the three tenderers. Instead it concluded that BAM’s totals tendered were reasonable when compared against the pre-tender estimate and the two other PLEEP projects in the State. The conclusion suggested by these Notes are not reflected in the Tender Assessment Report which relies heavily, if not entirely, on the scoring results which compare the three tenders submitted.

**232.** Behind the first page of this spreadsheet are separate tabs for each of (1) “Prelims”, (2) Lighting and Ancillary, (3) Contractor’s Fee, and (4) SCC (Schedule of Costs Components).

**233.** These tabs are populated with all the prices tendered by each of the three admitted to the competition. For the ‘Preliminaries’ Tab, the information is broken down between the seven counties. For the ‘Lighting and Ancillary’ Tab the information is further broken down between the 26 municipal districts within the region.

**234.** In each tab, further breakdowns are provided of the figures on the summary page. Comments are inserted identifying clarifications to be sought under different headings. The tabs are colour coded to identify prices or rates which are “very high (50% and higher)”, “very low (50% and lower)” and “slightly high/low (20% to 49% higher/lower)”. Across all of the three tenders, a range of different priced items attract designation as either showing rates high or low, very high or very low, or “slightly high or low”. These pages illustrate that different tenderers take different approaches to the pricing structure and include a number of items at extremely low or even zero rates, recognising that these may be compensated for elsewhere. In such cases, the comments include a note to the effect that “tenderer has the right to allocate costs here as they see fit”.

**235.** The notes used in this Tender Analysis Document formed the basis of clarifications sought from each of the tenderers. In the case of the preferred tenderer, 61 separate clarifications were sought arising from notes contained in these tabs.

### **Comparisons**

**236.** In respect of ‘Preliminaries’ the preferred tenderers price of €[REDACTED] is stated to be 35% of the average of the other two bids. The price of Le Chéile at €[REDACTED] is stated to be 121% of the average of the other two, and the Applicant’s figure of €[REDACTED] is stated to be 181% of the average of the other two. These averages relate to

the total for Preliminaries. Within the breakdown for each tenderer there are significant variances and each of the tenders includes certain items priced at nil or close to nil.

**237.** The tab relating to Lighting and Ancillary Works again shows extensive variances. The colour coding within the tab identifies different prices and rates as high, very high, low and very low. The total amount tendered by the preferred tenderer is €[REDACTED], which is stated to be 44% of the average of the other two bids. The price tendered by Le Chéile of €[REDACTED] is stated to be 96% of the average of the other two bids. The price tendered by the Applicant under this heading is €[REDACTED], stated to be 195% of the average of the other two.

**238.** The third tab relates to the Contractors' Fee. The striking feature of this item is that the preferred tenderer's Fee Percentage is shown as the highest at [REDACTED]%. The fee percentage of Le Chéile is [REDACTED]% and the fee percentage of the Applicant is [REDACTED]%. When the fee percentages are applied to totals of costed items, which are generally lowest in the case of the preferred tenderer, the comparative ranking changes. The preferred tenderer's fee is shown at €[REDACTED], being 95% of the average of the other two. The fee of Le Chéile is lowest, at €[REDACTED] which is 71% of the average of the other two, and the fee of the Applicant is shown at €[REDACTED], being 142% of the average of the other two.

**239.** The Contractor's Fee of the preferred tenderer at [REDACTED]% is broken down as to [REDACTED]% for profit, [REDACTED]% for head office overheads, and the balance for such matters as insurances, accounts administration and the cost of a performance bond.

**240.** In the case of Le Chéile, the Fee of [REDACTED]% is broken down differently. [REDACTED]% is for profit, [REDACTED]% for payroll and business support, and the balance relates to such matters as bond insurance, finance charges, and disallowed costs.

**241.** Of the [REDACTED]% Fee in respect of the Applicant, [REDACTED]% relates to profit, and [REDACTED]% to head office overheads.

### **Schedule of Costs Components**

**242.** The fourth tab relates to the Schedule of Costs Components. This contained rates for eight categories of cost, being People, Equipment, Plant and Materials, Subcontractors, Charges (other than charges for people), Manufacture and Fabrication, Design, and Insurance.

**243.** In this tab, the total tendered by the preferred tenderer is €[REDACTED], stated to be 70% of the average of the other two bids. For Le Chéile, it is €[REDACTED], stated to be 107% of the average of the other two bids, and for the Applicant, €[REDACTED], stated to be 130% of the average of the other two. Again, the colour coding scheme is used to identify amounts which are stated to be high or low, or very high or very low.

**244.** The element within the Schedule of Costs Components in Tab 4 which relates to “people” is the element which causes the most controversy in this case. The majority of the clarifications sought by the Respondent from the preferred tenderer relate to the rates in respect of people contained within this schedule. I shall return to these later in the context of the clarifications.

**245.** A separate tab compares the tendered rates against the pre-tender estimate (“PTE”). In this tab the pretender estimate quoted is a revised pretender estimate at [REDACTED]. This shows the preferred tenderers Total of Prices of [REDACTED] as 75% of the revised PTE, the Le Chéile bid of [REDACTED] as 124% of the revised PTE and the Applicant’s tendered total of [REDACTED] at 183% of the revised PTE.



### **The clarifications tab**

**246.** A separate tab described as “Clarifications” identifies clarifications intended to be sought of the bidders, although not all clarifications later requested are identified in this tab. It is the only place in the TAD where the phrase “abnormally low” has been used in respect of three items within the preliminaries.

**247.** In his affidavit sworn 3 November, 2023 Mr. O’Sullivan explains in respect of these three items that where they have been priced at nominal, in respect of certain temporary plant and equipment, a parent company guarantee and a performance bond, those have been priced elsewhere, either within the Contractor’s Fee or elsewhere within the Preliminaries. Although those were the only three items identified in the clarifications tab with the words “abnormally low”, the same explanation does not apply in respect of the rates for “people” contained in the Schedule of Cost Components, as appears later when I consider the clarifications provided.

### **Operation of the Contractor’s Share/ “pain/gain”**

**248.** The next tab in the TAD, headed “potential pain/gain scenarios” illustrates the operation of the Contractor’s Share or the “pain/gain” mechanism in a range of outcomes depending on the final Price for Work Done to Date (PWDD). Firstly, it shows the effect if the outturn corresponds to the original pre tender estimate (“PTE”) of 23.5 million and secondly applying an updated PTE of €[REDACTED].

**249.** This tab illustrates that if the total assessed PWDD is in line with the PTE of 23.5 million (which of course is higher than the preferred bidder’s tender total of prices [REDACTED]) the effect of the Contractor’s Share mechanism is that BAM would suffer monetary pain of €[REDACTED] and the Respondent would suffer pain of €[REDACTED].

**250.** Both of the experts gave evidence in relation to the operation of the Contractor’s Share. They were agreed that, as appears from this Tab, the preferred tenderer will suffer pain

on any of the projected outturns. The question is how much pain, and what the implications of these are for the operation of the contract and, more importantly, the evaluation of the tenders.

**251.** The Respondent's expert Mr. Wearen agreed that if the PWDD were at the higher PTE of [REDACTED], the preferred tenderer's pain would be [REDACTED]. He expanded by saying that if one adjusts this by deducting the entire profit element of the Fee of BAM/KLS this pain would reduce to €[REDACTED].

**252.** Mr. Wearen also gave evidence that if certain contingency amounts which appear in the Respondent's PTE referable to potential compensation events were to materialise at their budgeted figure of €[REDACTED] the pain for BAM/KLS would reduce further to €[REDACTED].

**253.** Further potential outcomes were identified by both witnesses including the possibility that the pain for BAM could be even lower again if the outturn were based on an average of the two tender returns excluding the Applicant's bid, described by Mr. Wearen as an "outlier".

**254.** A final scenario identified in this Tab was that if the PWDD reflected the average of all three of the tendered prices, being €[REDACTED], the total pain for the preferred tenderer could be as high as €[REDACTED]. The Respondent's pain does not change from €[REDACTED].

**255.** It was not in dispute that on any of the potential outcomes the Contractor's Share mechanism would result in the preferred tenderer suffering a loss on the contract ranging from as low as €[REDACTED] (a figure which would only apply if the contingencies for Compensation Events at €[REDACTED] were all realised) through to the more likely figure of €[REDACTED], and potentially on a worst outcome as high as €[REDACTED].

**256.** The Respondent submits that it was entitled to accept the proposition that the preferred bidder had the scale and financial capacity to absorb this element of “pain” and that this element of the evidence does not mean that the preferred tenderer’s bid was abnormally low.

**257.** Although much time was taken on this subject at the hearing, there is limited evidence before the court as to the extent to which the Tender Assessment Panel considered the operation of the Contractor’s Share. Mr. O’Sullivan in his affidavit of 3 November 2023 says that the consultant team developed the working spreadsheet referred to as the TAD to collate the tender submissions and analyse submitted tenders. He says that the team then reported its findings to the Tender Assessment Panel, who then completed a full tender evaluation “including both quality and commercial aspects”. He says that during this process, the Panel decided on commercial queries to be referred to the tenderers including queries which might not impact on the evaluation outcome but might “assist in future contract administration”. The Tender Assessment Report, considered later, makes no reference whatsoever to the subject of the Contractor’s Share or the capacity of the preferred tender to absorb its impact.

**258.** Mr. O’Sullivan says that the evaluation of tenders include an assessment of the “Total of the Prices” and that these were compared with similar tenders in the East and the South. He says that the analysis shows that the preferred tenderer’s price per lantern at €[REDACTED] was [REDACTED] % higher than the successful tenderer on the East project and [REDACTED] % higher than the successful tenderer on the South project. Although these comparisons appear in the Tender Analysis Document, they do not feature in the Tender Assessment Report.

**259.** Mr. O’Sullivan also says that when the preferred tenderer’s total of prices, at €[REDACTED], was compared with the pre – tender estimate and found to be [REDACTED]% lower than that estimate “we did not believe the pricing to be abnormally

low”. Mr. O’Sullivan did not give evidence in court and was not cross – examined. I take his use of the term “we” as a reference to the consultant team because Mr. O’Sullivan is not a member of the Tender Assessment Panel.

### **Commercial clarifications**

**260.** On 2 December 2022, the Respondent issued a Tender Clarification to each of the tenderers.

**261.** The clarification request to the preferred tenderer identifies 61 points. Points 1 – 5 relate to the Preliminaries. Points 6, 7 and 8 relate to the Activity Schedule. Points 9, 10 and 11 relate to the Contractor’s Fee and points 12 – 61 relate to the Schedule of Cost Components (SCC).

