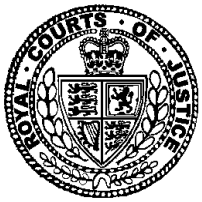

Neutral Citation Number: [2016] EWHC 1988 (TCC)

Case No: HT-2014-000053, HT-2014-000094, HT-2015-000163

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
TECHNOLOGY AND CONSTRUCTION COURT

Royal Courts of Justice
Rolls Buildings, London, EC4A 1NL

Date: 29/07/2016

Before :

THE HONOURABLE MR JUSTICE FRASER

- -

Between :

ENERGYSOLUTIONS EU LIMITED	**Claimant**
- and -	
NUCLEAR DECOMMISSIONING AUTHORITY	**Defendant**

- -
- -

John Howell QC, Andrew Hunter QC and Ewan West (instructed by **Freshfields Bruckhaus Deringer LLP**) for the **Claimant**
Nigel Giffin QC, Joseph Barrett and Rupert Paines (instructed by **Burges Salmon LLP**) for the **Defendant**, together with **Mark Hapgood QC** for 25 and 26 July 2016

Hearing dates: 16-19, 23-26, and 30 November 2015, 1-3, 7-10, and 16 December 2015, 26-27 January 2016, 23 March 2016, 14, 25 and 26 July 2016

- -

JUDGMENT No.2 (LIABILITY)

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

.....

MR JUSTICE FRASER

Mr Justice Fraser:

1. These proceedings concern the procurement of a very sizeable contract for the decommissioning of 12 different Magnox nuclear facilities in the United Kingdom. The proceedings consist of three claims, each commenced by the entity that was then called Energy*Solutions* EU Limited (now called Atk Energy EU Limited) as Claimant ("Energy Solutions") against the Nuclear Decommissioning Authority ("NDA"). All three claims concern the same procurement exercise, and have been case-managed and tried together. The NDA is an Executive Non-Departmental Public Body established under the Energy Act 2004, responsible to the Department of Energy and Climate Change. It is tasked with overseeing the clean-up and decommissioning of a number of the United Kingdom's civil public sector nuclear sites, installations and facilities. The NDA has responsibility for 17 different sites, and the associated civil nuclear assets and liabilities that were formerly owned by the United Kingdom Atomic Energy Authority and British Nuclear Fuels Ltd ("BNFL"). All three of the claims issued by Energy Solutions arise out of the same public procurement competition, namely one undertaken by the NDA for the award of a contract central to the decommissioning of 12 of these former nuclear sites. The contract the subject of the procurement was called a Transition Agreement. Assuming certain conditions precedent were complied with, a successful tenderer who was awarded the Transition Agreement would then be awarded another contract called the Parent Body Agreement (or "PBA") about six months after award of the Transition Agreement. The 12 sites in question are the ten nuclear power stations that are called "Magnox" power stations, namely Berkeley, Bradwell, Chapelcross, Dungeness A, Hinkley Point A, Hunterston A, Oldbury, Sizewell A, Trawsfynydd and Wylfa, together with two other sites. These latter two sites, namely those at Harwell and Winfrith, are (or were) nuclear research sites, and not power stations, although one of the reactors at Winfrith did produce some electricity which was supplied to the National Grid for a time. The two research sites both had nuclear reactors. Magnox is the name for a particular type of nuclear reactor which was designed in the UK; these nuclear power plants were built in the 1960s and 1970s. Some of the Magnox reactors were exported abroad but are not relevant for the purposes of these proceedings. Magnox reactors are older nuclear technology and are no longer used in the United Kingdom, although one of the nuclear reactors at Wylfa in Anglesey was operational at the time of the procurement. The other sites were no longer operational by then. The term "Magnox" is taken from the magnesium-aluminium alloy used to clad the fuel rods used by the reactor. Magnox is also the name used for various entities that were previously responsible for the Magnox sites, which is explained further below.

2. The Contents of this judgment, which is in a number of different parts, are as follows below. There are also five appendices, Appendix 1 being a glossary. Appendix 2 is a graphic. Confidential Appendix 3 contains judgment narrative and findings on the allegations that concern the successful bidder, CFP, and hence material already protected by an existing confidentiality order. This Appendix falls within the wider of the two Confidentiality Rings, namely that which currently includes not only the legal representatives acting for Energy Solutions, but also Mr Bowes and Mr Board, the two employees (now former employees) of Energy Solutions permitted to see certain parts of the CFP bid documents. Appendix 4 contains a summary of the scores that were awarded by the NDA in the evaluation,

together with a summary of the adjusted scores for some of the Requirements as a result of findings within this judgment. Confidential Appendix 5 contains salary and bonus details for some of the Energy Solutions' witnesses. These details only became relevant during the NDA's application to dismiss the whole claim at the very end of the trial, in the circumstances explained in Part V of the judgment. The application itself is dealt with in Part XI of the judgment. I do not consider that this judgment needs to make available publicly these personal salary details, which is why they appear in an appendix. Neither Appendix 3 nor Appendix 5 will be made available on www.bailii.org.

Table of Contents

I Introduction

3. This Introduction is intended as a high level summary. In broad outline terms, the Claimant was part of a consortium with another company, Bechtel Management Company Ltd ("Bechtel"), which submitted a tender to the NDA for the Transition Agreement. Initially there had been a third member involved with Bechtel and Energy Solutions, URS International Holdings (UK) Ltd, as well. URS withdrew from the procurement prior to the submission of the tender, and following this withdrawal Bechtel and Energy Solutions formed a consortium called Reactor Site Solutions ("RSS") for the purposes of the procurement.

4. That consortium was unsuccessful in the procurement process. The purpose of the procurement was for the NDA to award a contract to the successful tenderer, who would then become what was known as the parent body organisation ("PBO") for two separate Site Licence Companies ("SLCs"). The intention was for the PBO to acquire the two then-existing SLCs by way of transfer of shares in those companies to the PBO. The two SLCs in existence at the time of the procurement were called Magnox Ltd ("Magnox") and Research Sites Restoration Ltd ("RSRL"). Energy Solutions was the incumbent PBO at the time of the procurement for Magnox, which as the name suggests, was the SLC for, and managed and operated, the ten Magnox power stations (but not the two research sites). Energy Solutions had become the incumbent PBO for Magnox by means of the commercial acquisition of a subsidiary of BNFL in 2007. RSRL managed and operated the two research sites of Harwell and Winfrith. The two research sites were, at the time of the procurement, essentially under separate control, and contained within a separate SLC, from the ten Magnox sites.

