



OUTER HOUSE, COURT OF SESSION

[2024] CSOH 66

CA34/24

OPINION OF LORD SANDISON

In the cause

AMEY OW LIMITED

Pursuer

against

NORTH LANARKSHIRE COUNCIL

Defender

Pursuer: Borland KC, Breen; Shepherd and Wedderburn LLP

Defender: J Findlay KC, Watt; Ledingham Chalmers LLP

28 June 2024

Introduction

[1] In this commercial action the pursuer, Amey OW Limited, seeks declarator that the decision in March 2024 of the defender, North Lanarkshire Council, to award a “Roads and Infrastructure Maintenance and Improvement Services” contract to Hochtief PPP Solutions GmbH after a competitive procurement procedure with negotiation was in breach of its obligations under regulations 19, 30(23), 57, 85 and/or 87 of the Public Contracts (Scotland) Regulations 2015, as well as an order reducing that decision. It alternatively seeks an award of damages against the defender in the sum of £45,000,000.

[2] In essence, the pursuer advances five grounds upon which it maintains that the decision to award the contract to Hochtief should be set aside, which may be very briefly summarised as follows:

- (a) The defender failed to act transparently in failing substantively to engage with concerns expressed by the pursuer in relation to the procurement process, in breach of regulation 19 of the 2015 Regulations, as well as breaching regulation 85(6) by not providing certain information to the pursuer, including the reasons why it was unsuccessful in the tender and the relative advantages of the successful tenderer, within 15 days of being requested to do so, and breaching regulation 85(1) by not informing tenderers of its decision to award the contract as soon as possible after that decision had been made.
- (b) The defender did not assess the final tenders on the basis of the award criteria, contrary to regulations 19 and 30(23)(c), by using something known as a Should Cost Model in assessing the price element of final tenders, without informing tenderers by the stage of inviting final tender submissions that it intended to do so.
- (c) The defender ought to have excluded Hochtief's final tender as abnormally low and ought to have concluded that the pursuer's final tender was the most economically advantageous, in breach of regulations 69 and 19.
- (d) The defender ought to have excluded Hochtief's tender as non-compliant with the invitation to submit final tenders in relation to its demonstrated capability to perform the contract works, in breach of regulations 87 and 19.
- (e) The defender erred in scoring the pursuer's final tender in relation to its acceptance of the material terms of the draft contract, in breach of regulation 19.

[3] In terms of regulation 89 of the 2015 Regulations, the service of these proceedings on the defender prevented it from entering into the proposed contract unless and until the court orders otherwise. The defender has applied to the court for an interim order in terms of regulation 89(1)(b) permitting it to enter into the proposed contract with Hochtief notwithstanding the subsistence of the action. At the outset of the hearing of that motion, I granted an unopposed motion by the pursuer for commission and diligence in respect of a specification setting out a number of documents pertinent to the issues between the parties.

Relevant Statutory Provisions and Regulations

[4] Section 1 of the Local Government in Scotland Act 2003 provides:

“(1) It is the duty of a local authority to make arrangements which secure best value.

(2) Best value is continuous improvement in the performance of the authority's functions.

(3) In securing best value, the local authority shall maintain an appropriate balance among—

- (a) the quality of its performance of its functions;
- (b) the cost to the authority of that performance; and
- (c) the cost to persons of any service provided by it for them on a wholly or partly rechargeable basis.

(4) In maintaining that balance, the local authority shall have regard to—

- (a) efficiency;
- (b) effectiveness;
- (c) economy; and
- (d) the need to meet the equal opportunity requirements.”

[5] The Public Contracts (Scotland) Regulations 2015 provide, *inter alia*:

“89. — Automatic Suspension of authority power to proceed with contract award

(1) Without prejudice to the application of any relevant standstill period, where proceedings under this part are served on a contracting authority in relation to a contract that has not been entered into, a framework agreement that has not been

concluded or a dynamic purchasing system that has not been established, the contracting authority must not enter into the contract, conclude the framework agreement or establish the dynamic purchasing system unless —

- (a) the proceedings are determined, discontinued or disposed of; or
- (b) the court, by interim order, brings to an end the prohibition.

...

90.— Powers and duties of the court

...

(2) In any interim proceedings under this Part the court may decide not to grant an interim order when the negative consequences of such an order are likely to outweigh the benefits, having regard to the following considerations —

- (a) that decisions taken by a contracting authority must be reviewed effectively and, in particular, as rapidly as possible;
- (b) the probable consequences of an interim order for all interests likely to be harmed; and
- (c) the public interest.”

Submissions for the defender

[6] Senior counsel for the defender began his submissions by drawing my attention to the terms of regulation 89 and 90(2), set out above. The court’s approach to the motion should be the same as it would apply in the context of a motion to recall an interim interdict. The defender accepted, at least until the document recovery process set in train by the grant of commission and diligence had concluded, that the pursuer had averred a *prima facie* case in relation to grounds of complaint (c) and (d) narrated above. That also applied to ground (e), although the defender contended in that connection that, if it had made a mistake in the scoring of tenders (which it denied), the error made no difference to the outcome of the procurement process since it had been applied to every tender submitted. No concession was made that a *prima facie* case existed in relation to grounds of complaint (a) and (b). Damages would be an adequate remedy for the pursuer, whereas the defender would suffer financial and non-financial loss which would be incapable of remedy if the

contract could not be awarded until the conclusion of the litigation. In these circumstances the balance of convenience favoured the lifting of the suspension imposed by regulation 89. Reference was made to *Shetland Line (1984) Limited v Scottish Ministers* [2012] CSOH 99, and in particular to what was there said by Lord Malcolm at [11] to [13], as follows:

“[11] All counsel submitted that I should deal with the motion on the basis set out by Lord Glennie in *Elekta Limited v The Common Services Agency* 2011 SLT 815 (subsequently adopted by Lord Hodge in *Clinical Solutions International Limited v NHS 24* [2012] CSOH 10). In *Elekta* at paragraph 26 Lord Glennie said:

‘It seems to me that what requires to be considered is the strength of the parties’ cases, the balance of convenience having regard, but not overwhelming regard, to the question of whether damages might be an adequate remedy, and the public interest.’

In *Clinical Solutions* Lord Hodge observed that the public interest overlaps with the other factors and takes account of, amongst other things, the requirement for effective review of a challenged procurement process, the need for certainty in the procurement exercise, and the avoidance of delay if the challenge has no reasonable prospect of success.