**262.** Clarification request no. 12 arises from Item 1A in the SCC which is “Labour”. The first item under that heading in the Schedule of Costs Components tab attached to the Tender Analysis Document relates to a daily rate for a “foreman” of €[REDACTED]. This has been identified by the Respondent under its Comments as “based on an eight hour day this is €[REDACTED] which is below CIF craftsperson rate of €[REDACTED]”. In clarification no. 12, the Respondent requested that the preferred tenderer “please explain the rate proposed in the tender”. The response given was as follows: -

*“Specifically, the tender includes for factoring in both labour and equipment rates while submitting the most economically beneficial tender. We have extensive experience in performing contracts of a similar type.*

*In our experience, projects of this nature require labour to be provided with transport and/or equipment to fulfil their role and accordingly enables us to pay industry standard labour rates while still providing the best value for money service to the client”.*

**263.** The same question is raised by the Respondent in respect of rates for 34 other grades of person. These clarifications are sought at items numbered 13 – 32 and 48 – 59 inclusive. These are all identified in the “comments” column of the SCC Tab as being “below CIF [category] rates” for the grades concerned. The same response quoted above is repeated verbatim for each one.

**264.** For a number of the rates for persons under the heading “Design”, covering such persons as design engineers and technicians, the response is even more concise. It states: -

*“The tenderer confirms the adequacy of the rate included in the tender for design engineer”.*

**265.** Clarifications 33 – 47 relate to equipment. This includes such items as 3H mini excavator, truck, trailer, HIAB truck, small van, large van, MEWP, insulated MEWP, passenger vehicle, underground detection equipment, whacker, breaker, generator, concrete saw and barriers. For these items, the amounts tendered are rates which on their face appear extraordinarily high, ranging up to in some cases, in the case of the breaker for example, 36,364% of the average of the other tenders. This is not as extraordinary as it appears because some of these items are not priced at all by the other tenders. So the percentage comparison is not informative. However, when these rates were queried by the Respondent the response is the same in each case as follows: -

*“Specifically, the rate includes for equipment costs. This, in association with the labour element required to undertake the works, allows us to provide the most economically beneficial tender to the client”.*

**266.** The essence of these replies is that the preferred tenderer was asserting that when rates in respect of people are blended with rates applied to transport and equipment, which they say, correctly of course, can only be operated by people, the effect of blending these rates enables the preferred bidder “to pay industry standard labour rates”. The second element

of the reply is the general statement of assurance that the preferred tenderer “confirms the adequacy of the rate included”.

**267.** There is no evidence that the Respondent interrogated these responses before accepting them. As appears from the next section, the ‘people’ rates below industry standard were incorporated in the figures transposed into the Schedule of Costs Components which informed the price criteria when scoring the tenders.

### **Tender Assessment Report 21 February 2023 (“TAR”)**

**268.** Mr. O’Sullivan of RPS gave evidence that the “Project Board” met on 13 December 2022. No account is provided of the proceedings of that meeting, save that the clarifications which were issued on 2 December 2022 had been replied to on 8 December 2022. Therefore it is assumed they were available when the board met on 13 December 2022.

**269.** In his affidavit of 3 November 2023, Mr. O’Sullivan refers to the meeting of 13 December 2022 as a meeting of the Tender Assessment Panel. He says that the panel considered the commercial assessment using the “tender assessment spreadsheet tool”. The Respondent submits that this is a reference to the Tender Analysis Document dated two months earlier, 11 December 2022, and the responses to clarifications. He says that recommendations were made arising from this meeting to seek final clarifications, which were issued in January 2023.

**270.** The Tender Assessment Report was authored by a Mr. Jason Collins of Arup and reviewed and approved by Mr. O’Sullivan for issue finally on 21 February 2023. It recites the background to the tender process and contains comparisons between the amounts tendered by each of the three competitors then deemed qualified.

**271.** The Tender Assessment Panel comprised Mr. Gerry O’Brien of GMOB Consultants, as Chair, Marianne McHugh, Senior Executive Engineer, NRDO (I assume meaning National Roads Development Office), Mayo County Council, and Mr. Gerry Naughton, retired Senior

Engineer, Limerick County Council. It recites that the Tender Assessment Panel was supported by the consultancy teams of RPS and Arup including Mr. O’Sullivan.

**272.** Section 3.3 refers to the European Single Procurement Document which addresses the suitability requirements of each of the tendering parties.

**273.** The report recites that each of the three tenderers had met the “pass/fail” criteria for suitability. It later transpired, by its concession on this point, that the Respondent could not stand over the admission of the Le Chéile consortium because it did not meet the Minimum Turnover Requirements.

**274.** The report contains a summary of the total prices tendered, namely BAM/KLS at €[REDACTED], Le Chéile at €[REDACTED] and the Applicant at €[REDACTED]. These figures do not include the amounts in the submitted Schedules of Cost Components. However, the Report records the critically important fact that marks awarded for the SCC informed the price scoring.

**275.** In the “Summary of Cost Scoring”, the Report summarises the result of marking as follows: -

*“In accordance with s. 7.6.2 of the ITT the tender with the lowest overall notional tender price following the assessment of the Activity Schedule subtotal ([REDACTED] marks) were awarded to BAM/KLS, the lowest Fee Percentage ([REDACTED] marks) were awarded to [REDACTED], the Notional Total Schedule of Cost Components ([REDACTED] marks) were awarded to BAM/KLS (emphasis added). The Tenderers were awarded the maximum marks available for price in each respective subcategory. The other tenderers were then scored by deducting one half of one percent (0.5%) of the total marks available for price for every one percentage points difference between the lowest eligible price and that of the tenderer under consideration.”*

**276.** The SCC, for which the successful tenderer was awarded 100 out of a maximum of 100 marks, contained the sub-industry-standard rates for labour which were the subject of the clarifications and responses I quote (and on which I comment) in paragraphs 263-268 above.

**277.** The result in respect of price therefore was that out of the total marks available of 600, BAM scored [REDACTED], Le Chéile scored [REDACTED] and the Applicant scored [REDACTED].

**278.** The Report recites the clarifications sought from the tendering parties on 2 December 2022 and refers to and appends the responses.

**279.** In the Summary and Recommendations, it is recorded that three tenders were received within the time stipulated in the Instructions to Tender. An assessment of the ESPD for all three tenders was undertaken and that each of the three provided a compliant tender. The summary recites that “all tenderers comfortably passed the minimum qualifying thresholds”. This proved to be incorrect, as conceded by the Respondent.

**280.** At 4.1.9 the Report states: “The tender board’s assessment of price and quality revealed that BAM KLS JV submitted the Most Economically Advantageous Tender achieving the highest overall mark as seen in Table 16”.

**281.** Table 16 is headed “Marking Summary”. Reference is made to the Quality Marks, Price Marks and Total Marks. BAM were awarded [REDACTED] marks, Le Chéile [REDACTED] and the Applicant [REDACTED].

**282.** Under “Recommendations” in Section 4.2 the Report states: -

*“Arup agrees with the findings of the Tender Board Assessment Panel and therefore recommends Mayo County Council accepts the BAM/KLS tender for the sum of €[REDACTED] excluding VAT”.*

**283.** The report is signed by Mr. O’Brien, Ms. McHugh, and Mr. Naughton.



**284.** The appendices to the Report are extensive. They include detailed backup to the scoring tables, a query register, copies of the clarifications post tender and commercial clarifications, and a competency and health and safety evaluation. The report itself contains no record of any discussion of the variances in prices identified in the Tabs to the Tender Analysis Document which were the subject of the clarifications, or evidence of consideration by the Panel of the adequacy or otherwise of the responses to the clarification request. Nor does it record any consideration of the comparisons with the South and East Project, on which the Respondent places reliance, or of the effect of the Contractor's Share mechanism on the preferred, or any tender.

**Project Review 7, 27 February 2023.**

**285.** Among the exhibits is a document called "Project Review 7". This document, although unsigned is stated to have been authored by Mr. Collins of Arup and reviewed and approved by Mr. O'Sullivan on 27 February, 2023, six days after the date of the Tender Assessment Report. It states that the procurement and tender analysis for the Project has been completed. It continues:-

*"As part of the Capital Works Management Framework, project management GM 1.1 it is necessary to carry out a Project Review 7 where a review of the tender submission is carried out in advance of awarding the contract.*

*Project Review 7 is a mandatory red-light review that takes place at the end of the tender process. It is appropriate for all projects, both traditional, employer design projects and design and build projects.*

*The main purpose of Project Review 7 is to review the results of a tender competition in advance of awarding the contract. This is a significant review as the decision at this point involves a considerable commitment to capital expenditure."*

**286.** This report records that when the tender total of prices from BAM/KLS of €[REDACTED] is taken into account, the “post tender” combined cost of the Project, to take account all of the Respondent’s other costs not tendered, is €[REDACTED]. This is said to compare favourably with the pretender estimate for the total of such costs at €[REDACTED] made in July 2022.

**287.** The report then quotes from the Tender Assessment Report and summarises its result and the scoring and ranking of the three tenders.

**288.** The report recites that assessments were undertaken against the “pass/fail” criteria for eligibility of all tenders and recites the fact that “all tenders pass the minimum qualifying thresholds allowing the panel to assess the quality and price elements of the tenders in detail”, a repetition of this important error.

**289.** The report recites the fact that clarifications were issued and responses received from tenderers, but again, like the Tender Assessment Report itself, there is no evidence of consideration of the quality of the responses received.

**290.** A section headed “RMO Business Case” is entirely blank.

**291.** In submissions no particular reliance was placed on this report by the Respondent. However it is surprising that since it is described as an important “red-light review” it is in substance no more than a recital of the conclusions contained in the Tender Assessment Report made six days earlier.

### **Affidavit evidence**

**292.** Mr. John Donaghy is the Commercial Director of the Applicant. He exhibited the minutes of a meeting of the Public Lighting Project Board, held on 16 November, 2022. This of course is not the Tender Assessment Panel but it is a meeting of the board coordinating the PLEEP project for the country. At this meeting a Mr. Peter McLoughlin of the Respondent reported on the tenders which had been received for the North West Project. He commented

that “there was a massive price difference in the three tenders”. Mr. McLoughlin confirmed that the tender assessment board was meeting in the following “couple of weeks”.

**293.** Mr. Donaghy exhibits also the minutes of a meeting of the Respondent’s Project team on 21 October, 2022 at which it was noted that there were “significant difference in prices and target costs, this will require consideration – to be discussed with tender board.”

Nowhere is there any evidence of the discussion with the tender board about these differences.

**294.** In an email on 31 January, 2023 from Mr. O’Sullivan of RPS to Mr. Collins of Arup Mr. O’Sullivan says, in the context of discussing the clarifications received from the preferred tenderer “the responses are a bit ‘weaselly’ but we can live with them – the clarifications will become part of the contract documents.”

**295.** Mr. O’Sullivan says that this comment related only to the fact that although a confirmation had been received from the preferred tender that it would meet the contract requirements, he had simply noted that they had not elaborated on that any further.

**296.** There has also been exhibited an email from Mr. Collins to the consultant team and the Respondent on 31 January, 2023, arising from receipt of response to the second clarification where he states “the response to the clarifications concurs with our queries and agree with the terms of the contract”. This is the high point of the Respondent’s evidence of its consideration of the clarification responses.