5. The then-existing PBO for RSRL was UKAEA Ltd ("UKAEA"). Part of the outcome of the procurement process was to be that the 12 sites would all come together under a single PBO. Energy Solutions was unsuccessful in becoming that PBO. Due to the nature of the subject matter, there are a great number of abbreviations and Appendix 1 to this judgment is a glossary of these.

6. The outcome of the tender process was that the NDA awarded the contract for the PBO for the two SLCs to another consortium (at the start of the Competition this consortium had been called the Babcock Fluor Partnership and had as its members Babcock Nuclear Services Limited and Fluor Enterprises Inc. This consortium changed its name after Babcock rebranded its nuclear services division as Cavendish Nuclear). I will refer to it as CFP throughout this judgment for convenience. Following the detailed evaluation exercise, the overall scores given to the two different tenderers were 86.48% to CFP and 85.42% to RSS. The difference between them was therefore 1.06%, which is a very small margin. It can therefore be seen that the outcome of the procurement, as conducted at the time, was very close indeed. The tender procurement process took place between 2012 and 2014. The maximum duration of the contract was to be approximately 14 years, and the NDA's funding limit for the first seven years of the contract period was stated to be in the region of approximately £4.211 billion. It was a very complicated and technical procurement process, of what is evidently very complicated and technical subject matter, namely the decommissioning of multiple nuclear facilities across a large number of sites. It also, again evidently, was a procurement for a contract that involved very considerable sums of public money

and was of some public importance. All public procurement exercises are important, and governed by regulations requiring fairness and equal treatment. There is obviously a scale with, at one end, relatively small value contracts for limited periods of time being awarded by local authorities for services of limited scope. At the other end of the scale are very large value contracts for very important services over a considerable period of time. The same legal principles and regulations apply to both. The NDA, in its submissions, relies on the scale, value and importance of the procurement as having a particular effect or effects upon my consideration of principle. I will deal with those points in detail below. It is otiose to debate whether procurement exercises at either end of the scale are more important than those at the other. However, it could be said that it would be difficult to envisage many cases more at, or towards, the extreme upper financial end of the scale, or involving greater amounts of public funds, than this one.

7. The Procurement was initiated by way of publication on 18 July 2012 of a notice in the Official Journal of the European Union published under the number 2012/S 136-227570 (the "OJEU Notice") {L/2/1}. This was the formal commencement of the process. The competitive dialogue procedure was used. This is one where an authority's requirements are not fully defined at the beginning of the process. On 31 March 2014, Energy Solutions was notified by the NDA that it had been unsuccessful. In the period between those two dates, the consortia involved in the procurement procedure expended considerable time and large sums of money in seeking to win the contract award. The NDA also expended considerable time and doubtless large sums of money in developing the procurement, engaging in the dialogue process with the potential bidders, evaluating the tenders and deciding which consortium was to succeed in achieving the contract award. Energy Solutions has stated that it expended approximately £10 million in the tender process, and stood to earn approximately £100 million in fees had it been successful. There are different forms of relief available to an aggrieved bidder who challenges a procurement exercise as being unlawful. In this case, proceedings were not issued within the time required to trigger an automatic suspension of the contract award. Accordingly, the NDA and CFP entered into the Transition Agreement untroubled by any automatic suspension, and Energy Solutions claims damages in these proceedings. This judgment does not deal with the quantum of damages, but those claimed by Energy Solutions are said to be in the region of approximately £100 million.

8. Energy Solutions took the view, when it received the notification of its lack of success, that it should seek further reasons from the NDA and it did so. Upon analysis, Energy Solutions decided that there had been various breaches by the NDA of its obligations under the regulations that govern such procurement processes, namely the Public Contracts Regulations 2006 (SI 2006 No.5) ("the Regulations") {AB/4/1}. It is agreed that these Public Contracts Regulations 2006 are the relevant ones that apply to the procurement in question in these proceedings. They implement the provisions of Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 ("the Directive") {AB/2/1} and Council Directive 89/665/EEC, as amended by Directive 2007/66/EC of the European Parliament and of the Council of 11 December 2007 ("the Remedies Directive") {AB/1/1}.

9. Bechtel, for reasons that are not known and which are immaterial to the issues before the court, did not choose to adopt the same course of action as Energy Solutions, and neither issued proceedings nor joined these proceedings as a party. Bechtel therefore was not involved in these proceedings, which were issued by Energy Solutions alone, and Bechtel has consequently taken no part in them. However, that is not relevant to the claims as Energy Solutions, as a member of a consortium, is entitled to bring proceedings individually. This is because pursuant to Regulation 28(4), Energy Solutions is itself, as a member of a consortium, an "economic operator" within the meaning of Regulation 4. Energy Solutions issued proceedings in the First Claim, HT-2014-000053 on 28 April 2014 against NDA seeking damages {A/1/1}. This date post-dated that which would have triggered the automatic suspension that would have prevented the NDA from contracting with CFP, and the Transition Agreement had already by that date been entered into by them on 15 April 2014. As a result of certain pleas in the Defence served by NDA in that action {A/5/1}, and to avoid limitation issues, ES issued proceedings in the Second Claim, HT-2014-000094 on 29 August 2014 {A/12/1}. This was to rely upon additional breaches of the Regulations that had not been included specifically in the First Claim. Ramsey J made an order on 3 October 2014 that the two claims were to be heard together {F/7/1}.

10. There was a hearing of preliminary issues in December 2014 in the First and Second Claim, and a judgment by Edwards-Stuart J on those issues which is at [2015] EWHC 73 (TCC) and which was handed down on 23 January 2015 {F/13/1}. The preliminary issues that were to be tried were set out in an order of Akenhead J dated 10 October 2014 {F/8/1}. The point under consideration by Edwards-Stuart J was essentially whether, by Energy Solutions having failed to issue proceedings within the period which would have led to the automatic suspension of the process (such that the NDA would have been prevented from contracting with CFP), Energy Solutions had in some way either damaged its position or broken the chain of causation.