[12] South of the border the relevant regulations are to similar effect. In that jurisdiction much the same considerations have predominated when the court is considering interim orders and challenges to a public procurement exercise. For example in *Excel Europe Ltd v University Hospitals Coventry and Warwickshire NHS Trust*, [2011] BLR 167, Mr Justice Akenhead observed that the public interest in securing a valid and properly executed public procurement does not necessarily have an overriding impact. When considering whether to remove the automatic prohibition on the awarding of a contract he held that, in the circumstances of that case, if the challenge was ultimately successful, damages would be an adequate remedy. They would usually be calculable on a lost opportunity or lost chance basis. It was immaterial that they might not be in a substantial amount. In *Mears Limited v Leeds City Council (No 2)*, [2011] EWHC 1031 (TCC), this time in a final judgment, Mr Justice Ramsay refused to quash an invalid decision on the basis that damages were an adequate remedy. The court always has a discretion as to the appropriate remedy. At paragraph 224 the learned judge said:

‘The remedy must be proportionate. There will obviously be cases at one end of the scale where the impact of the breach of the regulations is so serious or obvious that it can only be met by setting aside a decision or action. At the other end of the scale, there will be cases where the impact is less serious or obvious, where damages will deal adequately with the breach. In between there will be many cases where the court must perform a balancing exercise of the various interests in deciding on the appropriate remedy.’

Later he observed that:

‘The question of remedy depends on the exercise of discretion based on a balance between the public interest in Leeds City Council proceeding with the award of the contract, and the private harm to Mears by not having the chance to be included in the next stage of the tender, taking account of the underlying principle that the public tender should be carried out in compliance with the regulations.’

His Lordship concluded that: ‘Overall the balance lies in favour of limiting the remedy to damages and not setting aside the procedure.’ He based this on the prejudice in terms of the housing arrangements for a significant number of tenants and the delay in the provision of those arrangements if the relevant decision was quashed.

[13] In agreeing with the approach adopted by Mr Justice Akenhead in *Excel Ltd*, I question the approach adopted by Mr Lake QC on behalf of the pursuers when he submitted that, in general, the court should favour reduction as the most effective method of reviewing procedures of this kind. It is true that, in accordance with the Remedies Directive, regulation 47A(2) states that regard has to be had to decisions being reviewed effectively and, in particular, as rapidly as possible. However this is achieved by, amongst other things, the various time limits in the regulations; the standstill period; the automatic prohibition on awarding a contract when proceedings are served; the requirement on the authority to persuade a court to lift that prohibition; and, more generally, the powers and duties of the court under regulation 47A, which provides a menu of interim and final remedial options.”

At [25], Lord Malcolm had noted that the court in *Shetland Line* was in essentially the same position as in the present case:

‘I now turn to my discussion of the issues, and ultimately to my decision in respect of the defenders' motion. I will begin with the question of the strength or otherwise of the case put forward by the pursuers. The action is still at an early stage. The pleadings are not fully developed and no doubt, if and when a full inquiry takes place, the court will be better placed to judge the merits of the pursuers' challenge. However it is clear that my deliberations must include an assessment as to whether a *prima facie* case has been presented, and if so, whether there are good or poor chances of it being successful. At least to a degree this will be impressionistic, although I have had the benefit of relatively full submissions and an affidavit from a representative of each interested party. Furthermore, although this opinion has been required as a matter of urgency, before delivering it I allowed myself some time in which to reflect on the productions, the case law, and the submissions made on behalf of the parties.’

Counsel next referred to *Kellogg Brown & Root Ltd v Mayor's Office for Policing and Crime* [2021] EWHC 3321 (TCC), where the current approach in England and Wales to the issue before the court (which counsel accepted was not necessarily in all regards the same as the law of Scotland) was set out as follows by Joanna Smith J:

'[22] As Stuart-Smith J (as he then was) said in *Alstom Transport Limited v London Underground* [2017] EWHC 1521 at [13], the applicable principles on an application to lift the automatic suspension are 'generally settled and well known'. Subject to one point to which I shall return below, they are not in dispute on this application, notwithstanding that I was referred to numerous previous decisions. Essentially the court must decide whether it would be appropriate to grant interim relief in favour of KBR on ordinary *American Cyanamid Co v Ethicon Ltd* [1975] AC 396 principles, as if no suspension was applicable (see *Bombardier Transportation UK Ltd v Hitachi Rail Europe Ltd & Ors* [2018] EWHC 2926 (TCC) per O'Farrell J at [37]-[38] and *Draeger Safety UK Ltd v London Fire Commissioner* [2021] EWHC 2221 (TCC) per O'Farrell J at [20]-[21]).

[23] In determining the application in this case, I must therefore consider:

- i) Whether there is a serious issue to be tried;
- ii) If so, whether damages would be an adequate remedy for KBR if the suspension were lifted and it succeeded at trial. An alternative and 'modern' way of phrasing this issue is to ask whether it is just, in all the circumstances, that KBR be confined to its remedy of damages (see *Evans Marshall & Co Ltd v Bertola SA and another* [1973] 1 WLR 349 per Sachs LJ at 379H, *Covanta Energy Limited v Merseyside Waste Disposal Authority (No 2)* [2013] EWHC 2922 (TCC) per Coulson J at [48] and *Alstom Transport Limited v London Underground* [2017] EWHC 1521 at [22]).
- iii) If not, whether damages would be an adequate remedy for MOPAC if the suspension remained in place and it succeeded at trial.
- iv) Where there is doubt as to the adequacy of damages for either of the parties, which course of action is likely to carry the least risk of injustice if it transpires that it was wrong, that is, where does the balance of convenience lie?'

Her Ladyship had continued at [33] – [34] as follows:

'[33] Whilst there has been some limited disclosure in this case, both parties envisage the need for a standard disclosure exercise to take place in due course and there is currently an outstanding application by KBR for specific disclosure. Ms Hannaford took me in some detail through the pleadings during her submissions and it was abundantly plain that, absent full disclosure and reasoned submissions, I am not in a position at this stage to determine the merits of the claim of manifest error or the allegations of breach of the Regulations. Furthermore, I cannot identify any

exceptional reason why I should do so. This is certainly not a case in which I can find on the evidence available at this hearing that KBR's case is obviously weak, such that there can be no credible dispute. Furthermore, I have already indicated that I am not inclined to take the view that KBR's case is so poorly particularised that it has little prospect of success.