**297.** By an email of 18 November 2022 from Mr. O’Sullivan of RPS group to other members of the consultancy team, both in RPS and in Arup, Mr. O’Sullivan stated as follows:

-

*“Gents,*

*I spoke to Gerry O’Brien [Chair of the TAP] today regarding the tender assessment.*

*1. He does not want to see the commercial assessment.*

2. *He would like an initial teams meeting to be steered on the documents next week.*
  3. *He then is looking to have a joint board and evaluation meeting.*
  4. *His idea of a tender report is a signed scoring matrix.*
  5. *He will be focusing on quality and will be relying on our commercial evaluation.*
- On a different note we can start progressing Project Review 7 and revising the cost estimate – it is very unlikely the tender evaluation will change from BAM so let's proceed on that basis”.*

**298.** There is no evidence from Mr. O'Brien or any member of the Tender Assessment Panel which would explain what Mr. O'Sullivan characterises as a lack of desire on the part of the Chairman to see the commercial assessment.

#### **Evidence of the experts**

**299.** Evidence was given on behalf of the plaintiff by Mr. Colin Loughran of Messrs Loughran Associates.

**300.** Mr. Loughran is a chartered quantity surveyor with over 30 years experience in the construction industry and says that he has extensive experience of projects similar in concept to this project.

**301.** On behalf of the Respondent, evidence was given by Mr. Mark Wearen. Mr. Wearen is also an experienced chartered quantity surveyor and a senior director within the expert services team at Kroll Advisory (Ireland) Limited.

**302.** The experts differed on a number of questions concerning the proper construction of the contracts and the ITT. It was recognised that these were not matters which could be resolved as between them but were matters of construction for the court to determine. They agreed on a number of points but differed on a range of questions. A principal difference was the high-level question of whether the preferred tenderer's bid was abnormally low or

abnormally high, such as ought to have caused the Respondent to perform a Regulation 69 Inquiry.

**303.** Much of the evidence of the experts concerned also the effect of the Contractor's Share or "pain/gain" mechanism and whether this would affect its ability to deliver the contract or whether in fact the tender could properly be treated, as the Applicants have put it, as a "genuine" tender.

**304.** Extensive parts of the expert evidence were devoted to the Tender Analysis Document and the numerous calculations contained in the Tabs annexed to that document. Each of the experts extrapolated different meanings from the financial information. Much of the evidence and submissions arising from information in that document, whilst interesting, was a form of 'ex post facto' debate about the merits of the tenders and not informative as the manner in which the Respondent evaluated the tenders and made its decision.

#### **Evidence of Mr. Loughran**

**305.** Mr. Loughran's evidence is summarised in a Report delivered by him on 17 October 2023, in the summary of which he stated the following: -

(1) The prices submitted by BAM/KLS in the Activities Schedule are significantly below the real cost of undertaking the works. The Contractor's Fee is abnormally high for this type of contract, as are the equipment rates in the SCC. The labour rates in the SCC do not meet the basic SEO rates required by the law.

(2) The Respondent did not challenge or seek sufficient clarification from the preferred tenderer on several of the abnormally low and abnormally high prices in their bid.

(3) The preferred tenderers' responses to the clarifications raised by the Respondent did not adequately answer the questions raised.

(4) The Respondent did not further challenge the inadequacy of the preferred tenderer's responses and appeared to accept those responses without doing so.

(5) The Activity Schedule prices submitted do not form the basis of payment under the contract. When the contractor's application for payment exceeds 110% of the Target the contractor will be "in pain" for all amounts above that threshold. If this occurs to the extent set out in the Respondent's own scenarios in the Tender Analysis Document, the contract could become unsustainable.

(6) The Respondent's evaluation of preferred tenderer's bid should have been more rigorous in interrogating the abnormally low and abnormally high prices submitted.

**306.** Mr. Loughran performed a review of the preferred tenderer's bid and expressed the following opinions.

**307.** In relation to Preliminaries, Mr. Loughran identified that the amount tendered by the preferred tenderer was €[REDACTED], by Le Chéile, €[REDACTED] and by the Applicant €[REDACTED]. Mr. Loughran recognised that contractors may have different methods of pricing by applying certain items into Preliminary costs which others include in direct works and this may account for some of the differences. Mr. Loughran expressed the view that the preferred tenderer could not manage the works within the preliminary price included in its Activity Schedule and therefore would incur significant pain under the contract payment mechanism.

**308.** Mr. Loughran performed a similar exercise in relation to other headings within the Activity Schedule. In respect of "lighting and ancillary works" the preferred tenderer had priced the tender at €[REDACTED], Le Chéile at €[REDACTED] and the Applicant at €[REDACTED]. Mr. Loughran broke these figures down as between survey works, replacement and refurbishment of luminaires and column works.

**309.** In relation to survey works, Mr. Loughran identified the preferred tenderer's bid at €[REDACTED], Le Chéile at €[REDACTED] and the Applicant at €[REDACTED]. Mr. Loughran described the resources required to perform the survey works and stated his opinion that the preferred tenderer's price for the work was inadequate to undertake the task correctly.

**310.** In respect of column replacement and refurbishment works, Mr. Loughran identified the bid of the preferred tenderer at €[REDACTED] of Le Chéile at €[REDACTED] and of the Applicant at €[REDACTED]. Applying the cited quantities against market rates, largely based on information provided to him by the Applicant, he concluded that the preferred tenderer's price for this activity was less than half the material cost for the activity.

**311.** Mr. Loughran expressed surprise that the Respondent had not raised any post – tender clarification on this element of the Activity Schedule particularly having regard to the difference of [REDACTED] between the bid of the preferred tenderer and Le Chéile, and a difference of €[REDACTED] between that of the preferred tenderer and the Applicant. Mr. Loughran said that based on the operation of the pain/gain mechanism and the risk of the costs associated with this item increasing “exponentially during the contract” the preferred tenderer simply would not have sufficient money “in the total price” to undertake these works.

**312.** Mr. Loughran contrasted the Contractor's Fee as tendered by each party. The fee percentage tendered by the preferred tenderer was [REDACTED]%, by Le Chéile [REDACTED]% and by the Applicant [REDACTED]%. Mr. Loughran expressed the view that in his experience of over 20 years of working on such contracts, any party bidding [REDACTED]% was unlikely to be successful. He acknowledged that the percentage fee includes overheads and only a limited proportion, typically one half, represents the contractor's profit.

**313.** Mr. Loughran expressed the view that the preferred tenderer had taken advantage of the fact that the Respondent's scoring requirements allocated only 50 marks for the Contractor's Fee and had therefore submitted what was an abnormally high contractor's fee. He said that the effect of the contractor's Fee as a percentage when applied across all elements of the contract would be to increase all defined costs and apply pressure to both the client and the contractor when the pain/gain mechanism is applied.

**314.** In relation to the Schedule of Costs Components, Mr. Loughran said that these rates, in accordance with the provisions of the contract, would be used in the assessment of the Defined Cost and therefore in establishing the Price for Work Done to Date.

**315.** Mr. Wearen takes a different view on this question, that the amount included in respect of the Schedule of Costs Components is not included in the total of the prices tendered and therefore not included in the Target Cost. This difference of opinion relates to the interpretation of the documents.

**316.** Mr. Loughran identified items in respect of labour in the SCC which he said did not meet applicable Sectoral Employment Orders, and items in respect of plant and equipment which he said were abnormally high.

**317.** Mr. Loughran says that the Respondent nowhere requested the preferred tenderer to explain how it could perform the works for the tendered prices. He quoted from the clarifications and responses which I have described earlier (see paras 263-268). He expressed the view that these responses do not answer the question seeking an explanation as to why the people rates were not in accordance with industry standards. He says that attempts to connect equipment rates with labour rates, thereby achieving a "blended" rate is "not how the contract operates". He stated that the "PWDD is calculated using defined costs and the SCC for the individual resources; there are no blended rates under the NEC 4 Option C".



**318.** In relation to the operation of the Contractor’s Share or “pain/gain” mechanism Mr. Loughran contrasted the pain which would be incurred by the preferred tenderer if the out turn of the contract matched the pre – tender estimate of €23.5 million (later recognised as possibly €[REDACTED]) or based on an average of the tender returns at €[REDACTED]. In the latter case, the potential pain for the preferred tenderer is €[REDACTED]. Mr. Loughran expressed the opinion that the second of those scenarios is the more likely outcome. Therefore, in his opinion there is doubt whether the preferred tenderer could deliver the Project. Mr. Loughran said that even if the pain were at the lower figure of €[REDACTED], the preferred tenderer would be facing a “serious situation derived from abnormally low prices” submitted by it.

**Independence of Mr. Loughran**

**319.** In cross examination of Mr. Loughran, it emerged that on various dates between 2006 and 2017 he had held senior management positions in certain Lagan Group companies. In 2017 he left to establish his own consulting practice. It emerged also that the Applicant was until 2010 owned by the original Lagan Group, and from 2010 onwards by the part of the restructured Lagan Group owned by Mr. Kevin Lagan. From 2010 Mr. Loughran was employed in the part of the Group owned by Mr. Michael Lagan. Mr. Loughran said that since 2010 he has had no association with the Applicant, until it approached him in December 2022 to provide an Expert Quantum Report in an adjudication.

**320.** The Respondent submitted that because the concise curriculum vitae in the introduction to Mr. Loughran’s Expert Report did not disclose these associations his status as an expert witness with a duty of candour to the court is compromised.

**321.** The curriculum vitae does not disclose the connections between Mr. Loughran and the Applicant. There is therefore some force in the Respondent’s submission. While the court respects the professional expertise of the experts, a substantial portion of the Reports

trespassed into the realm of submissions, or construction of the legal effect of the documents presented. Their Reports and evidence have assisted the court in understanding a number of the issues within their spheres of expertise and by articulating their respective opinions on a range of matters. I have taken account of their opinions, but the core findings I make in this judgment do not turn on the credibility of either of them but on the court's assessment of the evidence adduced by the parties themselves. Accordingly, I do not find that anything material turns on this non-disclosure.

### **Evidence of Mr. Wearen**

**322.** Mr. Wearen expressed the following opinions: -

(1) The tender submitted by the preferred tenderer cannot be regarded as abnormally low. It reflects competitive pricing strategy aimed at optimising the preferred tenderer's chances of securing the contract.

(2) BAM/KLS are capable of complying with their contractual obligations in completing the works on the basis of the bid they have submitted.

(3) While there are labour rates within the preferred tenderer's Activity Schedule in Tab 4, namely the Notional Total Schedule of Costs Components, which are low and below corresponding SEO rates and could be considered to be abnormally low on that basis, the equipment rates contain items which could be considered to be abnormally high, and this will compensate for the low labour rates as works on the Project will involve both labour and plant. These rates do not render the total of the prices abnormally low or high.

(4) As regards the question of compliance with applicable social/labour law obligations the pricing of a rate at a particular level, even below statutory, and the legal obligation to pay certain wages are not the same thing. The preferred tenderer has confirmed that it will comply with social/labour law obligations. The preferred

tenderer's bid could be considered low in relation to the pre – tender estimate and the Le Chéile tender. Mr. Wearen considers the Applicant's tender to be an outlier. This view is recorded nowhere as taken by the TAP.