11. However, the parties in correspondence prior to the hearing of those issues embarked upon a course that effectively sought to amend those issues between themselves. This meant that Edwards-Stuart J found himself in the position that by the hearing of the preliminary issues, the issues themselves had changed somewhat. The formulation of the issues by the parties was described by the Court of Appeal, in the subsequent appeal concerning the answers to those issues, as problematic, and Vos LJ explained in paragraph [6] of the judgment on the appeal at [2015] EWCA Civ 1262 {F/39/1} that "the judge was required to address what was really something of a moving target". The final versions of the issues, and the answers provided by Edwards-Stuart J at first instance in his judgment {F/13/1}, were as follows:

> "a. whether the fact that the Claimant did not issue a claim form and notify the Defendant that it had done so before the Defendant's entry into the Contract means that, given regulation 47G of the Public Contracts Regulations 2006, any loss that the Claimant has suffered in consequence of any breach of its obligations by the Defendant is not attributable to any such breach

[Answer: the issue is not appropriate to be determined as a preliminary issue].

b. if the Claimant has suffered any loss in consequence of any breach by the Defendant of its obligations:

i. whether the Court has any discretion not to make any award of damages in respect of that loss or a discretion to make only a partial award of damages in respect of any such loss

[Answer: No]; and

ii. if so:

(1) on what basis any such discretion is to be exercised; and

(2) whether the fact that the Claimant did not issue a claim form before the Defendant's entry into the Contract and notify the Defendant that it had done so means that, given regulation 47G of the Public Contracts Regulations 2006, it would be inappropriate for the court to make any award of damages or one in relation to the full loss suffered by the Claimant [Answer: Does not arise]."

12. Energy Solutions appealed in relation to the finding on the first issue, and NDA appealed concerning the second issue, with the permission of Edwards-Stuart J which was given on 13 February 2015. He gave permission on the grounds that the issues (in particular the second issue) raised points of general principle and public importance {F/16/1}. Appeals by both parties of the judgment upon the preliminary issues were heard by the Court of Appeal on 26 and 27 October 2015, very shortly before the trial before me began. The Court of Appeal (the Master of the Rolls, Tomlinson and Vos LJJ), in a judgment handed down during the trial, unanimously upheld the appeal by Energy Solutions regarding the first issue, and dismissed the appeal by NDA on the second issue. As a result of this, the position is that the third issue, even after the appeal, still does not arise. The answers to the two issues in question were reformulated by the Court of Appeal in order to eliminate the multiple negatives in the questions posed in the issues. The preliminary issues and the answers to them are therefore as follows after the appeal (in paragraph [78] of the judgment of Vos LJ {F/39/23}):

"i) Energy Solutions' failure to issue and alert the NDA to a claim form before it entered into the Contract does not break the chain of causation between any breaches of the NDA's obligations that may be established and any loss caused to Energy Solutions in consequence of them.

ii) The English court has no discretion as to making an award of damages to Energy Solutions if it is shown to have suffered

> loss as a consequence of breaches of duty established against the NDA under the Regulations."

13. The Court of Appeal refused NDA's application for permission to appeal to the Supreme Court {F/40/1}. NDA made an application for permission directly to the Supreme Court itself. Although the outcome of that application was not known at the conclusion of this trial, during the drafting of this judgment on 16 May 2016 the Supreme Court granted permission, although the hearing of that appeal has not yet occurred. It is therefore the case that the Supreme Court could find that the so-called "*Francovich* conditions" *are* imposed on the damages claim by Energy Solutions, such that these conditions have to be satisfied in order for Energy Solutions to be entitled to recover any damages. The term "*Francovich* conditions" refers to the three conditions applicable to awards of damages in EU law that were explained by the Court of Justice of the European Union ("CJEU") in ***Francovich v Italy*** (C-6/90) [1991] ECR I-5357, as formulated by the CJEU in ***Brasserie du Pêcheur S.A. v Federal Republic of Germany***, ***Regina v Secretary of State for Transport ex parte Factortame Limited*** (Joined cases C-46/93 and C-48/93) [1996] Q.B. 404 (the "*Brasserie du Pêcheur*" case) {AB/6/1}. They are as follows, namely that (i) the rule of law infringed must be intended to confer rights on individuals, (ii) the breach must be sufficiently serious, and (iii) there must be a direct causal link between the breach of the obligation and the damage sustained by the injured party. Energy Solutions' argument, which was accepted by Edwards-Stuart J and upheld in the Court of Appeal, was that ordinary English law principles were applicable to such awards of damages, and that once a breach of the Regulations was established the award of damages was not discretionary.

14. The second of the *Francovich* conditions requires that a breach has to be "sufficiently serious" for damages to be awarded. The NDA argued in the Court of Appeal, unsuccessfully, that the phrase "may award damages" in Regulation 47J(2)(c) gives effect to the *Francovich* conditions in a claim such as this one. That argument is, unless the judgment of the Court of Appeal is overturned in the Supreme Court, not one which needs to be considered further in this case at this stage. The parties have agreed that any submissions on this (whether following a successful appeal to the Supreme Court, or before that for reasons of efficiency to avoid later remission) will be in a subsequent judgment, prepared after hearing submissions on "sufficiently serious" by reference to any actual specific breaches that I may find. I do not therefore deal in this judgment with the issue of whether any breaches are "sufficiently serious" within the meaning of the second of the *Francovich* conditions, which is a point that currently is academic.

15. Energy Solutions also issued another claim, known as the Third Claim {A/17/1}. This was done following disclosure, in particular examination by Energy Solutions and its advisers of the entries made by the NDA evaluation team on the AWARD system (a computerised method used by the NDA for noting and evaluating the different bids). The Third Claim, HT-2015-000163, was issued on 16 March 2015, after the preliminary issues in the First and Second Claims had been heard and decided by Edwards-Stuart J. The Third Claim did not raise any new or different issues so far as the preliminary issues were concerned. In summary, the Third Claim pursued further alleged breaches by the NDA in its evaluation of both the RSS and CFP Tender Responses. It is said by Energy Solutions that clarification of

the two competing bids had been sought by the NDA in a way which breached its obligations of transparency and equal treatment, and that the consensus rationale and scores given to the CFP bid were not supported by the comments of the individual evaluators in the AWARD system. It was also said that the NDA had amended scores of the two bids in the absence of justification. There were also other complaints made in the Third Claim, including that the NDA had not acted properly in considering the pass/fail thresholds. This was a mechanism whereby the scoring for some requirements was one of pass/fail, or "Below Threshold/Threshold". This is further considered in paragraph 805 and following below. Energy Solutions submit that CFP had, on Energy Solutions' view of the case, failed properly to provide the relevant information within the CFP bid such that the correct outcome should have been an evaluation by the NDA that resulted in "below threshold", or "fail", in respect of some parts of the CFP bid. Failure, or a finding of "below threshold" would have led to the bidder in question being excluded from the competition, although there was a dispute between the parties about the way in which that consequence would apply. The principles dealing with this are considered in Section C1 of this judgment.