[34] Absent a 'knock out point' of the type envisaged by Coulson J in *Sysmex* [i.e. *Sysmex (UK) Ltd v Imperial College Healthcare NHS Trust* [2017] EWHC 1824 (TCC), [2017] Med LR 569], it is not appropriate for me to engage in any form of analysis over the relative strengths and weaknesses of the respective parties' cases, much less to be drawn into conducting a mini-trial (for a very recent case making exactly this point, see *Vodafone Limited v Secretary of State for Foreign Commonwealth and Development Affairs* [2021] EWHC 2793 (TCC) per Kerr J at [60]). Accordingly I do not intend to take the merits of this case into consideration when it comes to considering the balance of convenience.'

The approach of the English courts to the question of the balance of convenience was as summarised by O'Farrell J in *Draeger Safety UK Ltd v London Fire Commissioner* [2021] EWHC 2221 (TCC), 197 Con LR 151, at [48]:

'The balance of convenience test requires the Court to consider all the circumstances of the case to determine which course of action is likely to carry the least risk of injustice to either party if it is subsequently established to be wrong. As set out by this court in *Alstom Transport UK Limited v Network Rail Infrastructure Limited* [2019] EWHC 3585 (TCC) at [51], when determining where the balance of convenience lies:

- i) the Court should consider how long the suspension might have to be kept in force if an expedited trial could be ordered: *DWF LLP v Secretary of State for Business Innovation and Skills* [2014] EWCA Civ 900 per Sir Robin Jacob at [50];
- ii) the Court may have regard to the public interest: *Alstom Transport v Eurostar International Limited* [2010] EWHC 2727 per Vos J at [80];
- iii) the Court should consider the interests of MSA, as the successful bidder, alongside the interests of the other parties: *OpenView Security Solutions Ltd v Merton London Borough Council* [2015] EWHC 2694 (TCC), per Stuart-Smith J at [14];
- iv) if the factors relevant to the balance of convenience do not point in favour of one side or the other, then the prudent course will usually be to preserve the *status quo* (or, perhaps more accurately, the *status quo ante*), that is to say to lift the suspension and allow the contract to be entered into: *Circle Nottingham Ltd v NHS Rushcliffe Clinical Commissioning Group* [2019] EWHC 1315 (TCC) at [16].'

It appeared in the present case from an affidavit lodged by the pursuer (although not from the terms of the Summons itself) that it claimed that it would suffer reputational loss incapable of being made good by an award of damages if the contract were to be awarded to another party. The court should approach any such claim along the lines set out by Stuart-

Smith J (as he then was) in *OpenView Security Solutions Ltd v Merton London Borough Council* [2015] EWHC 2694 (TCC), [2015] BLR 735, as follows:

'37. I am not persuaded that loss of reputation as such affects the question of adequacy of damages as a remedy. If damages were otherwise an adequate remedy, I see no reason why the 'reputation' of a tendering party as such should affect the giving or withholding of interim relief. With commercial parties, what ultimately matters is whether the loss of the contract in question will reduce their profitability in a way that is not recognised by the normal principles on which damages are awarded. This in turn suggests that what is generally of concern is whether the aggrieved tenderer will lose out on other contracts which it might have obtained if it had added lustre to its reputation by getting the contract at issue. In other words, the real subject of the 'loss of reputation' argument is financial losses which the law of damages does not normally recognise ...

38. This points to the answer to the second question: the constituency of interest is future prospective contracting authorities (or other contracting parties) who might be influenced to give work to a party which has the contract at issue rather than to a party which has not. The answers to the two questions explain in many cases why the 'loss of reputation' does not normally sound in damages in the first place: the loss is speculative and legally too remote. They also provide good reason for restraint on the part of a Court which is urged to adopt 'loss of reputation' as a reason for holding that the damages that would be awarded are not adequate compensation.

39. What then are the criteria to be applied before a court accepts that 'loss of reputation' is a good reason for holding that damages which would otherwise be adequate are an inadequate remedy for *American Cyanamid* purposes? In the absence of prior authority directly in point (none having been cited by the parties) but with an eye to the approach adopted by the Court in *Alstom*, *DWF* and *NATS* I suggest the following:

- i) Loss of reputation is unlikely to be of consequence when considering the adequacy of damages unless the Court is left with a reasonable degree of confidence that a failure to impose interim relief will lead to financial losses that would be significant and irrecoverable as damages;
- ii) It follows that the burden of proof lies upon the party supporting the continuance of the automatic suspension and the standard of proof is that there is (at least) a real prospect of loss that would retrospectively be identifiable as being attributable to the loss of the contract at issue but not recoverable in damages;
- iii) The relevant person who must generally be shown to be affected by the loss of reputation is the future provider of profitable work.

40. These are general criteria, which need to be reviewed and considered in the light of the facts of each case. I readily accept that there is more to be said on the subject and that principles such as those I have suggested are not to be applied by rote."

In the present case, the issues to be considered in weighing the balance of convenience were to be found in Answer 39 to *Condescence*, which was in *inter alia* the following terms:

'39. ... The balance of convenience strongly favours bringing to an end the prohibition on entering into the contract with Hochtief by interim order. As hereinbefore averred the scope of the proposed contract is substantially wider than the existing contract. The indicative contract value of the new contract is £29,885,000. The indicative contract value under the existing contract is some £16,150,000. The procurement forms part of the defender's wider Enterprise Project, the objectives of which are (a) through the scale and extent of interconnected activities to secure additional value promoting economic growth in North Lanarkshire (b) the bringing together of aspects of infrastructure 'place shaping', such investment, professional services (such as design and technical) and construction (c) bringing together comprehensive asset maintenance and life-cycle management (d) linking related service activities and contracts together to enable strategic development, interconnected end-to-end delivery and programming of investment priorities. Any delay to the award of the contract to Hochtief will delay achievement of the contribution to be made by the contract to the achievement of these wider economic and investment related activities within North Lanarkshire. The Procurement Objectives include ensuring that the defender is able to fulfil its statutory duties as a roads authority; ensuring that the roads network is safe; delivering innovation and value for money in the provision of services through increased use of data and analytics. As regards social value associated with and derived from the contract, the defender anticipates that the contract will create pathways into employment, training and apprenticeships, address local skills shortages, and create opportunities for local businesses. The successful bidder has made a number of social value commitments including in relation to apprenticeships, work placements, community engagement, and support for the local supply chain. Its net zero carbon commitments are relevant to the defender's achievement of reductions in carbon emissions pursuant to the Climate Change (Scotland) Act 2009. The successful bidder has also made various innovation commitments the delivery of which will be delayed if the contract is not awarded. The existing contract for the provision of roads, street lighting and winter services has expired. Further extensions are dependent on the parties to the existing contract reaching agreement as to the terms upon which any such extensions are to be made. The current extension is on the basis of cost +5.96% and will endure until 4 August 2024. Further extensions on this basis will result in additional cost to the defender, and a significant decrease in productivity and efficiency as there will be a delay in capital projects being delivered. Further, the defender operates an asset management system which deals with customer enquiries, works management, asset management and financial management. That system is no longer technically supported by the supplier. The defender intends to introduce a new system which will be aligned with the scope of processes prescribed by the new contract. Failure to let the contract will result in increased risk of system failure of the asset management