(5) Having regard to a benchmarking exercise performed with the East and South projects and all the circumstances of this procurement and the participation of the preferred tenderer in the market, the tender is within the range of what Mr. Wearen would consider to be normal albeit at the lower end of the range and not abnormally low.

**323.** Mr Wearen said:

*“The tenderers completed an Activity Schedule that forms the Total of the Prices for tender evaluation but not for routine payment assessments, except for Contractor's Share calculation. The notional total from the SCC tab in the Activity Schedule (Excel file tab 4. SEC) assists with tender evaluation and is not included in the Total of the Prices. No contract amendments have been made to expand the list of items in the current project's Contract Data Part 2 to include other resources including labour (“people”) and the equipment items for which rates have been provided in the Activity Schedule Excel file Tab 4.SCC”*

**324.** When one examines the scoring system applied to the evaluation of the tenders it is clear that the amounts inserted in the Schedule of Costs Components are embedded in the marking system, albeit only for 100 out of 1000 marks. Even if Mr. Wearen is correct that the figures inserted in the Schedule of Costs Components do not govern payments as the contract progresses, they are an integral feature of the scoring system which was implemented and which informed the evaluation and the Decision made by the Respondent.

**325.** Mr Wearen responded to Mr Loughran's opinion regarding variations between the amounts tendered by the preferred tenderer and market rates and other bids. He expressed the

view that whilst the amount for Preliminaries quoted by the preferred tenderer was lower than that of the competitor Le Chéile and of course of the Applicant it falls “within a plausible range”. He believes that this points to a “competitive yet practical approach corroborated by the Respondent’s robust tender assessment scoring”.

**326.** In relation to Lighting and Ancillary Works Mr Wearen said that the preferred tenderers amounts are “notably lower than those of LC and WMQ, and marginally lower when compared to the pre-tender estimate”. However, he continued “discrepancies in price and strategies among the tenders and the exceptionally high prices from WMQ suggest that their figures might be outliers and should be excluded from benchmarking analysis”.

**327.** In relation to the Contractor’s Fee Mr Wearen agreed that the preferred tenderer’s fee percentage is higher than industry norms but said that the pain gain mechanism acts as a guaranteed maximum price and ensures that excessive profits from the fee percentage are controlled.

**328.** In relation to the important question of labour rates Mr Wearen stated the following: -  
*“Certain labour rates applied by BAM KLS and their tender are not sufficient to cover the minimum cost for labour set down in the sectoral employment orders (SEO) requirements. Despite the low rates in the Activity Schedule for many categories of labour (people under the NEC) the rates in BAM KLS’s official Contract Data Part 2 are reasonable with some exceeding the SEO rates. The obligation to comply with SEO rates when paying labour is distinct from supplying tendered rates. This is evident with Public Works Contracts allowing for hourly rate valuations based on the SEO rates plus a zero markup for other costs which will be incurred, demonstrating that tendered rates below actual costs are permissible”.*

**329.** Mr Wearen expresses the view that the plant rates proposed by the preferred tenderer are “high and potentially abnormally so”. He continues: “these also have not been integrated

into BAM/KLS's Contract Data Part 2 meaning that they will not affect the PWDD unless its (sic) determined otherwise. Even if the rates are so incorporated the Contractor's Share mechanism would limit any long term financial benefit to BAM/KLS and the high plant rates might offset any under recovery from low labour rates."

**330.** The repeated focus on the price which will be paid for the works is misplaced. The court is concerned with the manner in which the competition was determined. The information which informed the TAP in evaluating competing tenders, is rooted in the marks awarded which are based on tendered prices. The potential application of the Contractor's Share to control total amounts paid is relevant in another context but does not feature in the scoring system adopted.

**331.** Mr Wearen expresses the following conclusions in response to those made by Mr Loughran: -

*"(1) That the preferred tenderer's tender is competitively priced, not abnormally low considering the Project's contract cost structures.*

*(2) Despite some rates being lower or higher than normal the overall tender total is within a normal range and not considered abnormally low when benchmarked against other schemes.*

*(3) The BAM KLS tender, although at the lower end, falls within a normal range for this procurement and does not require the Council to deal it abnormally low.*

*(4) When compared with the East and Southern benchmarks the BAM KLS tender is on the lower end but not abnormally so. It is deemed within a normal range for this market context even though it is lower than pre-tender estimate and Le Chéile tenders.*

The comparative reference here to Le Chéile, later conceded to be not qualified, and the reference elsewhere to the Applicant as an outlier reveals that comparative scoring of all three tenders, relied on and central to the conclusions stated in the Tender Assessment Report was fundamentally flawed.

*(5) Tactical pricing is acknowledged as a customary practice across different procurement methods including target costs contracts.”*

**332.** Mr Wearen refers again to the fact that in the Tendered Total of Prices, which in the case of BAM KLS was [REDACTED] does not include the amount in the Schedule of Costs Components. He continues:

*“52. Instructions to tenderers (ITT) sets out the basis of the assessment of the tenders under the Price Criteria and one of these is consideration of the ‘Notional Total Schedule of Costs Components’. Thus, the inclusion of the SCC tab in the Activity Schedule File is to assist with the tenderer selection by comparing the impact of tenderer rates for certain resources using notional quantities as inserted by the Employer. This aids in the tenderer’s selection process by illustrating the potential financial impact of each tenderer’s rates.*

*53. The ITT also states that tenderers shall populate the Schedule of Costs Components and include this in the Contract Data Part 2. Presumably this is a reference to the SCC tab in the Activity Schedule File which contains rates inserted against various categories contained in the Contract Schedule of Cost Components including for example ‘People’.*

*54. It is notable that this is in the ITT and that the Schedule of Costs Components in the Contract has not been amended. It is also important to highlight that BAM KLS have not populated Contract Data Part 2 as suggested in the ITT with the rates*

*included in the SCC tab from the Activity Schedule Excel file. This may be because in the Preamble to the Activity Schedule Section 4, item 1 states that 'the rates and percentages shall be the same as entered in the Contract Data Part 2 where applicable'. This could be read as clarifying the ITT direction that 'tenderers shall populate the Schedule of Costs Components and include this in the Contract Data Part 2', by limiting the requirement to transfer rates into the Contract Data Part 2 to those related to the items included in the unamended Contract Data Part 2 details of the Contract'.*"

**333.** When Mr. Wearen says that the ITT “suggests” that a tenderer populate Contract Data Part 2 with rates included in the SCC tab he is mistaken. It is not merely a suggestion. The ITT states that tenderers are required to complete the Activity Schedule and all items must be priced. (Paragraph 5.6 of the ITT).

**334.** Mr Wearen continues:-

*“57. In my opinion the BAM KLS tender does not allow for the inclusion of the rates entered in the SCC tab (which was used to ascertain the Notional Total Schedule of Costs Components) within Contract Data Part 2. Therefore, in the event of a contract award to BAM KLS these rates cannot be used under the contract to assess the Defined Costs of either the routine payments to be made periodically under the Contract or Compensation Events. Assessments are therefore to be based on the expense actually incurred or 'real money' for the resources in question as per the original intent of the standard form of the NEC 4 Option C contract with the exception of the specific items included in the unamended Contract Data Part 2 which have been rated by BAM KLS”.*

**335.** Mr. Wearen’s reference to the “intent of the form of the contract” when applied to payments has some force, but, the operation of payments is different to the calculations used

to inform the tender scoring and selection evaluation which underpinned the Decision now under scrutiny.

**336.** Mr Wearen states at para. 100

*“In my opinion the obligation to comply with the rates of pay in the SEO/SEOs is a separate matter to the question of whether or not a tendered rate has to be in excess of the corresponding SEO rates. Under the public works suite of contracts tenderers are similarly obliged to ensure that operatives are paid in accordance with the SEO rate, but compliance is monitored during the course of the works with contractors being obliged to allow an independent audit of their records to verify that SEO rates are being paid.*

*Thus the minimum rate contractors will be paid is the SEO rate and the percentage uplift for additional costs over and above the SEO rate as referred to above, if left blank by tenderers or if a negative percentage is inserted, neither of which is a breach of the ITT, the uplift will be deemed as zero percent per the above extract. The SEO rate is actually below expense incurred but as shown above, it is acceptable in the public work contract for tenderers to insert a rate that is below costs incurred”.*

**337.** Mr Wearen then says in para. 103: -

*“As the above examples illustrate on public sector contracts there is no obligation to provide rates and prices that reflect the actual cost of labour and to conflate the obligation to pay rates as per the SEO with the requirement to provide rates and/or in excess of SEO rates for particularly categories of labour or people under the NEC four is misleading or erroneous.*

*On a standalone basis and without considering the pricing strategy that appears to have been adopted by BAM KLS in relation to the labour and plants rates, the labour*



*rates are low and might be considered to be abnormally low in isolation. The plant rates which I consider below will however compensate for the level of the labour rates.”*

**338.** Mr Wearen refers to the plant rates which he says could be considered abnormally high and says:

*“This should alleviate concerns regarding BAM KLS’s adherence to pay the SEO rates simply by virtue of the pricing tactics they have adopted when tendering for this project. The likelihood is that high equipment rates coupled with the high fee would benefit BAM KLS commercially which seems to contradict the contention that the low labour rates will in some way inhibit BAM KLS from meeting their obligations to pay in accordance with the SEO. This scenario appears to be consistent with the BAM KLS responses to the tender clarifications on the labour rates.*

**339.** Mr. Wearen quotes the clarification repeated twenty times by the preferred tenderer:

*‘the tender includes for factoring in both labour and equipment rates while submitting the most economically beneficial tender...in our experience, projects of this nature require labour to be provided with transport and/or equipment to fulfil their role and accordingly enables us to pay industry standard labour rates while still providing the best value for money service to the client’”.*

**340.** Mr Wearen summarises as follows:

*“Mr Loughran observes that MCC have not requested that BAM KLS explain how they can perform the works for their tender price.*

*As I have outlined above in my opinion there are instances where there are low and very low prices that could be considered to be abnormally low but the impact of these,*

*along with any consideration of the operation of the contractor's share mechanism, must be in the context of the adequacy or otherwise of the total of the prices.*

*Mr Loughran does not seek to consider the overall total of the prices and benchmarking of same against other schemes for example as has been done on this project, instead relying on conclusions he draws from looking at the individual prices or constituent elements."*

**341.** Mr Wearen also expresses the view that insofar as Mr Loughran's comparisons included information inputted and provided to him by the Applicant he Mr Warren considers that the total of prices submitted by the Applicant shows it to be an "outlier" which cannot be relied on in the context of any of these comparisons.

**342.** In relation to the clarifications provided Mr Wearen states the following:

*"I agree with Mr Loughran's views on the inadequacy of the BAM KLS responses to some of the clarification questions posed by MCC insofar as they did not 'explain' the basis of the presentation of low rates for labour and very high rates for plant and equipment but it is likely as noted above that BAM KLS priced the items tactically."*

**343.** Mr Wearen then says:

*"If it is determined that the rates and prices to be used to determine the defined costs are limited to those included in Contract Data Part 2 as set out in BAM KLS tenderer's submission, the points raised by Mr Loughran in relation to the sufficiency or otherwise of the labour rates and the very high level of the plant rates are rendered virtually irrelevant".*

**344.** This observation wholly misses the point that whether or not the rates cited in the SCC will inform pricing and payment as the contract progresses, it is clear from the TAR that those rates informed the scoring exercise undertaken by the Respondent and the evaluation of

the tenders leading to the Decision which is the subject of these proceedings. Therefore they are not irrelevant.