16. The Third Claim therefore raised new matters which supported or supplemented the claims brought by Energy Solutions of breaches of obligation by NDA. An order was made by Akenhead J by consent on 14 August 2015 that the three actions be tried together and that is what has happened. There was no distinction made at the trial in terms of which issues were contained in either the First, Second or Third Claims, nor was there any need for such distinction to be made. Had all the relevant information been available to Energy Solutions at the time the First Claim was issued, the claims made in the Second and Third Claims would simply have formed part of the particularisation of the same claim. The same damages are claimed, and no point is made by the NDA that a complaint, say, made in the Third Claim could and should have been brought in one of the earlier claims. I recite this purely for completeness, and there is no criticism of either party for the adoption of this approach, which was perfectly sensible in the circumstances, entirely in accordance with the over-riding objective, and often occurs in procurement cases. It avoided the necessity for lengthy amendment of pleadings, which can sometimes become cumbersome as a result, and also the issue of the Second Claim avoided potential limitation issues. The three claims have proceeded as though they comprised different elements of the same action, which is how I intend to deal with the matters raised in each, in this judgment. I therefore make no differentiation in this judgment between issues arising in the three claims.

17. The focus at the trial (apart from the obvious need for consideration of the relevant legal principles) was therefore on the following main factual areas. Firstly, the way in which the NDA had evaluated the tender bids of both RSS, and CFP. Each separate part of the tender bid was called a Node, and contained different matters that were called Requirements. Each Requirement was given a particular score by the team of evaluators responsible, which numbered three individual Subject Matter Experts or SMEs. The SMEs were also sometimes referred to during the trial and in some of the evidence as evaluators. There was a detailed process by which this scoring exercise was undertaken to which I return in Part X Section B below. The SMEs were under the overall management of the Core Competition Team ("CCT") in the NDA. Mr Rankin, the Head of Competition at the NDA,

evaluated one of the other Nodes, but that Node is not under consideration in these proceedings.

18. Secondly, as part of the evaluation, in respect of some of the Nodes under consideration, the clarification process used by the NDA had to be considered. If the SMEs considered at the time that part of a bid was unclear, clarification could be sought. Clarification was sought by the NDA in documents called Bidder Clarification Requests ("BCRs") which were drafted by the SMEs or the Core Competition Team and issued by the Core Competition Team to the bidders. The responses would be scrutinised by a member of the CCT. The NDA's approach was said, by the NDA, to be that if the CCT member felt the response went further than clarification, those parts that did provide additional information would be redacted and only the clarification element provided to the SMEs. This is challenged by Energy Solutions.

19. The final scores that were given to the different Requirements and Nodes by the SMEs were then translated into a percentage result for the overall bid by applying the relevant weighting to the different scores. Different Nodes had different weighting towards the overall percentage result.

20. It was, in the usual way, necessary to distil from the pleadings the different issues that were to be resolved. This trial was initially concerned with the following issues, taken from the List of Issues lodged by Energy Solutions for the Pre-Trial Review. They were not dissented to in any appreciable respect by NDA, although they were not formally agreed and eventually superseded during the trial by a far more comprehensive list of formally Agreed Issues. They do however outline in useful summary form the areas of dispute between the parties:

Evaluation of the RSS Tender Response

Initial Issue 1. In respect of its evaluation of RSS'S Tender Response in relation to the evaluation nodes listed below, was the NDA in breach of its obligations under the Public Contracts Regulation 2006 and/or Directive 2004/18/ED and/or applicable general EU Treaty principles in its evaluation of the RSS Tender Response?

a. Nodes 110.5.9(c) and 113.5.9(c)
b. Node 303.5.2(a)
c. Node 303.5.3
d. Node 306.5.1(a)
e. Node 306.5.1(h)
f. Node 306.5.1(n)
g. Node 307.5.2(d)
h. Node 307.5.3(d)
i. Node 405.5.3(j)
j. Node 405.5.3(k)
k. Node 408.5.1(a)
l. Node 408.5.3(c)
m. Node 408.5.3(i)
n. Node 408.5.3(g)
o. Node 409.5.1(a)

p. Node 409.5.1(d)
q. Node 409.5.3(e)
r. Node 410.5.3(c)
s. Node 410.5.3(i)
t. Node 411.5.3(c)
u. Node 412.5.3(c)
v. Node 414.5.3(c)

Initial Issue 2. What scores should have been awarded to RSS in respect of those Nodes which the Court determines were unlawfully evaluated?

Evaluation of the CFP Tender Response

Initial Issue 3. In respect of its evaluation of CFP's Tender Response in relation to the evaluation nodes listed below, was the NDA in breach of its obligation under the Public Contracts Regulations 2006 and/or Directive 2004/18/EC and/or applicable general EU Treaty Principles in its evaluation of the CFP Tender Response?

a. Node 106.5.6(b)
b. Node 106.5.6(d)
c. Node 112.5.6(d)
d. Node 112.5.6(e)
e. Node 116.5.3
f. Node 117.5.3
g. Node 118.5.3
h. Node 303.5.2
i. Node 303.5.3
j. Node 303.5.4(a)
k. Node 303.5.4(d)(i)
l. Node 306.5.1(j)
m. Node 307.5.1(n)
n. Node 307.5.2(e)
o. Node 401.5.1(b)(ix)
p. Node 405.5.3(k)
q. Node 406.5.1(d)
r. Node 408.5.3(g)
s. Node 410.5.1(c)
t. Node 410.5.2
u. Node 410.5.3(a)
v. Node 410.5.3(d)
w. Node 410.5.3(f)
x. Node 411.5.3(c)

Initial Issue 4. Should the CFP Tender Response have been evaluated as being non-compliant and been excluded from the Procurement?

Initial Issue 5. If not, what scores should have been awarded to CFP in respect of those Nodes which the Court determines were unlawfully evaluated?