system. That would have a variety of consequences including as regards (i) instructing work (ii) monitoring financial performance of the contract (iii) postponing asset management updates (iv) record keeping including for road inspections (v) delay in achieving digitisation and (vi) delay in achieving relative service improvements. In addition, various construction projects are to be delivered under the new contract. The defender's transportation engineering team is responsible for commissioning around £5,000,000 of improvement works annually, which is in the region of 35 to 50 projects. Were these contracts to be let individually (rather than progressed under the new contract) the cost is likely to be 15 to 20% greater. That is an anticipated cost increase of £750,00 to £1,000,000 pa. Furthermore, there would be a need for additional procurements relative to the letting of such contracts, with additional anticipated costs of £100,000 per month. The new contract incorporates the provision of professional services to support design and delivery of projects, and alternative arrangements would require to be made to procure such services on an ad hoc basis. If the contract is not let, and the existing contractor and the pursuer are unable to agree on a further extension or extensions of the existing contract there is a material risk that the pursuer would fail to discharge its statutory duties to maintain the road network. Alternative arrangements are in place through existing contracts that would allow delivery of major maintenance work until March 2026. However these arrangements do not cover incident response, flooding, safety defect repairs, minor repairs, cyclic maintenance (gully cleaning), winter maintenance electrical safety, fault repair for street lighting, and out of hours standby. The defender would not be able to procure a new winter services provider in time for winter 2024/25 if the service provider is neither the existing provider (under a contract which has expired) or Hochtief under the new contract. Further, Hochtief's bid is valid, pursuant to an extension, until 1 July 2024. Hochtief requires time to mobilise its service provision, a process which is conditional upon the contract being awarded. The defender and each of the bidders have incurred substantial expense relative to the running of and participation in the procurement. The defender reasonably believes and hereby avers that each of the bidders is likely to have incurred costs in the region of £500,000. The defender's external costs relative to the procurement (as a share of procurement costs attributable to its wider Enterprise Project) are in the region of £1,300,000."

[7] Much of that body of averment was vouched and expanded upon by the terms of an officers' report to the defender entitled "The Enterprise Strategic Vehicle – Roads and Infrastructure Maintenance and Improvement Services – Contract Award" and dated 28 March 2024, to which reference was made. That illustrated the range of financial and non-financial losses which the defender would suffer were the letting of the contract to be delayed, and was backed up by an affidavit from Evelyn McDowall, a director of Turner &

Townsend Contract Services Ltd, which had provided procurement services to the defender in relation to the contract in question.

[8] All parties to the tendering process had agreed to extend their bids to 1 July 2024, but certainly one way or another was required by the end of June, since Hochtief needed to commence its mobilisation if it was to start providing the contract services as envisaged at the beginning of August. The pursuer had undertaken to continue to provide the existing services it was contracted to provide until the dispute was resolved, but at cost plus 5.96%, which was significantly more expensive than would be the case were the new contract in place. Further, the existing contracts which the new one was designed to replace were much more limited in their nature, and inability to award the new contract would cause delay in the transitioning of those other contracts too. It was unlikely that bidders for the new contract would keep their bids open indefinitely while the dispute was resolved, leading to the prospect of the need for an expensive new procurement process. Reference was made in this connection to an affidavit from John Ashcroft, a Business Manager in the Community Operations Service of the defender, and in charge of its Roads and Asset Services.

[9] Turning to the pursuer's grounds of challenge, counsel noted that on 18 April 2024 (being the same date on which the Summons had been served), the defender had issued to the pursuer, along with the standard standstill letter, a lengthy document setting out in great detail the published evaluation criteria, the pursuer's scores and the successful tenderer's scores, together with an equally detailed summary of the reasons why the pursuer was unsuccessful and the characteristics and relative advantages of the successful tender. The content of that letter wholly answered the pursuer's first ground of challenge, even though the defender was obliged by the 2015 Regulations not to disclose information designated as confidential by other tenderers, as Hochtief had done.

[10] In relation to the pursuer's complaint that the use of a "Should Cost Model" (i.e. a forecast of what a service, project or programme 'should' cost over its whole life) had amounted to the use of an undisclosed evaluation criterion, it was accepted that the defender had used such a model, but only in the context of its duty under section 1 of the Local Government in Scotland Act 2003 to secure best value. Reference was made to a Guidance Note dated May 2021 and issued by the Cabinet Office, dealing with the use of Should Cost Modelling in local authority contracting. That document *inter alia* noted:

"4.1.2 It is good practice to produce an SCM for all procurements and its development should be agreed as part of the planning stage of the business case and procurement, prior to advertising the contract and the publication of any procurement documents.

...

4.2.2 SCMs can be used during a competitive dialogue or competitive procedure with negotiation to help ensure that suppliers provide transparency throughout the dialogue/negotiation of all key cost drivers over the whole life of the service, project or programme. An SCM can provide contracting authorities with a better understanding of costs. Where they are higher or lower than expected this should prompt a discussion with the bidder around how they arrived at their costing. The SCM will not normally be shared with bidders during dialogue/negotiation but used to inform the contracting authority's negotiation position and the robustness and deliverability of bids.

...

4.3.1 SCMs can only be used as formal evaluation criteria for final bids if they have been disclosed to bidders during the procurement. How the SCM will be used for the evaluation and how bids will be scored against the SCM shall be clearly set out in the procurement documents. If a department doesn't disclose an SCM it cannot be used for evaluation purposes ..."

[11] The defender had used Should Cost Modelling entirely within the scope of that guidance. As could be seen from the report dated 28 March 2024, the price and quality evaluation of tenders had been carried out by reference to the relevant published criteria and without reference to any Should Cost Model. Only when the report turned to the financial implications of accepting Hochtief's bid, and in addressing the question of best

value, had reference been made to the Should Cost Model which had been deployed. The pursuer had no *prima facie* case in this regard.