### **The Contractor's Share**

**345.** Mr Wearen addresses the effect of the “pain/gain” mechanism and responds to the claims made by Mr Loughran as to the viability or genuine nature of the BLM/KLS bid.

**346.** Having referred to the potential range of “pain” which is anything from as little as [REDACTED] up to even €[REDACTED] (net €[REDACTED]) depending on the ultimate outcome of the contract Mr Wearen states the following:

*“142. Mr Loughran states that if faced with that level of pain consideration would have to be given to whether or not BAM KLS could ‘continue with the Project in such a scenario’ and with such a financial position”.*

*I agree with Mr Loughran to the extent that this is a significant amount and if it were ever realised, which I consider again is inconceivable, it will be challenging even for an organisation with the resources of the BAM (sic) and BAM Ireland to deliver the Project. However, as is evident from BAM Ireland’s recently published results (citing a recent article in the Irish Times) and the much publicised issues of the National Children’s Hospital mega project (certainly in Irish terms) where it is public knowledge that BAM have submitted claims which remain unresolved which are well into six figures, it appears to me that BAM Ireland and by extension BAM Civils have the ability to absorb significant losses should they arise on any project. This may not be the case with their JV partner on this project or many other specialist sub-contractors in this and other sectors.*

**347.** This expression of opinion, linked to the status of the preferred tenderers contract with the National Children’s Hospital project, and reported disputes, is the most extraordinary piece of evidence put forward. Counsel for the Applicant put it to Mr. Wearen that the

existence of a contractual dispute on the National Children’s Hospital project could equally have an adverse effect on the preferred tenderer’s ability to complete the Project. Under cross-examination Mr. Wearen stood over his opinion.

**348.** In a supplemental report made on 15 November 2023, Mr. Loughran expresses the contrary view that pressure on cashflow caused by such issues as BAM are experiencing on the National Children’s Hospital project renders it less likely to be in a position to deliver this project if so much “pain” were suffered.

**349.** I cannot accept the evidence, or submission as more properly described, that the existence of the contract for the National Childrens Hospital and disputes thereon, enhances the preferred tenderer’s ability to deliver on this contract even if it suffers the “pain” projected. Nor is there any evidence that the Tender Assessment Panel took such a consideration into account.

#### **Incorporation of sub – SEO rates in SCC**

**350.** I have referred already to the tab annexed to the Tender Analysis Document which is headed “4.SCC”.

**351.** This Tab contains references to rates in respect of 23 grades of persons, labour, staff and design personnel which are noted by the Respondent in the Tab to be based on rates stated to be “below CIF craftsperson rate or below CIF category rates”. A further number of six are stated to be either “just in line with” and “seems low for description”.

**352.** In the clarifications sought on 2 December 2022, the Respondent requested explanations of these rates and was provided the clarification referred to earlier. The clarification, repeated for each case contains the statement simply that “when taken in conjunction with higher rates applicable to plant and equipment and the use of special equipment, the rate when taken together is acceptable”. A general assurance is then given that

“the preferred tenderer will be in a position to pay all statutory rates and comply with all applicable obligations”.

**353.** Other than reciting the fact of these answers, and in one place referring to them as “weaselly”, there is no record of any interrogation of these explanations or analysis by the Tender Assessment Panel of these replies.

**354.** The Respondent says that these were commercial clarifications sought and confirms that it did not perform a Regulation 69 Inquiry. In circumstances where the schedule referred to rates which were stated to be “below CIF” and even on the Respondent’s own acknowledgment questionable having regard to SEOs, those are rates which at a very minimum ought to arouse suspicion and trigger a Regulation 69 Inquiry.

**355.** The Respondent relies on the assurance given that the preferred tenderer will pay wages that meet the requirements of the SEOs and on Clause Z6 of the contract which obliges the appointed contractor to pay industry agreed rates.

**356.** The Respondent submits that although there was a requirement in the ITT that tenderers populate the Schedule of Costs Components and include this in Contract Data Part 2, the rates which found their way into Tab 4 SCC to the Tender Analysis Document are not rates which will govern payment during the currency of the contract.

**357.** The Respondent says this is because of the nature of the contract, which sets a Target price but which provides for payment based on the cost of carrying out the works “regardless of the target price”. It submits that the inclusion of rates recorded in the Tender Analysis Document does not mean that the Respondent was accepting that rates lower than SEO rates would be paid in respect of any category of persons.

**358.** The rates contained in the Schedule of Costs Components informed the marking used by the Tender Assessment Panel under the heading of Price. This is clear from (i) Para. 1.2 of the ITT which requires that the documents which must be completed by all tenderers include

the Activity Schedule which includes for this purpose the Schedule of Costs Components, (ii) s. 7.6 of the Instructions to Tenderers and (iii) from Section 3.5.2 of the Tender Assessment Report.

**359.** It is contended that because payments are referable to Defined Costs as defined in the NEC 4 Option C contract form this means that the successful tenderer was not bound by, let alone limited to, the rates identified in the Schedule of Costs Components, and which found their way into Tab 4 of the Tender Analysis Document.

**360.** This argument is based on a description of the suite of contract documents which distinguishes the Schedule of Costs Components and an Activity Schedule annexed to the contract when signed from tendered prices for the SCC which found its way into the Tender Analysis Document which informed the scoring for the evaluation of the bids.

**361.** I am not persuaded of this distinction. This case is not about predicting how the successful tenderer will be paid during the contract. It is about the tender assessment process and the Decision to award the contract. Even if such a distinction can be made, one cannot escape the critical fact that for the purpose of calculating the marks which informed the Decision of the Tender Assessment Panel, the Tender Analysis Document identified rates quoted which, at the very least generate suspicion of abnormality. At a minimum, this gave rise to a requirement to perform a Regulation 19 Inquiry. One could go further and state that this meant that the pricing directly violated Regulation 18 (4) and therefore ought to have been rejected without further inquiry. It is not necessary to go that further step because the Respondent did not perform the inquiry.

**362.** Without further interrogation, or evidence of any considered analysis by the Respondent it accepted bare and formulaic assurances of the preferred tenderer that it will not break the law. Even with evidence, limited as it is, of the financial resources and ability of the preferred tenderer to observe statutory requirements regarding employment rates, there is no

evidence of how this was assessed by the Respondent and the evaluation is recorded as based on a marking system which gave the highest marks for a Schedule of Costs Components which according to the Tender Analysis Document, included rates below industry standards.

**363.** The Tender Assessment Report records that the “Notional Total Schedule of Costs Components” of the preferred tenderer is €[REDACTED] which is the figure contained for SCC in the table based on which the preferred tenderer was awarded the [REDACTED] marks available.

**364.** Mr. Wearen says that in the Grand Summary at page 1 of the Tender Analysis Document the total from the SCC tab which in the case of the preferred tenderer was €[REDACTED] is not included in the total of the prices tendered. He continues: -

*“The inclusion of the SCC tab in the Activity Schedule file is to assist with the tenderer selection by comparing the impact of tenderer rates for certain resources using notional quantities as inserted by the employer. This aids in the tenderer selection process by illustrating the potential financial impact of each tenderer’s rate”.*

**365.** Mr. Wearen continues at para. 54: -

*“BAM/KLS have not populated Contract Data Part 2 as suggested in the ITT with the rates included in the SEC tab from the Activity Schedule excel file. It may be because in the preamble to the Activity Schedule section 4, Item 1 states that ‘the rates and percentages shall be the same as entered in the Contract Data Part 2 where applicable’. This could be read as clarifying the ITT direction that ‘tenderers shall populate the Schedule of Costs Components and include this in the Contract Data Part 2’ by limiting the requirement to transfer rates into the Contract Data Part 2 to those related to the items included in the unamended Contract Data Part 2 details in the contract”.*

**366.** Mr. Wearen suggests that because the ITT is not part of the contract, the rates cited in the Activity Schedule do not necessarily inform the Defined costs as the contract progresses. But the ITT contains the rules governing the competitive tender. It does not merely “suggest” that the Contract Data Part 2 be fully populated. It so requires. Mr Wearen continues at para. 57: -

*“In my opinion the BAM/KLS tender does not allow for the inclusion of the rates entered in the SCC tab (which was used to ascertain the notional total Schedule of Costs Components) within Contract Data Part 2. Therefore in the event of a contract award to BAM/KLS these rates cannot be used under the contract to assess the Defined Cost of either the routine payments to be made periodically under the contract or compensation events. Assessments (i.e., assessments relevant to ongoing payments during the contract) are therefore to be based on the expense actually incurred or ‘real money’ for the resources in question as per the original intent of the standard form of the NEC 4 Option C contract with the exception of the specific items included in the unamended Contract Data Part 2 which have been rated by BAM /KLS”.*

**367.** The proposition advanced by the Respondent is that the mere fact that rates, on their case, appear in the SEC Tab 4 to the Tender Analysis Document does not mean that those figures would inform the pricing of the contract in its operation. Critically however they were intended to and did in fact, according to the Tender Assessment Report, inform the marking and scoring of the respective tenders and therefore the result. It is that process of evaluation which is under review.

#### **Summary of Respondent submissions on the labour rates**

**368.** The Respondent’s submissions on this subject are as follows.



**369.** Firstly, that on a proper construction of the suite of contract documents the preferred bidder is not bound by the rates identified in Tab 4 to the Tender Analysis Document and that it was reasonable for the Respondent to accept the assurance that rates below statutory rates would not be paid.

**370.** Secondly, that the preferred bidder is contractually bound to pay the statutory rates by Clause Z 6 of the contract.

**371.** Thirdly, that the preferred bidder is not only bound by statute and contract to pay no less than statutory rates, but that the evidence contained in the opinion of Mr. Wearen, is that the preferred bidder will observe the relevant laws.

**372.** Fourthly, that when the blended rate for persons is taken together with the “fat” (as the Respondent described it in submissions) derived from the higher rates applicable to equipment, and contained within the contractor’s percentage Fee of [REDACTED]%, the Respondent was entitled to accept the assurance that the contract would be performed without risk to adherence to statutory rates.

**373.** Fifthly, that the operation of the Contractor’s Share or “pain/gain” mechanism is such that the Respondent is protected against the use of any rates that may differ from those tendered in the sense that the “pain/gain” mechanism operates as a form of guaranteed maximum price. This maintains the incentive for the contractor to operate within the amounts tendered.

**374.** Sixthly, that the only relevance of the rates in the Schedule of Costs Components for this purpose is in the context of any Compensation Events such as would inform any adjustment to the Target Cost, but that the parties to the contract once awarded are not otherwise bound by these rates.