Generally

Initial Issue 6. Was the NDA in breach of Regulation 18(27) and/or Regulation 30(1)(a) of the Public Contracts Regulations 2006?

Initial Issue 7. Would RSS have been awarded the Transition Agreement but for the NDA's breaches of the Public Contracts Regulations 2006 and/or Directive 2004/18/EC and/or applicable general EU Treaty principles?

Initial Issue 8. Are the NDA's breaches of the Public Contracts Regulations 206 and/or Directive 2004/18/EC and/or applicable general EU Treaty principle such that Energy*Solutions* may be entitled to compensation for losses arising from such breaches?

21. Initial Issues 1 to 5 above, although requiring consideration of the scope of the legal obligations upon the NDA under the Regulations, involve a large amount of factual consideration, even though they are not purely "factual issues". Having considered and decided the legal framework within which the NDA was required to consider the different tenders, they required analysis of all of the different elements of the 22 Requirements within the RSS Tender Submission, and the 24 within the CFP Tender Submission, of which complaint is made by Energy Solutions. The final three, namely Initial Issues 6, 7 and 8, could be termed the "legal issues". These are not, for the most part, as controversial as the "factual issues". The legal issues themselves are not, however, free from controversy. Paragraphs 58 to 62 of the Particulars of Claim in the First Claim {A/2/11} set out the applicable principles that Energy Solutions say govern the procurement exercise. These paragraphs pleaded that the conduct of the Procurement was subject to the 2006 Regulations, and/or the Directive, and/or applicable general EU Treaty principles, including those of equal treatment, transparency, non-discrimination, proportionality and good administration. In particular, pursuant to those principles and to Regulation 4(3) of the Regulations, Energy Solutions averred that the NDA was required to treat RSS and Energy Solutions equally, transparently and in a non-discriminatory way and to conduct a fair and objective assessment of Tender Responses free from manifest error. Energy Solutions also maintain that the NDA was also required to comply with the obligations in Regulations 18, 30 and 32. It is also said that under Regulation 47A, the NDA also owed Energy Solutions a duty to comply with the relevant provisions of the Regulations and any enforceable EU obligations. These paragraphs are admitted by the NDA in paragraph 26 of the Defence to the First Claim {A/5/8} with the following exceptions:

1. The NDA denied that the relevant legislation imposed upon the NDA any duty of "good administration".

2. The NDA also denied that the relevant legislation imposed any undefined duty of "fairness".

3. The NDA stated that "where the Defendant exercised its discretion or judgment, in particular in relation to the scoring of tender responses, the Court may only

intervene if the Defendant committed a manifest error." Although the Defence was amended, re-amended and re-re-amended, these paragraphs were all left un-amended in each of the different iterations of the Defence.

22. The second caveat by the NDA may be seen as simply a semantic quibble. If the NDA had a duty to treat all the tenderers equally – which it doubtless did have – that probably amounts to simply stating in different language that the NDA had to treat the tenderers fairly. "Unfairness" could be simply treating one tenderer more favourably than another.

23. By far the most controversial of the three exceptions identified in the preceding paragraph, proved to be the third one, although as stated above it does not appear initially controversial. Although the parties are agreed that "manifest error" forms an essential element of the test that is to be applied by the court, the NDA contended as follows in respect of a great many of the alleged breaches: "An evaluative judgment of this sort is not capable of constituting a manifest error". This point is dealt with in Part IX below. The NDA would have the court approach whether or not there was a "manifest error" by the NDA in a rather different way than Energy Solutions submits I should approach the exercise. I deal with this further below but it means that the first task I have is to consider and establish the legal framework within which the tenders were to be considered by the NDA.

24. These Initial Issues were, during the trial itself, refined and expanded. This was in response to a number of requests from the court that the parties, by agreement, attempt to identify the issues for decision in respect of each of the complaints which related to each of the nodes in both the RSS and CFP tenders. The outcome of this was dramatically to expand the number of issues affecting both the different Nodes, and the legal issues. I have reproduced the Initial Issues above because it was agreed that the points concerned in Initial Issue 7 could not be dealt with in this judgment, and also because Initial Issue 8 deals with the "sufficiently serious" point to which I have referred in respect of the appeal from the Court of Appeal to the Supreme Court. Initial Issue 7 cannot be dealt with in this judgment because adjustment of the scores that were given to either of the tenders – namely that of RSS, and/or CFP – does not lead to a simple arithmetic adjustment of the overall score, due to the different weighting given to the scores obtained against different requirements. It has been agreed by the parties that following this judgment, the percentage effect of the adjustment will be agreed by them. It will only be possible to answer the question posed in Initial Issue 7 once that exercise is done. Although hypothetically there would in such a case be the possibility that the trial would lead to *no* adjustment of the score given both to the RSS and the CFP tenders, in this case that hypothesis will not come to pass. This is because prior to the trial the NDA conceded that the marks given to RSS on two Requirements in two Nodes should be increased. This is dealt with in Agreed Issue 37 below but relates to Requirements 110.5.9(c) and 112.5.9(c). On each of these the NDA only gave RSS a score of 1 in the evaluation, and now accepts that each ought to have been awarded 5, the top mark available. Accordingly, the RSS tender is by this concession entitled to an increase of 8 marks (prior to adjustment for weighting). The number of marks awarded to the RSS tender will therefore change, but not necessarily the percentage due to the correlation between the scores for the Costs and Technical Nodes. However, even on the scores awarded prior to the

commencement of the litigation, the resulting scores given to the two tenders were very close. CFP was awarded a score of 86.48% {U/5/1} and RSS was awarded a score of 85.42% {U/2/1}. That margin may, prior to my findings, become narrower due to the concession to which I have just referred. In opening, Mr Howell QC for Energy Solutions submitted that if just a few of the challenges to the scores succeeded – and Energy Solutions highlight as many as 35 different serious errors – the outcome of the competition would have been very different. That remains to be seen, but it does mean that the overall scoring consequences of my findings in this judgment will have to be dealt with subsequently.

II Agreed Issues

25. The refined, expanded, and eventually agreed list of issues for decision by me at the conclusion of this trial are as follows. It can be seen that Agreed Issue 4 deals with the "sufficiently serious" point with which I have been asked to deal on a contingent basis in a later judgment, given the possibility of the appeal by the NDA to the Supreme Court being successful. The parties however wish to make further submissions by reference to any specific findings on breach before that later judgment is made.