[12] In relation to ground of complaint (c), the defender had considered the question of whether Hochtief's bid was abnormally low, had met with and obtained further information from Hochtief in that regard, and had concluded that it was not. It was accepted that the court would need to see and consider the relevant material before being able to conclude that no manifest error had been made in connection with that decision, and that such a review was not possible in the context of the present motion in the current state of the document recovery exercise. The defender could not, therefore, presently seek to persuade the court that there was no *prima facie* case in relation to this matter, though that position might require to be reviewed as the action progressed.

[13] Essentially the same position pertained in relation to the complaint that Hochtief did not have the requisite experience, that its submission was impossible to perform and not in accordance with its management plan, and that the defender ought to have realised that and excluded it from the tendering process. The defender had considered the matter and maintained that no manifest error attended its conclusions in that regard. Further, there was a time bar issue, in that the pursuer ought to have known from April 2023 that that was the defender's position. It could not be shown to the court as matters stood that there was no *prima facie* case in these respects, although that might well come to be the defender's position as matters developed.

[14] Finally, the pursuer's complaint about a scoring error did raise an arguable point about the proper approach to a particular aspect of the scoring process, but if an error had been made, it had been made equally in relation to each tender and thus would have made no material difference to the outcome of the tendering process.

[15] The court should adopt the approach taken in *Shetland Line*. Although elements of the pursuer's position did amount to a *prima facie* case, there was no particular strength to that case, damages would be an adequate remedy, and the balance of convenience, having regard to the impact on the defender and the public interest, clearly indicated that the regulatory suspension on the award of the contract should be lifted.

Submissions for the pursuer

[16] Senior counsel for the pursuer noted that the contract in dispute was a lengthy one, with a duration between 8 and 12 years, and that it had a value of up to £450 million. The court should apply the approach in *Shetland Line* at [11]. I was reminded that regulation 19 of the 2015 Regulations required a contracting authority to treat economic operators equally and without discrimination, and to act in a transparent and proportionate manner. The terms of regulation 30, dealing specifically with the competitive procurement procedure with negotiation were also canvassed, with particular reference to the requirement to specify the contract award criteria and to assess the final tenders on the basis of those criteria, set out at paragraphs 3(c) and (23)(c) of that regulation respectively. Reference was also made to the further stipulations about contract award criteria made in regulation 67.

[17] Coulson J (as he then was) in *Woods Building Services v Milton Keynes Council* [2015] EWHC 2011 (TCC) had expressed the matter correctly when he said:

“[6] The award criteria must be drawn up ‘in a clear, precise and unequivocal manner in the notice or contract documents so that first, all reasonably informed tenderers exercising care can understand their exact significance and interpret them in the same way and, secondly, the contracting authority is able to ascertain whether the tenders submitted satisfy that criteria applying to the relevant contract’: see *Commission v The Netherlands* [2013] All ER(EC) 804 at paragraph 109.

[7] The true meaning and effect of the published award criteria is a matter of law for the court: see *Clinton (t/a Aureal Training Services) v Department of Employment and*

Learning and Another [2012] NICA 48 at paragraph 33. A failure to comply with the criteria is a breach of the duty of transparency: see *Easycoach Ltd v Department for Regional Development* [2012] NIQB10.

[8] Unlike other allegations commonly made during procurement disputes, such as whether or not a manifest error has been made in the evaluation, a breach of the transparency obligation does not allow for any ‘margin of appreciation’: see paragraph 36 of the judgment of Morgan J in *Lion Apparel Systems v Firebuy Ltd* [2007] EWHC 2179 (Ch).”

[18] Reference was also made to *Federal Security Services Ltd v Northern Ireland Court Service* [2009] NIQB 15, [2009] Eu LR 739 per McCloskey J at [34] – [38] and to *Lettings International Ltd v Newham London Borough Council* [2008] EWHC 1583 (QB), 119 Con LR 89 per Silber J at [52] – [54], [62] and [83] – [84]. All criteria used to enable a contracting authority to determine which tender to accept had to be clearly disclosed by the stage of submission of final tenders.

[19] Counsel then turned to examine in detail the second ground of complaint advanced by the pursuer, namely the claim that a Should Cost Model had been used by the defender as an award criterion, on the basis of which bids had been assessed and the contract awarded. As the Should Cost Model had not been identified as a contract award criterion, its use as such was a breach of the defender’s obligation of transparency. The award criteria and evaluation methodology had been set out in section 4.1 of the Invitation to Submit a Final Tender issued by the defender on 6 November 2023, and included no mention of any requirement to comply with, or meet any threshold brought out by, a Should Cost Model.

[20] From the report to the defender dated 28 March 2024, it could be seen that the cost of the Hochtief bid had been described as 26% lower than the cost of the current contract, assessed by use of the Should Cost Model. The defender had not been advised by its officers that this matter should not be taken into account in the decision as to who should be awarded the contract. That anticipated cost saving had been described as a key outcome of

the negotiation stage of the procurement project, as well as being mentioned again in the context of best value. The affidavit of the defender's officer John Ashworth highlighted the difficulties inherent in using the Should Cost Model as a means of comparison in the circumstances of the procurement exercise in question. Reference was made to the Cabinet Office guidance document noted above, at section 4.3.1. Compliance with the obligation of transparency required to be verifiable and verified, which it was not in the present case. On the contrary, the documents available to the court demonstrated that the defender was in breach of its relevant duties. The meeting of the defenders on 28 March 2024 which decided to award the contract to Hochtief, and which had been video-recorded and transcribed, further illustrated that the results of the Should Cost Modelling had been a factor in its decision-making. The issue of the supposed cost savings which emerged from the use of the Should Cost Model had there been raised by a councillor with the reporting officer.

[21] Failure to disclose award criteria was in itself sufficient to make the procurement process unlawful, without the court having to consider whether it would have made a difference to the outcome: *Lettings International* at [85] – [88], *Federal Security* at [37]. If it was necessary to establish that what had happened could have made a difference to the outcome, then the affidavit of the pursuer's senior employee Allan Adams made it clear that disclosure of the intended use of a Should Cost Model would have caused the pursuer to take a more granular approach to its tender so as to maximise the potential for meeting the demands of that model.

[22] There was a very strong *prima facie* case that Should Cost Modelling had been a material factor in the award of the contract, a matter which was capable of determining the litigation and obviating the need for any consideration of where the balance of convenience

lay at this stage of proceedings. The pursuer intended to enrol a motion for summary decree so that this ground of complaint (and thus the action) could be determined very quickly.

[23] The only other ground of complaint specifically mentioned by counsel was the fourth, namely the complaint that Hochtief's bid ought to have been excluded as non-compliant. The allocation of certain costs in that bid had not been in accordance with the requirements of the tendering process and had resulted in an apparent reduction in Hochtief's price. The *prima facie* case in this respect was also clear and strong.