### **Conclusions on labour rates**

**375.** The evidence is that the scoring system applied for the tender assessment included 100 marks by reference to the Schedule of Costs Components. The figure in the Schedule of Costs Components which informed the marking utilised by the Panel included the rates identified in the Tender Analysis Document as either low or below industry rates. It is the Decision based on that scoring which is under review and not the future operation of payments under the contract.

**376.** On this subject, my conclusion is as follows.

**377.** Firstly, the Schedule of Costs Components contained rates for 35 categories of persons which were identified as below CIF rates.

**378.** Secondly, for this 35 categories, the Respondent requested explanations from the preferred bidder as to the rates, requests which the Respondent confirms were not a Regulation 69 inquiry.

**379.** Thirdly, the explanation given was that the tender includes “for factoring in both labour and equipment rates while submitting the most economically beneficial tender” and because “projects of this nature require labour to be provided with transport and/or equipment to fulfil their role and accordingly enables us to pay industry standard labour rates while still providing the best value for money”. These bare assurances were accepted and there is before the court no evidence of them being tested either through the further clarifications, which were raised on different questions, or in the deliberations of the Tender Assessment Panel.

**380.** It is not sufficient to say that only 100 out of the 1,000 scoring marks relate to the SCC or that there are other reasons to believe generally that the preferred tenderer would not breach SEO’s. Even if this belief were held, it appears to be based on general statements of assurances given in the responses to clarifications. The critical issue is that the evaluation and scoring was informed by a scoring matrix which gave full marks to the preferred tenderer

based on a Schedule of Costs Components which was at the very least suspect, if not pointing to a direct breach of Regulations 18 and 69. On this ground alone I would find that the Respondent erred in its failure to perform a Regulation 69 inquiry.

**Further issues arising from expert evidence**

**381.** In the week immediately preceding the hearing of these proceedings the experts met with a view to identifying areas of agreement and disagreement. A report dated 27 November 2023 was presented in the form of a Joint Statement made by the experts identifying areas of agreement and of disagreement. I have already considered a number of these earlier in this judgment but I now turn to a number of matters which emerge from their Joint Statement.

**Tender evaluation process.**

**382.** The experts agreed that further questions could have been asked of the preferred tenderer in relation to the labour and other rates identified.

**383.** Mr Wearen agreed with Mr Loughran's view on the inadequacy of some of the clarifications which he acknowledged did not "explain" the basis of the presentation of low rates for labour and the very high rates for plant and equipment.

**384.** Mr Wearen expressed the opinion on this subject that the effect of "blending" of rates identified in the SCC was that the contract would yield sufficient to cover payment of wages at least at SEO rates.

**385.** Mr Wearen stated that for this and other reasons he did not believe that the failure to interrogate these questions any further had any material bearing on the decision to accept the preferred tenderer.

**386.** Having considered these two expressions of opinion and analysed the matter as described earlier in this judgment it seems to me that the replies provided in the clarification were patently inadequate on the subject. The bare statement that the effect of blended rates

would be to ensure that the preferred tenderer was in a position to at least observe SEO rates, was accepted without critical analysis or question. There may be a place in tenders for blended rates, even as part of tactical pricing, and for other evidence of the tenderer's ability to observe the statutory rates. However, it seems to me that where rates below industry standard form the foundation of the scoring system in accordance with the ITT, albeit offset by other rates, the recipe for the blend is tainted by the use of those rates and the obligation arose to perform a Reg. 69 inquiry.

### **Tender of total prices or "target cost"**

**387.** The experts were agreed that there is nothing unlawful or improper in tactical pricing. It is clear even from the English case law that tactical pricing has a place in competitive tendering processes.

**388.** Mr Loughran points to some elements of the preferred tenderer's bid which he says are abnormally low and which Mr Wearen states can be regarded as "low" but "not abnormally low".

**389.** Linked to this discussion is the contractor's Fee percentage which for the preferred tenderer was [REDACTED]%, which included [REDACTED]% for profit, with the balance applicable to Head Office and other overheads. Mr Loughran was of the view that this was abnormally high. The Respondent's case is that because there was "fat" in the contractor's Fee this ameliorated any potential effects of rates which might otherwise be characterised as low or even abnormally low.

**390.** Mr Weaver accepted that a contractor's Fee of [REDACTED]% is at the "higher end of a range" which would ever been acceptable in such a competitive tender.

### **Benchmarking against other projects**

**391.** Mr Wearen expressed the view that the Applicant's tender should be excluded from the calculations on the basis that it was "an outlier".

**392.** Mr Wearen also said that if the bid of Le Chéile is excluded from consideration, then the Applicant's tender is even more of an outlier. If the tender of Le Chéile was excluded one would simply be comparing the tender of total prices of the preferred tender at [REDACTED] with that of the Applicant at [REDACTED].

**393.** The summary note on the Tender Analysis Document states "due to the large spread of prices tendered a direct comparison within the three tenderers was deemed insufficient when assessing rates and total prices tendered". When one then takes the concession made by the Respondent that the tender of Le Chéile was not qualified and the submission of the Respondent that the Applicant's tender is an outlier, on that analysis, there was no meaningful competition. The summary in the TAD suggests that this caused the Respondent to rely on the comparison against the pre-tender estimate and others PLEEP projects, (the East and South), against which it is said that "total tenders were found to be reasonable". This summary conclusion is not reflected in the Tender Assessment Report.

**394.** Nowhere in the Tender Assessment Report is there any discussion of benchmarking with the East and South projects. They are referenced in the TAD, but the court cannot be expected to infer that the Panel performed a meaningful consideration of this information in the absence of any mention in its Report or other evidence of such examination.

**395.** The Applicant makes two further objections in relation to the benchmarking with the East and South region projects. Firstly, it says that the comparative outturn on a per lantern basis takes no account of inflation having regard to the fact that those tenders preceded this tendering competition by some considerable time. Secondly, the Applicant says that the Projects are not comparable. It submits that the profile of the North West project is more

rural, less densely populated, and includes more islands and generally that it is likely to lead to higher costs and therefore that no assistance is to be gained by comparing lower prices tendered in the other projects.

**396.** There was not before the court sufficient evidence to draw these comparisons, other than the submission, which I accept, by the Respondent that in truth each of the Projects was a mix of urban and rural and there could have been as many cost challenges in delivering the Project in the South and East as there were for the North West. This aspect of the distinction was not expanded on with any evidence before the court.

**397.** As regards inflation Mr Wearen undertook an exercise adjusting for inflation which showed that the per lantern rates in the East and South projects would even if adjusted by inflation still compare favourably to the BAM tender total of prices in this case.

**398.** The fundamental difficulty with the benchmarking against the East and South projects is that the only information shown to the court, and which appears in the Tender Analysis Document is the amounts which were tendered in those projects. No evidence was advanced as to how precisely those projects have materialised in terms of cost. The Applicant sought to put into evidence minutes of meetings of the boards associated with these projects nationally. They include a suggestion that in the South region the Project was running “significantly over” the current target and proposals were being sought to reduce costs.

**399.** The Respondent objected to the introduction of such evidence. References to the cost overruns on those projects is of interest and would generally not be surprising. However, no evidence was adduced as to the outturns or up to date position on those projects. More importantly there is no evidence of any consideration of this benchmarking exercise by the Tender Assessment Panel.

### **Significance of Le Chéile Tender**

**400.** The summary and recommendations contained in the Tender Assessment Report recite that Le Chéile had provided a compliant tender and that all tenderers comfortably passed the minimum qualifying thresholds. This is patently incorrect as now conceded. It is important because the critical marking summary which immediately precedes the recommendations in the Tender Assessment Report is based on quality and price marks which are awarded on a comparative basis taking account of the tenders of all three.

**401.** The information and recommendation underpinning the Decision and recorded in the Tender Assessment Report is the scoring as between the three tenderers namely BAM, Le Chéile and the Applicant. All three feature in every aspect of the scoring, and the marks awarded depend on the comparative scoring of each in respect of both quality and price. In circumstances where the Respondent has conceded that the tender of Le Chéile was not qualified having regard to its failure to pass the minimum turnover requirements this is an error which taints the entire exercise.

**402.** The Respondent submits that it is not open to the court in reviewing the process to simply reverse the analysis or as counsel put it to “magic out” the information relating to the Le Chéile bid. This information formed part of the evaluation and the Respondent does not seek to pretend that this did not inform the scoring and the comparisons made. That is correct but if anything, it affirms this critical flaw.

**403.** The court does not place itself in the position of the contracting authority in making the assessment and the Decision, much less to speculate as to what results would emerge if Le Chéile were removed from all the comparisons. On this aspect of the case the test is whether a “manifest error” occurred. The court cannot ignore the fact that all of the comparisons which grounded the scoring exercise which led to the recommendation on the face of the Tender Assessment Report were informed by marks which are based on relativity

between tenders, being all three including, as it has transpired, the non-qualified tender and including the Applicant's tender which the Respondent submits is an "outlier".

**Is the preferred tender genuine?**

**404.** Apart from the question of the inclusion of rates for labour below industry standard, there are two further elements to the question of whether the preferred tender was a genuine tender. The first is the effect of the Contractor's Share. The second is the evidence of the wide ranges of prices in the tenders themselves.

**405.** The application of the Contractor's Share or "pain/gain" mechanism as described in the Tender Analysis Document results in "pain" for the preferred tenderer on any possible outcome.

**406.** According to Mr. Wearen the preferred tenderer's pain could be as low as €[REDACTED]. It is this low only if in the performance of the contract it secures payment for "Compensation Events based on the Respondent's pre – tender estimate 'risk allowance' of €[REDACTED], and after all of the preferred tenderers intended profit of [REDACTED]%, being €[REDACTED], is absorbed". It is unrealistic to assume that the full risk allowance contingency of €[REDACTED] would be utilised and taken into the equation. When that amount of €[REDACTED] is removed from the equation, the "pain" projected, based on the pre – tender estimate of €[REDACTED], is €[REDACTED], and even this assumes absorption, or cancellation, of the entire of the projected profit on the contract.

**407.** In the alternative scenarios identified by the Applicant, including an out turn based on the average of the tendered returns, which would mean an out turn on the total project of €[REDACTED], the contractor's pain would be at a level of €[REDACTED].

**408.** The Applicant submits that the contract is loss making at the preferred tenderer's prices and that this means that the bid cannot be treated as a credible bid. The argument runs that there is therefore not enough money "in the contract" for the preferred bidder to be relied



on to perform the contract and therefore that the tender is not genuine. The Applicant submits that this means that at the very least the tender ought to have been treated as suspicious if not abnormally low based on the total of tendered prices.

**409.** The Respondent submits that this is not an appropriate test and that bidders are entitled to price the Project strategically and even on a loss-making basis. There can be any number of valid reasons why a tenderer would do this. These include a decision by the bidder that it is so anxious to enter the market for the type of project concerned that it will pitch its tender even at cost or below. It submits that provided it can demonstrate that it has the capacity to perform the contract such a bid should not be excluded on this ground.