1. In relation to each Requirement that is in issue:

(i) Whether the Defendant made a manifest error of assessment or otherwise acted unlawfully in awarding that score;

(ii) If it did, what score would have been awarded if the Defendant had acted lawfully.

2. In relation to whether a manifest error of assessment has been committed in a particular case:

(i) The Claimant's position is that this must be assessed by reference to the consensus rationales provided with the Defendant's letter dated 31 March 2014 {U/1/1} and to the Defendant's further letter of 11 April 2014 {U/23/1}, and whether the reasons there set out disclose a manifest error of assessment;

(ii) The Defendant's position is that the question for the Court is whether the scores awarded were in fact manifestly erroneous, and that consideration of this question is not limited by reference to the documents mentioned in (i) above.

3. In relation to the overall effect of the issues raised in relation to individual Requirements:

(i) Whether the effect of the answers is that the RSS tender and/or the CFP tender ought to have been disqualified if the Defendant had acted lawfully;

(ii) In relation to a tender that ought not to have been disqualified, what the final score awarded to that tender ought to have been if the Defendant had acted lawfully;

(iii) Whether the Transition Agreement ought to have been awarded to RSS if the Defendant had acted lawfully, or the percentage chance that that should have occurred.

4. If the Defendant acted unlawfully, whether any such unlawfulness (whether individually or cumulatively) constituted a sufficiently serious breach to give rise to a liability in damages (assuming that to be a requirement of such liability).

ISSUES ARISING UPON THE RSS TENDER RESPONSE CRITICAL ASSETS

General issues

5. Whether :

   a. the SORR required RSS's response to be evaluated on the basis that the determination of whether an asset was critical should take no account of (i) the probability of asset failure and (ii) measures to mitigate the consequences of any such failure; and

   b. the Defendant was entitled to evaluate RSS's response on that basis.

6. On what basis:

   a. Did the SORR require or permit a bidder to identify a critical asset as a "key" critical asset; and

   b. Was the Defendant entitled to evaluate a response as failing to identify a "key" critical asset?

7. What was the nature of the explanation of the management of key critical assets (a) that the SORR required bidders to provide and (b) that the Defendant was entitled to look for in the evaluation of RSS's responses.

Node 411 Dungeness (Sample Project 2): Requirement 5.3(c)

8. The primary issue is whether a score of 1 was lawfully awarded because the active effluent treatment plant ("AETP") and saline groundwater pumping system were not treated as key critical assets in the RSS's response.

9. Within that issue, a specific sub-issue is whether the Defendant was entitled to treat an asset as one needing to be identified as a key critical asset for a project, even though the management of that asset fell outside the scope of that project (and whether the groundwater pumping system in fact fell outside the scope of this project as described in the RSS tender[1]).

10. The secondary issue is whether the score which should have been awarded if the NDA had acted lawfully was 3 (rather than 5) given the explanation of the management of the weather envelope cladding identified as a critical asset by RSS.

Node 412 Sizewell A (Sample Project 3): Requirement 5.3(c)

11. The primary issue is whether a score of 1 was lawfully awarded because the skip crane was not treated as a key critical asset in the RSS response.

12. Specific sub-issues with respect to the skip crane are:

[1] It is common ground that the AETP did fall outside this project.

a. whether there was an error by the Defendant in relation to what function could and needed to be performed by the skip crane; and

b. the materiality of any such error.

13. The secondary issue is whether the score that should have been awarded if the NDA had acted lawfully was 3 (rather than 5) given the explanation of the management of the AETP components and sludge drying kit identified as critical by RSS.

Node 414 Sizewell A (Sample Project 5): Requirement 5.3(c)

14. The primary issue is whether a score of 1 was lawfully awarded because the pond water treatment plant (PWTP) was not treated as a key critical asset in the RSS response.

15. Specific sub-issues with respect to the PWTP are:

a. Whether the PWTP would manage active effluent; and

b. whether there was an error by the Defendant in relation to the functions of the PWTP or the consequences of it failing, and

c. the materiality of any such error.

16. The secondary issue is whether the score that should have been awarded if the NDA had acted lawfully was 3 (rather than 5) given the explanation of the management of the AETP components and mobile AETP identified as critical by RSS.

Node 408 (Winfrith IES): Requirement 5.3(c)

17. The issue is whether a score of 1 was lawfully awarded because the ALES and TRS were not treated as key critical assets in the RSS response.

18. Within that issue, specific sub-issues concern:

(i) The relevance of RSS's intention to cease using the ALES and TRS before its own asset management system was fully functioning;

(ii) the consequences of failure of the ALES or TRS.

Node 405 (Spent Fuel and Nuclear Materials Management): Requirement 5.3(j)

19. The issue is whether a score of 1 was lawfully awarded given the explanation by RSS of how it would manage the modular flasks, M2 flasks, Wylfa flask handling crane and Wylfa pile cap equipment which it had identified as critical assets.

Node 410 Chapelcross (Sample Project 1): Requirement 5.3(c)

20. The issue is whether a score of 3 was lawfully awarded given the explanation by RSS of how it would manage the CXPP cave crane and CXPP process area ventilation system which it had identified as critical assets.

ASSUMPTIONS TO BOUND COST AND SCOPE

Node 405 (Spent Fuel and Nuclear Materials Management): Requirement 5.3(k)

21. The issue is whether a score of 3 was lawfully awarded on the basis that RSS's assumptions did not fully bound the scope at the end of the project.

22. It is accepted by the Defendant that RSS's assumptions did not fail to deal with regulatory approvals.

23. The Defendant contends that RSS's assumptions did not fully bound the scope of the project by failing to include assumptions dealing with the demobilisation of the programme and project teams and transfer of ownership of fuel route assets, and/or the acceptance of responsibility for spent fuel by Sellafield Ltd.

Node 410 Chapelcross (Sample Project 1): Requirement 5.3(i)

24. The issue is whether a score of 1 was lawfully awarded on the basis that RSS's assumptions should have included the construction of the interim storage facility (ISF), as a key handover point or one whose omission as an assumption was sufficiently serious to be a material omission.

Node 408 (Winfrith IES): Requirement 5.3(i)

25. Whether RSS's assumption that *"no soil contamination requires remediation"* was inconsistent with Fig 408-6 in its tender response.