[24] If, contrary to the pursuer's primary submission, it was necessary to consider the balance of convenience, despite the overwhelming strength of the complaint about the use of the Should Cost Model, then that balance favoured the preservation of the *status quo*, which was the suspension of the contract award process imposed by regulation 89. It could be seen from the affidavit of Mr Adams that the existing contract had originally been scheduled to end in June 2021, but had been extended by the defender for three years to 1 June 2024, and then by operation of regulation 72 until 4 August 2024. The pursuer had agreed to extend the provision of its existing services until the end of the dispute, and denied that it was making the profit therefrom which the defender claimed. Hochtief had indicated that it remained committed to the new contract, and had made certain necessary preparations to enable it to perform the new contract obligations, at its own risk.

[25] If the defender were to be permitted to enter into the contract with Hochtief, then the pursuer's remedy would be limited to damages, which would be inadequate. That fell to be taken into account in the balance of convenience. Reference was made to *Medequip Assistive Technology Ltd v Kensington and Chelsea* [2022] EWHC 3293 (TCC), [2023] BLR 127, per Eyre J:

'[40] The first question is, therefore, whether the Claimant has shown that there is a serious issue to be tried. This is a comparatively low hurdle. The court is not to conduct a mini or quasi-trial. Exceptionally there will be cases where it can be seen

at the interim stage that even though a serious issue has been shown the claim is clearly either particularly weak or particularly strong. This will only be where it can clearly be seen that by reference to 'evidence as to which there is no credible dispute that the strength of one party's case is disproportionate to that of the other party' (per Lord Diplock in *American Cyanamid v Ethicon* at 409). Where that is the position such strength or weakness of the claim can be of some relevance if and when the court reaches the stage of considering the balance of convenience. That is because such strength or weakness will be relevant to the degree of risk that the grant or refusal of an injunction (or in a procurement case the lifting or retention of the suspension) will cause irreparable prejudice if a different view of the merits prevails at trial. A claimant with a weak case is less at risk of suffering irreparable prejudice if the suspension is lifted and conversely the risk of irreparable prejudice to a defendant by keeping the suspension in place is less where a claimant has an evidently strong case. However, it will only be exceptionally that the court will be able to take such a view of the merits at this stage and it will be rare for the strength or weakness of a claim to be relevant save to the extent of demonstrating the presence or absence of a serious issue to be tried.

[41] If a serious issue has been shown the court will turn to consider whether damages would be an adequate remedy for the claimant if the suspension is lifted and the claim is ultimately successful at trial. This question can also be expressed as being that of whether it is just in all the circumstances for the claimant to be confined to the remedy of damages. The two expressions come to the same thing or to adopt Stuart-Smith J's language in *OpenView* at [18] are to be seen as 'two sides of the same coin, even if, in some cases, the formulations may carry slightly different emphasis'. If damages will be an adequate remedy for a claimant then it will be just for that party to be confined to that remedy; conversely if they will not be an adequate remedy then it would not be just for the claimant to be so confined. However, the latter formulation, deriving from *Evans Marshall & Co Ltd v Bertolo SA* [1973] 1 WLR 349, does serve as a reminder that the question of the adequacy or inadequacy of damages is not to be approached narrowly. Rather the court must look to the case in the round to consider the adequacy of damages as a remedy.

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

'82 It is evident that the question of adequacy of damages does not depend solely on whether or not the court could and would do its best in difficult circumstances to assess damages. As Sachs LJ said in *Evans Marshall v Bertolo* at 380 C to D:

'The courts have repeatedly recognised that there can be claims under contracts in which as here, it is unjust to confine a plaintiff to his damages for their breach. Great difficulty in estimating these damages is one factor that can be and has been taken into account. Another factor is the creation of certain areas of damage which cannot be taken into monetary account in a common law action for breach of contract: loss of goodwill and trade reputation are examples...'

83 In the present case I consider that there would be great difficulty in estimating the damages which would have to be assessed if the breach in terms of undisclosed, irrational and inappropriate criteria were to be proved. The court would have to assess what would be the impact if those criteria had been disclosed to the tenderers and what would be the impact if rational and appropriate criteria had been applied. Even with two tenderers the court will be left to speculate on a range of possibilities and, whilst it would do its best to come to a conclusion, the difficulty in estimating the damages is, as Sachs LJ said a factor to be taken into account in determining whether it would be unjust to confine a claimant to damages for breach'.

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

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

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

[26] The affidavit of Mr Adams noted that the loss of the contract would reflect badly on the pursuer and its reputation. There would be a perception that it had not delivered value for money or had failed to deliver an efficient and effective service, which would affect the pursuer's opportunities to develop relationships with new clients. Reference was made to *Kellogg Brown & Root* at [68] – [79].

[27] It was not in the public interest for the defender to be permitted to enter into the contract on the basis of a flawed procurement process. The broad purpose of the 2015 Regulations was to protect the public purse by ensuring that such processes were carried out properly. The defender's motion to remove the suspension should be refused.

Reply for the defender

[28] In a brief response, counsel for the defender submitted that the pursuer's primary reliance on its complaint about the Should Cost Model was misplaced. It was clear from the transcript of the meeting of the defender which decided to award the contract to Hochtief that the Should Cost Model had been used only to ensure compliance with the defender's statutory duty to obtain best value, and in accordance with the Cabinet Office guidelines.

[29] On the balance of convenience, the affidavit of Mr Adams was clear that the pursuer was in a substantial way of business and that no proper basis had been made out for a conclusion that it would suffer reputational damage from having failed to obtain a contract renewal in a competitive procurement process. Reference was made to *Medequip* at [66]. Delay in awarding the contract to Hochtief would result in the defender not being able to provide services in the form and on the terms it wished for a considerable period. That was a loss which could not adequately be compensated in damages: *Medequip* at [110], [113]. If it was necessary to consider what the true *status quo* was, in substance it was that the decision had been made to award the contract to Hochtief, subject only to procedural regulation by the court.

Decision

[30] Although both counsel commended *Shetland Line* to me as an appropriate model for approaching the question now before the court (albeit with different emphases), I consider that the primary source of guidance to which I should have regard in this context is regulation 90(2) itself.