**410.** If an entity with the means at its disposal to strategically price a tender with a view to entering into or breaking into a particular market is willing to do so potentially at cost or at a loss rather than at a profit, then that of itself does not rule out such a bid. There is no absolute rule that there must be “enough money in the contract”. If the tenderer can demonstrate that it has the capacity to deliver at the most competitive price then there is no reason why a contracting authority, in the expenditure of public money, should not avail of the benefit of this. This much is clear from the analysis of Fraser J. in *SRCL Limited v. NHS Commissioning* [2018] EWHC 1985 (TCC) where he said that entertaining bids which are pitched strategically in this way is not only lawful but is consistent with the objective of obtaining value for the use of public money.

**411.** The difficulty in this case is that there is no evidence that the Respondent ever interrogated the question of whether, in light of the potential out turns in the pain/gain analysis, the preferred tenderer’s bid was genuine. Apart from the clarifications, regarding people rates and equipment rates which I have considered earlier, a number of the general clarifications requested on 2 December 2022 raise questions as to whether the preferred

tenderer can duly execute the works for particular prices. Such questions are to be found in Questions 1 – 8 of the clarifications. For example, in question 1, the Respondent asks: -

*“In accordance with Section 7.2. of the IIT the Contracting Authority seeks the following confirmation, can the Tenderer explain the rate proposed and provide assurances that they can execute the works for the cumulative price of €[REDACTED] tendered under ‘Temporary plant, equipment and vehicles including servicing/maintenance’ under Activity Schedule 1. Prelims within each municipal district’?”.*

The response given is: -

*“The Tenderer confirms their assurance that they can execute the works for the cumulative price of €[REDACTED] as tendered under ‘Temporary plant, equipment and vehicles including servicing/maintenance’ under Activity Schedule 1. Prelims within each municipal district. We have extensive experience in performing contracts of a similar type and confirm the works can be performed for the rates tendered”.*

**412.** The same question is framed in relation to a number of other items such as “Progress Reporting and Contracting Administration” and “Site records, As-Built drawings, Operation and Maintenance Manual and documents to comply with Safety, Health and Welfare at Work (Construction) Regulations”. The same general reply is given “the Tenderer confirms their assurance that they can execute the works for the cumulative price...”

**413.** All these responses can only be characterised as formulaic and contain nothing other than a basic “the tenderer confirms their assurance that they can execute the works for the cumulative price” and the statement that “we have extensive experience in performing contracts of a similar type and confirm that that works can be provided for the rates tendered”.

**414.** Nothing in the Tender Assessment Report shows that the Respondent considered the normality or otherwise of the tender in light of the pain/gain scenarios described in the Tender Analysis Document.

**415.** The nearest the Tender Assessment Report comes to a discussion of the clarifications, albeit that they were not section 7.7.1 (abnormality) clarifications but merely commercial clarifications, is in section 3.6. This records that in respect of Le Chéile consortium and the Applicant, clarifications were sought on 2 December 2022 and replies received, in each case on 8 December 2022. The report recites, in relation to each of Le Chéile and the Applicant that the response addressed the 15 (or in the case of the Applicant 21) items queried and “this closed out the commercial tender clarification process” with each of Le Chéile and the Applicant. The conclusion is put differently in relation to the preferred tenderer. Reference is made to the clarifications of 2 December 2022 and the fact that the preferred tender responded on 8 December 2022 and the report states only “This letter and the clarifications contained within were reviewed by Arup”. No information is recited as to what that review found save that it gave rise to three additional clarifications issued on 23 January 2023, which were responded to on 27 January 2023.

**416.** On any view it is clear that, as the Applicant puts it, “there is not enough money in the contract” for the preferred tenderer. That of itself is not a bar to awarding the contract to such a tenderer. However, if the financial characteristics of a bid are such that on any potential scenario as can be seen from the Tender Analysis Document, the contract can only be performed by such a tenderer at a loss which in this case is not, on any described outcome, nominal or marginal, it seems to me that at a minimum this must be regarded at least as suspected to be an abnormally low tender and ought to have been subjected to a Regulation 69 inquiry. It does not mean that such a tenderer may not be awarded the contract. It only means that the rigours of a Reg. 69 inquiry should be applied. This did not occur.

**417.** The second element of the “genuine tender” question is the effect of the wide range of prices tendered, both in total terms and within the many subsets of the tenders.

**418.** At least one representative of the Respondent, when participating in a meeting of the national board for the public lighting project, reported on 16 November 2022 that there had been a “massive price difference in the three tenders”. There had been noted at an earlier meeting of the Project team on 21 October 2022 “significant difference in prices and target costs” which would require consideration and to be discussed with the tender board (see paragraphs 292 and 293). No evidence was given of examination of those differences by the Tender Assessment Panel.

**419.** In *SRLC v NHC* (op cit) Fraser J. used the phrase “beyond and below the range of anything which might legitimately be considered to be normal in the context of the particular procurement”. This contemplates that in a competitive public tender a wide range of prices and costs will be tendered. The evidence of the two experts demonstrates also the range of professional opinions which can be held as to whether any of the tenders, either in their totality or in different parts, are abnormal. But where differences had been identified by the Respondent itself as “massive” it was incumbent on the authority to recognise that, taken together with all the issues I have described earlier and which on any view would arouse suspicion there was cause for scrutiny by way of a Regulation 69 Inquiry.

### **Conclusions**

**420.** The parties proffered extensive evidence as to the contents of the Tender Assessment Document and calculations made in the tabs thereto and selected extracts from the proposed form of contract (NEC4 Option C), the Invitation to Tender, the Tender Assessment Report and a variety of email communications among the consultant team and the Respondent. Much of the evidence was presented by way of an effort to reconstruct from all those sources the Respondent’s account of the manner in which it evaluated the tenders and made its Decision.

The evidence is marked by the absence of any minutes of meetings of the Tender Assessment Panel or evidence by any member of that panel. Instead, the court is invited to adopt a version of this reconstruction by reference to selected items said to be considered in the course of the tender process. Of these, some of the items relied on by the Respondent at the hearing and in submissions were never recorded in the Tender Assessment Report. I am referring in particular to the submissions regarding comparisons with other projects tendered, and submissions as to the ability and resources of the preferred tenderer to absorb the losses which would flow from application of the Contractor's Share in the proposed contract.

**421.** My conclusions may be summarised under the following headings: -

- A. The preliminary objection.
- B. The effect of incorporating labour rates below industry standard.
- C. The comparisons between all three tenders
- D. Is the tender genuine?
- E. Overriding reasons.

#### **A. Time objection**

**422.** I have rejected the Respondent's objection that these proceedings are time barred pursuant to Reg. 7(2) of the Remedies Regulation, for two reasons. Firstly, the statement that no Regulation 69 Inquiry was performed was made on 5 April 2023, 28 days before the proceedings were commenced and therefore within the period of 30 days stipulated in Reg. 7(2). Secondly, if I am incorrect on this analysis of the correspondence, the award of the contract was suspended by the commencement of the Le Chéile proceedings, which were listed for hearing on the same days as these proceedings. Therefore, no prejudice was caused by the later commencement of these proceedings, even where Le Chéile withdrew its challenge in the week immediately before the hearing of this case.

## **B. Labour rates below industry standard**

**423.** The scoring method which underpinned the evaluation of tenders included 100 marks by reference to the Schedule of Costs Components. The successful tenderer received the [REDACTED] marks available for this criterion. Its Schedule of Costs Components contained in respect of 33 categories of persons rates which were identified by the Respondent in the Tender Analysis Document as “below CIF” rates by reference to relevant grades of persons.

**424.** The clarifications reveal a reliance on blending rates for labour with rates for equipment. Blending of rates generally is not of itself objectionable or unlawful. But rates of pay for people attract special rules (Regulation 18(4)(b)) designed to ensure compliance with applicable obligations. This is a cardinal value in public contracts and is consistent with the ‘level playing field’ objective of the Regulations. Where the recipe used in the blend incorporates rates below industry standard this must raise at least the suspicion of abnormality and Regulation 69 mandates the performance of an inter party inquiry.

**425.** In paragraphs 93-103 I have described the principles which inform a contracting authority’s duty when faced with a tender which arouses suspicion. The duty includes an obligation to identify suspect tenders. Even a prima facie assessment in this case reveals that the preferred tender was suspect at least because it included rates below industry standard. No inquiry pursuant to Regulation 69 was performed. This omission is a breach of Regulation 69(1).

**426.** This breach is not cured by any of the following: -

(a) the contractual provision in Clause Z 6 of the form of contract which obliges the contractor, when appointed, to ensure that rates of pay and conditions of employment comply with applicable law.

(b) the proposition that there is sufficient “fat” in the total of prices and the Contractor’s Fee to enable the tenderer perform the contract.

(c) the limited evidence, relying inter alia to its contract for the National Children’s Hospital, itself the subject matter of disputes, that the preferred bidder has the general reserves and capacity to perform the contract.

### **C. Comparisons between all three tenders**

**427.** The Respondent submits that the Applicant’s tender was an outlier where, inter alia, its total of tendered prices represents 184% of the average of the other two tenders. When this submission is taken together with the concession that the Le Chéile tender was not qualified, it becomes clear that there were no competing tenders suitable for comparison. This is acknowledged in the summary contained in the Tender Analysis Document which states: -

*“Due to the large spread of prices tendered a direct comparison between the three tenderers was deemed insufficient when assessing rates and total prices tendered”.*

**428.** Whilst this observation is made by reference to what is described as the “large spread of prices”, if Le Chéile is removed and if the Applicant is treated as an “outlier”, there are in fact no valid comparisons within this competition. In spite of the note recognising the insufficiency of comparators, comparisons between the three permeate both the Tender Analysis Document and the final Tender Assessment Report.

**429.** The Tender Analysis Document illustrates a comparison of each of the three tenderers against a number of averages. These include a “percentage comparison rate”, which is the comparison between the tender in each case and the average of the other tenderers. It incorporates also, in the case of the preferred bidder, a comparison of the tendered rate against that of the Le Chéile consortium.

**430.** The Tender Assessment Report is the principal document which the court must treat as the record of the Decision. It records the scoring rules as identified in the Instructions to

Tenderers. For Quality Criteria, maximum marks are awarded to the tender considered to have the highest technical merit. Proportionately lower marks are awarded to other tenderers equal to the proportion *their* scoring represents of the highest score.

**431.** For Price Criteria, the maximum mark is awarded to the tenderer with the lowest overall notional tender price. Other tenders are marked in a reducing scale by reference to the difference between their tendered prices and the lowest total of tender prices.

**432.** In scoring all of the tenderers, three tenderers were deemed qualified and were compared. The Respondent has conceded that the Le Chéile consortium was not qualified by reference to the Minimum Turnover Requirements for the competition. Accordingly, the tender of Le Chéile ought never to have featured in the calculation of scores. This had the effect that all comparison related scoring was flawed and it undermines the reliability of the scoring matrix. It is not open to the court to recalibrate that scoring *ex post facto* and it was not submitted by the Respondent that it should do so.