NODE 409 (COMMON SUPPORT FUNCTIONS AND SERVICES)

Requirement 5.1(a)

26. The issue is whether a score of 3 was lawfully awarded on the basis that the RSS's Tender Response had not addressed the needed competencies.

27. Within that issue, specific sub-issues are:

(i) What was the nature and particularity of the description of competencies (a) that the SORR required or permitted and (b) that the Defendant was entitled to look for in the evaluation of RSS's response;

(ii) Whether the *"key capabilities/skills/knowledge"* required in relation to the matters identified in Figure 409-45 of RSS's tender response should be treated as competencies.

Requirement 5.1(d)

28. The issue is whether a score of 3 was lawfully awarded on the basis that the RSS response had not addressed the scoring criteria in respect of risk tolerance.

29. A specific issue is whether risk tolerance requires a statement of the range within which risk can be borne or mitigated without fatally undermining the project.

Requirement 5.3(e)

30. The issue is whether a score of 3 was lawfully awarded on the basis that the strategic tolerances identified by RSS were not true strategic tolerances, and whether that score would otherwise have been awarded on the basis of the matters put forward in the RSS tender response as strategic tolerances.

NODE 303 (NOMINATED STAFF APPOINTMENT)

Construction of the SORR

31. The issues of construction and the parties' position are identified in their respective opening submissions.

Requirement 5.2

32. The issue is whether a score of 4 (rather than 5) was lawfully awarded on the basis of what were considered to be deficiencies (if any) in the supporting evidence provided by RSS in relation to the processes addressing element (c).

33. Specific sub-issues are whether the criticisms of the supporting evidence made by the Defendant disclose a manifest error of assessment – (i) in themselves; and/or (ii) having regard to the assessment of CFP's response.

Requirement 5.3

34. The issue raised by the Claimant is whether a score of 3 (rather than 5) was lawfully awarded on the basis of what were considered to be deficiencies (if any) in the supporting evidence provided by RSS in relation to the processes addressing elements (a) and (b).

35. Specific sub-issues are whether the criticisms of the supporting evidence made by the Defendant disclose a manifest error of assessment – (i) in themselves; and/or (ii) having regard to the assessment of CFP's response.

36. The issue raised by the Defendant is whether the score that should lawfully have been awarded to RSS was 2 rather than 3.

COST CONTINGENCY NODES

Nodes 110 and 112: Requirement 5.9(c)

37. It is conceded by the Defendant that a score of 5 rather than 1 should have been awarded to RSS in respect of each of these Requirements.

Node 113: Requirement 5.9(c)

38. The issue is whether a score of 3 (rather than 5) was lawfully awarded to RSS in respect of this Requirement given the form of risk register provided in the RSS tender response in respect of this Node.

39. Within that issue, specific sub-issues are:

(i) Whether the risk register was lawfully treated as being relevant to Requirement 5.9(c);

(ii) Whether the conclusion that there was a deficiency in the supporting evidence was a lawful one on the basis of the risk register and the edited BCR response supplied to the evaluators;

(iii) Whether it was lawful to supply the BCR response to the evaluators in redacted form (rather than supplying it in full or issuing a further BCR), and (if not) whether that would have made any difference to the conclusion reached.

(iv) If the risk register was irrelevant to Requirement 5.9(c), the Defendant contends that a score of 3 (rather than 5) should have been awarded under Requirement 5.9(d).

NODE 307 (PORTFOLIO/PROGRAMME/PROJECT MANAGEMENT)

Requirement 5.2(d)

40. The issue is whether a score of 2 was lawfully awarded to RSS for its response in relation to programme management, on the basis that the omissions identified by the Defendant constituted "a material omission".

Requirement 5.3(d)

41. The issue is whether a score of 4 was lawfully awarded to RSS for its response in relation to project management, on the basis that in the respects identified by the Defendant there were non-material omissions in it.

NODE 306 (SUPPLY CHAIN MANAGEMENT)

Requirement 5.1(n)

42. The issue is whether a score of 3 (rather than 4) was lawfully awarded to RSS for its response concerning the move to a new supply chain strategy, on the basis that it had failed to demonstrate improved performance outcomes.

NODE 408 (OTHER WINFRITH ISSUES)

Requirement 5.1(a)

43. The issue is whether a score of 1 was lawfully awarded to RSS on the basis of a material inconsistency within its tender response between the strategy for delivery of Winfrith Interim End State and the proposed use of fencing.

44. Within that issue, specific sub-issues are:

(i) How the Defendant understood what was being proposed in respect of the areas to be fenced;

(ii) Whether there was any obligation on the Defendant to issue a BCR to clarify RSS's proposals.

Requirement 5.3(g)

45. The issue is whether a score of 3 was lawfully awarded to RSS on the basis that there were non-material omissions and/or inconsistencies in its tender response in relation to the description of internal and external interdependencies and interfaces.

46. Within that issue, specific sub-issues are:

(i) Whether the Defendant was lawfully entitled to conclude that there were such omissions and/or inconsistencies in relation to –

(a) The NDA;

(b) The supply chain (in relation to the reactor decommissioning partner); and/or

(c) The LLWR (in relation to the management of the TRS drums.)

(ii) Whether the SORR required the significance of any interfaces to be identified;

(iii) Whether, in considering any references that existed in RSS's response to Node 408 to the interfaces said to have been omitted, the Defendant was lawfully entitled to take into account its views of what was or was not said about the significance of such interfaces and to have reduced RSS's score on that basis.

ISSUES ARISING UPON THE CFP TENDER RESPONSE

NODE 306 (SUPPLY CHAIN MANAGEMENT)

Requirement 5.1(j)

47. Whether a score of 4 (as opposed to 1) was lawfully awarded to CFP on the basis that its response contained an omission, but not a material omission, in relation to demonstrating how it would maintain the SLCs' requirements to contribute, support and develop the NDA's National Programmes Initiatives.

48. A specific sub-issue is whether the Defendant was entitled in relation to that requirement to rely upon what was said in CFP's response with respect to the Shared Services Alliance.

NODE 303 (NOMINATED STAFF APPOINTMENT)

Requirement 5.3

49. Whether a score of 3 was lawfully awarded to CFP.

50. Specific sub-issues are:

(i) Whether, on the basis of the reference in the consensus rationale to "some" supporting evidence, CFP ought to have been treated as providing insufficient evidence to give confidence;

(ii) Whether CFP ought to have been awarded a lower score on the basis that the supporting evidence that it supplied should not have been treated as giving confidence in all the outputs of the processes that it had identified to address the relevant elements.