[31] Three things may be taken from that provision. Firstly, although expressed in a negative and ostensibly permissive way (“the court may decide not to grant an interim order”), it in effect states that, when faced with a motion such as the present, the court’s primary task is to attempt to balance the benefits of lifting the automatic suspension with the negative consequences of that course of action. Secondly, the court should have regard to what is “likely” to be the case in the event that the suspension is lifted or in the event that it remains, that word being used in the introductory section of the relevant paragraph and again (this time in conjunction with “probable”) in paragraph (2)(a). Thirdly, the particular considerations to which regard should be had in the exercise are the requirement for effective and rapid review of decisions taken by a contracting authority, harm to any relevant interests, and the public interest itself. I agree with the observations of Lord Hodge in *Clinical Solutions* to the effect that the public interest can encompass a variety of factors, including those which are there set out. However, the approach mandated by regulation 90(2) does appear to me to be somewhat different from the approach which would be applied as a matter of generality in Scotland in the cases where the recall of interim interdict or other interim orders is being sought in a less regulated context.

[32] It appears that, in England and Wales, the principles applicable to a motion like the present are “generally settled and well known” (*Alstom* at [13], repeated in *Kellogg Brown & Root* at [22]). Those principles involve a relatively straightforward application of what was

said by the House of Lords in *American Cyanamid Co v Ethicon Ltd* [1975] AC 396 – see *Bombardier* at 37 and the cases cited therein. In *American Cyanamid*, it was decided that, unless the material available to the court at the hearing of an application for an interlocutory injunction failed to disclose that the plaintiff had any real prospect of succeeding in his claim for a permanent injunction at the trial, the court should go on to consider whether the balance of convenience lay in favour of granting or refusing the interlocutory relief that is sought: [1975] AC 408 A - B. The court's approach to the balance of convenience in *American Cyanamid* was summarised by Browne LJ in *Fellowes & Son v Fisher* [1976] QB 122 at 137 – 138, [1975] 3 WLR 184 at 196 – 197 as follows:

“1. ‘As to that, [i.e. the balance of convenience], the governing principle is that the court should first consider’ whether, if the plaintiff succeeds at the trial, he would be adequately compensated by damages for any loss caused by the refusal to grant an interlocutory injunction. ‘If damages . . . would be adequate remedy and the defendant would be in a financial position to pay them, no interlocutory injunction should normally be granted, however strong the plaintiff's claim appeared to be at that stage’: p. 408.

2. ‘If, on the other hand’ damages would not be an adequate remedy, the court should then consider whether, if the injunction were granted, the defendant would be adequately compensated under the plaintiff's undertaking as to damages. ‘If damages in the measure recoverable under such an undertaking would be an adequate remedy and the plaintiff would be in a financial position to pay them, there would be no reason upon this ground to refuse an interlocutory injunction’: p. 408.

3. ‘It is where there is doubt as to the adequacy of the respective remedies in damages . . . that the question of balance of convenience arises. It would be unwise to attempt even to list all the various matters which may need to be taken into consideration in deciding where the balance lies, let alone to suggest the relative weight to be attached to them. These will vary from case to case’: p. 408.

4. ‘Where other factors appear to be evenly balanced it is a counsel of prudence to take such measures as are calculated to preserve the status quo’: p. 408.

5. ‘The extent to which the disadvantages to each party would be incapable of being compensated in damages in the event of his succeeding at the trial is always a significant factor in assessing where the balance of convenience lies; . . .’: p. 409.

6. ‘ . . . if the extent of the uncompensatable disadvantage to each party would not differ widely, it may not be improper to take into account in tipping the balance the relative strength of each party's case as revealed by the affidavit evidence adduced on the hearing of the application. This, however, should be done only where it is apparent upon the facts disclosed by evidence as to which there is no credible dispute that the strength of one party's case is disproportionate to that of the other party’: p. 409.

7. ‘ . . . in addition to [the factors] to which I have referred, there may be many other special factors to be taken into consideration in the particular circumstances of individual cases ‘: p. 409.”

[33] To that summary I would add only that, after stating the proposition numbered fourth by Browne LJ, the House of Lords in *American Cyanamid* added:

“Where other factors appear to be evenly balanced it is a counsel of prudence to take such measures as are calculated to preserve the *status quo*. If the defendant is enjoined temporarily from doing something that he has not done before, the only effect of the interlocutory injunction in the event of his succeeding at the trial is to postpone the date at which he is able to embark upon a course of action which he has not previously found it necessary to undertake; whereas to interrupt him in the conduct of an established enterprise would cause much greater inconvenience to him since he would have to start again to establish it in the event of his succeeding at the trial.”

[34] In Scots law, the *American Cyanamid* method was, in substance if not in point of form, rejected as a general approach to the grant or recall of interim orders by the Second Division in *Toynar Ltd v Whitbread & Co plc* 1988 SLT 433, 1988 SCLR 35, the court noting with considerable understatement that “it is not clear that the attitude of the court towards injunction in England is precisely the same as the attitude of the court towards interdict in Scotland.” However, it may be that the *American Cyanamid* approach is in general terms actually more consistent with regulation 90(2), save for its particular focus on the primacy of issues arising out of adequacy of damages in the assessment of where the balance of convenience lies, a focus which is not obviously mandated by the terms of the regulation and which, while undoubtedly relevant, would not otherwise be regarded in Scots law as being of quite such centrality to the determination of an application for interim regulation.

[35] As noted above, in *Draeger* O'Farrell J stated at [48] that the balance of convenience test requires the court to consider all the circumstances of the case to determine which course of action is likely to carry the least risk of injustice to either party if it is subsequently established to be wrong. To that core formulation I would add in the present context, consistently with the terms of regulation 90(2), that the public interest (both in relation to the need for effective supervision of regulated procurement processes and to the need for the minimum necessary disruption to the activities of a public authority in the discharge of its functions) must also carry considerable weight in the balance, as (to a lesser extent) must the interests of the successful but stymied bidder.

[36] The English courts (Edwards-Stuart J in *Circle Nottingham* at [16], followed by O'Farrell J in *Draeger* at [48]) have held that if the factors relevant to the balance of convenience do not point in favour of one side or the other, then the prudent course will usually be to preserve the *status quo ante*, and have identified that *status quo ante* as the situation which pertained prior to the automatic suspension, so that the proposed contract would in those circumstances be allowed to proceed. The reasoned basis for such an identification of the *status quo ante* is not made clear in either case, seems to sit ill with the principle *ut lite pendente nihil innovetur*, and does not obviously emerge as the necessary approach from the way in which the matter was dealt with in *American Cyanamid*, set out above. Another way of approaching essentially the same question is to ask on whom the burden of showing that the automatic suspension should be lifted lies. The answer to that question in the law of England and Wales appears to be that it lies on the claimant (*OpenView*, per Stuart-Smith L at [39ii], see also *Medequip* per Eyre J at [45]). On the other hand, Lord Malcolm in *Shetland Line* at [13] referred to a "requirement on the authority to persuade a court to lift" the automatic prohibition, which respectfully appears to me to fit

with what I would regard as the appropriate analysis, that the automatic suspension is the *status quo* which the pursuer has to attempt to dislodge.