**D. Is the preferred tender genuine?**

**433.** I have considered this aspect in detail at paragraphs 404-419. The court should not engage in prediction of the likely outcome of the contract, even after hearing the evidence of the experts. The important fact is that there is no evidence that the members of the Tender Assessment Panel considered the effect of the Contractor's Share mechanism when assessing the preferred tenderer's bid.

**434.** The Tender Assessment Report makes no reference to:-

- (a) the application of the Contractor's Share mechanism and its impact on the ability of the preferred tenderer to perform the contract
- (b) the inclusion in the successful tenderer's SCC of people rates below industry standard



(c) benchmarking against the tendered costs on the East and South projects.

**435.** I do not go so far as to find that any of the numerous individual statistics put forward in evidence demonstrate conclusively that the preferred tenderer's bid was not a genuine bid, either because it was abnormally low or otherwise. The preferred tenderers prices were at least "considerably lower than that of the other tenderers", to use the phrase adopted by the CJEU in *Sopra*. The variances identified by the experts reveal a range of tenders which the Respondent itself described as "massive". The final Tender Assessment Report records that the Decision was made in reliance on a scoring system which incorporated and I have found to be tainted by rates for labour which were below industry standard and were, at best suspect. All these factors taken together mean that a serious question arose as to the credibility of the tender. The failure to perform a Regulation 69 Inquiry was a clear breach of the Regulation not cured by general evidence that the Respondent considered the preferred tenderer capable of delivering the contract because of the "fat" embedded in the pricing, or by any of the factors mentioned in paragraph 426 above.

### **E. Overriding reasons**

**436.** In its Statement of Opposition, the Respondent invokes Regulation 11(5) of S.I. 130/2010 (the Remedies Regulations) which provides that despite having power to do so a court "may decline to declare a contract ineffective if it finds, after having examined all aspects of the matter that it considers relevant, that overriding reasons relating to a general interest require that the effects of the contract should be maintained". The Statement of Opposition (paragraphs 136-138) refers firstly to delay hindering the local authorities' ability to deliver energy savings, and secondly, to public safety considerations and the consequences of a "break in service".

**437.** Those two considerations are clearly important, and must be taken seriously, although no submissions were made at the hearing on this point. The Statement of Opposition and the

affidavits of the Respondent place the Project in the context of the important national programme to improve the energy efficiency of public lighting. I do not underestimate the significance of that programme and the urgency of progressing it. But no submissions were made to assist the court in assessing the balance in this case between that mandate and the important policy underpinning the Regulations. In a case where the ‘cardinal value’ respected by the impermissibility of labour rates below industry standard is compromised, I am not persuaded that the court should decline to set aside the Decision on this ground.

**438.** As to the second of these considerations, namely safety and security, no evidence was adduced of interruption in the continuing duties of the relevant local authorities or the National Roads Authority as regards safety and security. Conditions of safety and security may be improved when the Project is delivered, but the description of this risk in the Statement of Opposition is made without evidence of any increase in such risk during the further time it will take to appoint a contractor to deliver the Project.

### **Reliefs**

**439.** I shall hear the parties as to the form of order to be made. By reference to the Notice of Motion and Second Amended Statement of Grounds, it appears to me that, the following orders should be made: -

(1) An order pursuant to Regulation 8 and/or 9 and/or 14 of the 2010 Regulations setting aside the decision of the Respondent as reflected in the Respondent’s letter dated 16 March 2023 to award the contract for the provision of public lighting services to the Respondent to BAM/KLS JV;

(2) A declaration that the Respondent failed to identify that the successful tenderer’s tender was suspect and therefore appeared to be abnormally low.

(3) A declaration that the successful tenderer’s tender appeared to be abnormally low on the basis of noncompliance with Regulation 18 (4) of the 2016 Regulations, namely that the

successful tenderer had failed to comply with applicable labour law obligations, imposed by national law, namely S.I. no. 703 / 2021 – Sectoral Employment Order (Electoral Contracting Sector) 2021 and S.I. no. 598 / 2021 – Sectoral Employment Order (Construction Sector) 2021;

(4) A declaration that the Respondent was obliged to and failed to require the successful tenderer to explain the prices and costs in its tender;

(5) A declaration that the Respondent has acted in breach of Regulation 69 (1) of the 2016 Regulations.

**Michael Quinn 1 March 2024**

**Addendum: 2 May 2024**

1. This judgment was delivered to the parties unredacted on 1 March 2024. At the hearing of the proceedings the court was informed that evidence adduced included information and documents provided through a confidential discovery process and in respect of which the parties were and remain subject to obligations of confidentiality. The matter was listed before the court on 5 March 2024 so that an application by the parties for appropriate redactions could be made. The matter was adjourned twice and the application for redactions came before the court on 23 and 26 April 2024. The redactions sought by the parties related to monetary amounts and certain percentages quoted in the judgment, the publication of which it was submitted would compromise the effectiveness and integrity of public contract award procedures.

2. In *Varec SA v Etat Belge* case C450/OC the court stated the following:-

“34. The principal objective of the Community rules in the field of public procurement is the opening up of public procurement to undistorted

competition in all the Member States (see case C-26/03 *Stadt Halle and RPL Lochau*).

35. In order to attain that objective, it is important that the contracting authorities do not release information relating to contract award procedures which could be used to distort competition, whether in an ongoing procurement procedure or in subsequent procedures.
36. Furthermore, both by their nature and according to the scheme of Community legislation in that field, contract award procedures are founded on a relationship of trust between the contracting authorities and participating economic operators. Those operators must be able to communicate any relevant information to the contract authorities in the procurement process, without fear that the authorities will communicate to third parties items of information whose disclosure could be damaging to them.
37. Accordingly, article 15 (2) of Directive 93/36 provides that the contracting authorities are obliged to respect fully the confidential nature of any information furnished by the suppliers.
38. In the specific context of informing any eliminated candidate or tenderer of the reasons for the rejection of his application or tender and of publishing a notice of the award of a contract, Articles 7 (1) and 9 (3) of Directive 93/36 give the contracting authorities the discretion to withhold certain information where its release would prejudice the legitimate commercial interests of particular undertakings, public or private, or might prejudice fair competition between suppliers.
39. Admittedly those provisions relate to the conduct of the contracting authorities. It must nevertheless be acknowledged that their effectiveness

would be severely undermined if, in an appeal against a decision taken by a contracting authority in relation to a contract award procedure, all of the information concerning that award procedure had to be made unreservedly available to the appellant, or even to others such as the interveners.”

3. This court was satisfied that the redactions proposed by the parties are appropriate having regard to the ‘Varec’ principles, and the judgment now published has been so redacted.

4. When the matter was before the court on 23 April 2024 counsel appeared on behalf of the successful tenderer, BAM KLS JV (“the JV”). Counsel applied that the name of the JV be redacted from the judgment in the following circumstances.

5. The attention of the court was drawn to the fact that one of the sectoral employment orders referred to in the judgment namely S.I. 703/2021, Sectoral Employment Order (Electoral Contracting Sector) 2021 had been the subject of a consent order made by this court (Meenan J.) on 25 October 2022 quashing S.I. 703/2021, in proceedings entitled *Náisúnta Leictreach Contraitheoir Éireann Cuideachta Faoi Theorainn Rathaiochta v. The Minister for Enterprise, Trade and Employment* [2022 No. 206 JR.]. By letter dated 23 September 2022 the Minister had stated his consent to the making of such an order.

6. At the hearing of these proceedings no reference was made to this event and it is said that the parties who participated in the hearing were not aware of this. Nor was it referred to in the two rounds of clarifications provided by the JV to the Respondent in the course of evaluation of tenders.

7. The parties have informed the court that they agree that in circumstances where S.I. 703/2021 was quashed on 25 October 2022 and the respondent in these proceedings was evaluating tenders submitted on or before the deadline of 7 October 2022, and therefore in accordance with the laws in force at that date, the fact of the later order quashing one of the

relevant Sectoral Employment Orders does not affect the findings of this court or the result of the case.

**8.** The JV submits that this is incorrect because the agreement by the State to the quashing of the S.I. was given on 23 September 2022, before the deadline for the submission of tenders in this case. It submits also that the evaluation of tenders was made after the S.I. was quashed, and that this fact would alter the findings and result of the case.

**9.** The JV now claims that the judgment is injurious to its reputation because it finds, *inter alia*, that the JV tendered rates for labour which did not comply with applicable Sectoral Employment Orders. It submits that its identification in the judgment will harm its legitimate commercial interests in future competitions and might prejudice the conduct of future competitions and accordingly that the public interest in the integrity of contract award processes is not served if its name appears in the judgment.

**10.** This judgment is concerned with failures on the part of the Respondent in its evaluation of the tenders having regard to the information available to the Respondent including information as to the laws in force when tenders were submitted.

**11.** These proceedings were commenced by originating notice of motion on 3 May 2023. In accordance with Order 84A of the Rules of the Superior Courts, the proceedings were served on the JV. The purpose of serving such proceedings on a successful tenderer is to afford it the opportunity to apply to be joined as a party, whether to defend or protect its own interests or for other good reasons. The JV elected not to apply to be joined as a notice party or to appear in the proceedings, thereby not availing of the opportunity to adduce evidence or make submissions which it considered relevant.

**12.** When amended Statements of Grounds were delivered on 14 August 2023 and 17 October 2023 these were also served on the JV.

**13.** The action was heard over four days from 28 November 2023 to 1 December 2023 and judgment was delivered to the parties on 1 March 2024. That judgment is the result of the court's consideration of the evidence adduced and submissions made by the parties as to the facts and the law.

**14.** The JV made its first appearance in the matter on 23 April 2024 and applied to have its name redacted from the judgment. This application was renewed before the court on 26 April 2024.

**15.** Almost a full year after the proceedings were served on the JV, after it had elected not to participate in the proceedings at any stage, and after delivery of the judgment, the JV seeks now to make a submission on matters which were not before the court and which it says affect its reputation.

**16.** The court was not told when the JV or, for that matter, any of the parties first became aware of the order of Meenan J. But his order predates by six months the commencement of these proceedings, by over twelve months the hearing of the action and by a further two months the delivery of the judgment.

**17.** I have decided to refuse redaction of the name of the JV for the following reasons.

**18.** Firstly, the JV could have applied to be joined as a Notice Party when it was served with the Originating Notice of Motion in May 2023 or later. It elected not to do so and instead to appear in court after the delivery of the judgment.

**19.** Secondly, the application for redaction is made in circumstances where the JV now says that the judgment is erroneous. The parties to the case say that the court's findings and the result of the case are unaffected by the Order of Meenan J. and have not sought to reopen the case. No authority has been proffered for the proposition that there should be redacted from a judgment the name of a party which, having elected not to exercise its right to apply to

be joined as a party in the proceedings, after delivery of the judgment asserts that it is wrong and injurious to its reputation.

**20.** Thirdly, every party, and non-party, is entitled to hold and express a view that a judgment is erroneous and that it is injurious to its reputation. Whether or not such a view is valid, I find nothing in the *Varec* principles to support the proposition that the appropriate remedy is redaction of its name from the judgment.

**21.** This judgment will now be published with the redactions described on page 3, and including this addendum.

**Michael Quinn 2 May 2024**