[37] I note finally in the context of review of the authorities cited to me that a relatively complex approach appears to be taken in England and Wales to the issue of claimed reputational loss to the disappointed tender, again viewing matters through the prism of the adequacy of damages as a remedy – see *OpenView* at [37] – [39]. In this regard, as in others, I prefer an approach more closely related to the terms of regulation 90(2) itself, and to ask what consequences are shown to be “likely” or “probable” before admitting those which meet those criteria, and those only, to the balance of convenience.

[38] I turn to consider the application of what I consider to be the relevant legal principles to the material before the court on the present motion. The question of *prima facie* case appears to me to come into the exercise imagined by regulation 90(2) in the following way. If the court is in a position at the hearing of the relevant motion to determine that the pursuer puts forward no serious issue to try, or that if there is such an issue, the strong likelihood is that that issue will be determined in favour of the defender, then it may be relatively easy to reach the conclusion that the positive consequences of lifting the interim suspension will probably outweigh the negative in the sense of the regulation. If, on the other hand, there is a clear issue to try, in relation to which the pursuer appears to have strong prospects of success, the opposite conclusion may well suggest itself. As the English authorities, in particular, acknowledge, in most cases the court will not be in a position when an application to lift the automatic suspension is made to reach any views about the strength of an apparently viable case put forward by the pursuer, in which circumstances no such consideration will impinge, one way or the other, on the regulation 90 exercise, which

falls to be determined by a weighing of the balance of convenience along the particular lines envisaged by the text of regulation 90(2).

[39] Does the present application represent one of those exceptional cases in which the pursuer can be seen to have a clear and compelling case (the “knock out point” figured by Coulson J in *Sysmex*) which ought to weigh heavily in that exercise? Counsel for the pursuer claimed that to be so in relation to the complaint that a Should Cost Model had been used by the defender as an undisclosed contract award criterion. I have carefully read and considered the passages in the report to the defender dated 28 March 2024 and the sections of the transcript and video recording of the defender’s meeting on the same day which were said to vouch that proposition. Without having formed any conclusive view on the matter (something to be avoided at the current stage of proceedings), I was not persuaded on the material currently available to the court that the pursuer’s contention as to their import was made out. The alternative view, that discussion of the Should Cost Model took place only in the context of enabling the defender to understand the financial implications of the recommended award of the contract to Hochtief and how such an award might correspond to its best value obligations, is at least as plausible. I did not understand either counsel to suggest that any other aspect of the pursuer’s case might constitute a “knock out point”. On the other hand, the defender accepts, at least for now, that a *prima facie* case exists in at least two regards. It follows that I do not accept that this is an exceptional case where the pursuer’s prospects of success are obviously good, or that the possibility of its being finally resolved quickly is materially high. Equally, it cannot be said at this point that its case is clearly poor. The motion accordingly falls to be resolved without the prospects of success or failure weighing in the prescribed version of the balance of convenience set out in regulation 90(2).

[40] In relation to the pursuer's claim that it is likely to suffer reputational loss should it lose its position as the defender's preferred contracting partner, I have read the claims put forward in that regard in the affidavit of Mr Adams. Again, without having formed any final view, I do not presently find myself persuaded that the pursuer is likely to have a claim for reputational loss. I recall in this context the observations of Eyre J in *Medequip* at [66]:

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

[41] I consider that those remarks are apposite to the situation described by Mr Adams. Not being satisfied that reputational loss to the pursuer (and the consequent difficult assessment of damages which might follow thereon) is a probable consequence of the removal of the automatic suspension, I leave it out of account in the balance of convenience exercise. No attempt was made to persuade me that any other aspect of the pursuer's alternative damages claim would qualify as sufficiently difficult to assess as to weigh on that account in that balance.

[42] That conclusion effectively leaves the pursuer relying on the general public interest in the proper scrutiny of regulated procurement exercises (and the adverse consequences for the public purse which might flow from an eventual finding that it is entitled to substantial damages) as what it has to put in the balancing exercise which the regulation envisages. Such scrutiny may, of course, still take place to a meaningful extent in the context of an ongoing damages claim by the pursuer. Since the defender as a public authority has no private interest to advance, the only private interest at stake is that of Hochtief, which has such an interest in obtaining certainty as to what calls are likely to be made on its resources, and when, so as to be able to order its affairs accordingly. That interest, however, seems to me to be of little significance when weighed against the public interests in play.

[43] Turning to what the defender has to place in the balance, some of its more pressing expressed concerns (e.g. an imminent prospect of failing in the fulfilment of its statutory duties as local roads authority) fall to be regarded as having been assuaged by the pursuer's undertaking to continue its existing services until the dispute is resolved. Others, such as the prospect of bids being withdrawn, or a full re-procurement exercise having to be undertaken, fail to meet the qualifying criterion of probability to be entered into the balancing exercise to be carried out in terms of regulation 90(2). However, there remain the defender's claims, vouched by the affidavits of Ms McDowall and Mr Ashcroft, that the procurement exercise in question forms part of a wider enterprise project with the important public objectives set out in Answer 39 and noted above, and that any delay in the award of the contract to Hochtief would delay the contribution to be made by the contract to the achievement of those wider economic and investment related activities within North Lanarkshire. Although I do not as presently agree with the apparent suggestion (again, seemingly heavily influenced by the supposed need to deploy at every opportunity the

concept of the adequacy of damages) by Eyre J in *Medequip* at [110] that a public authority's inability to deliver future services in the way it wishes falls to be regarded as sounding in damages which it would be exceptionally difficult to quantify, and for that reason weighs in the relevant balance, it does appear to me that in the present case there would probably be clear and vouched damage to the public interest, along the lines just discussed, in the local authority area for which the defender is responsible, were the award of the contract in question to be delayed for the period which appears likely to be required finally to determine the action (an estimate of six months seems reasonable in that regard) were the automatic suspension meantime to remain in place. That consideration appears to me to outweigh, by a moderate but decisive measure, the others properly in the balance contemplated by regulation 90(2).

[44] I therefore conclude that the negative consequences of lifting the interim suspension are outweighed by the positive such consequences, and that the suspension falls to be removed. I shall so order.