Requirement 5.4

51. The issue is whether CFP was lawfully treated as having passed this Requirement in circumstances where, as at the Commencement Date, it proposed that the same individual should fill the roles of RSRL Managing Director and Harwell Closure Director?

52. Specific sub-issues are:

(i) (As amended to correct a typographical error) Whether the Defendant was entitled to conclude that maintaining the same posts at the Commencement Date but having those two posts occupied by the same individual on a temporary basis was consistent with the Nominated Staff Bulletin of 18 July 2013, and with CFP's organogram being aligned with the RSRL Transition Plan;

(ii) If not, whether the Defendant should have concluded that any such inconsistency was a "material omission" for the purposes of the SORR;

(iii) Whether the Defendant would have been entitled to disqualify CFP's tender without first clarifying what was required by the Bulletin and giving CFP an opportunity to amend its tender response.

NODE 401 (OVERALL SCOPE SUMMARY)

Requirement 401.5.1(b)(ix)

53. The issue is whether CFP was lawfully treated as having passed this Requirement given its treatment of supply chain resource cost.

54. Specific sub-issues are:

(i) Whether CFP's response to Node 401 was clearly communicated in AO format?

(ii) Whether Requirement 5.1(b)(ix) could be met by the inclusion of supply chain resource costs within the spend profile provided to meet Requirement 5.1(b)(viii) and (if it could) whether such costs had to be separately identifiable;

(iii) Whether the Defendant's evaluation was entitled to have regard to the response to the BCR issued on 26 November 2013;

(iv) If the Requirement was not met because of the omission of supply chain resource costs from the resource profile, or because such costs were not separately identifiable, whether the Defendant should have concluded that that omission was a "material omission" for the purposes of the SORR;

(v) If the Defendant acting lawfully should have treated the omission of supply chain resource costs from the resource profile as a material omission, whether –

(a) The RSS response to Requirement 5.1(b)(ix) did not meet the Requirement because it did not show each year's resource cost as a percentage of the Target Cost and/or because its supply chain costs included costs that were not properly supply chain resource costs ; and

(b) If so, whether that should also have been treated by the Defendant as a material omission.

NODES 116, 117, 118 (Alternative Strategies Costs)

Requirements 116.5.3, 117.5.3, 118.5.3

55. The issue is whether CFP was lawfully treated as having passed the Requirement to provide, for each of the Lowest CWBS Levels, *"A reference to the CWBS element within the relevant Technical Scope and Methodology Underpinning Evaluation Node"*.

56. Specific sub-issues are:

(i) Whether that requirement could only be satisfied by the inclusion within the relevant Costs Node of a cross-reference to the location within the corresponding Technical Node for that CWBS element, or whether it could be satisfied by the inclusion within the corresponding Technical Node of a reference to the relevant CWBS element in the relevant Cost Node;

(ii) If the latter, whether the Defendant was entitled to conclude that such references could be found in Technical Nodes 416, 417 and 418 respectively.

(iii) Whether the Defendant would have been entitled to disqualify CFP's tender without first clarifying what was required by Requirement 5.3(c) and giving CFP a an opportunity to amend its tender response.

NODE 410 Chapelcross (SAMPLE PROJECT 1)

Requirement 5.1(c)

57. The issue is whether a score of 5 (as opposed to 3) was lawfully awarded to CFP in view of its proposed mitigation activity in relation to Threat 656 identified in CFP's tender response, i.e. *"Reassign and maintain skilled resources to other site projects or programmes so that they would be available when Phase 2 work begins."*

58. Specific sub-issues are:

(i) Whether it was necessary for the Defendant to consider in evaluation whether the proposed mitigation activity was realistic and/or likely to be successful;

(ii) Whether CFP's proposal should have been understood as assuming that replacements for the skilled workforce could be obtained within 3 weeks;

(iii) Whether a proposal to assign the skilled workforce to other activities so that they would be available if required should have been regarded as realistic or likely to be successful.

Requirement 5.3(a)

59. The issue is whether a score of 3 (as opposed to 1) was lawfully awarded to CFP in view of its description of its approach to implementing its strategy or whether CFP's tender response ought to have been evaluated as failing to demonstrate how the implementation of its strategy would be delivered.

Requirement 5.3(d)

60. The issue is whether a score of 5 (as opposed to 3) was lawfully awarded to CFP in view of the portfolio of management metrics contained in that response.

61. Within that issue, a specific sub-issue is whether the note in the consensus rationale (in relation to the metric proposed for minimising lifetime costs) that *"the metric description does not entirely match up with the metric proposed"* ought to have led to the conclusion that the CFP response contained an inconsistency.

COST UNDERPINNING

NODE 106

Requirement 5.6(b)

62. The issue is whether a score of 5 (as opposed to 1) was lawfully awarded to CFP, when it did not provide a separate description of the information required for sub-contractor resource costs (referred to in Requirement 106.5.6(b)) in response to that Requirement but stated that such costs were included within the material and supplies resource costs (supplied pursuant to Requirement 106.5.6(d)).

Requirement 5.6(d)

63. The issue is whether a score of 5 was lawfully awarded to CFP given that its response to the Requirement included sub-contractor resource costs within materials and supplies.

NODE 112

Requirement 5.6(d)

64. The issue is whether CFP's tender response had explained the relevant resource unit costs for "materials and supplies" and provided evidence to support the explanation in its response to this requirement.

65. A specific sub-issue is whether the reference in the consensus rationale to the location of supporting evidence not being readily apparent but explained in a clarification was a copying error.

Requirement 5.6(e)

66. The issue is whether a score of 5 was lawfully awarded to CFP, having regard to the content of its tender response in relation to the resource type, "*waste arising, packaging and disposal routes*".

67. Specific sub-issues are:

(i) Whether CFP's response had explained the relevant resource unit costs for "waste arising packaging and disposal routes" and provided evidence to support the explanation in its response to this requirement;

(ii) Whether the SMEs concluded, and whether it was lawful to conclude in the light of the CFP response, that this resource type was not required and that a rationale had been provided why not;

(iii) Whether the Defendant was entitled to take into account in evaluating this Node the reference to CFP's response to Node 107 Volume 3?

NODE 307 (PORTFOLIO/PROGRAMME/PROJECT MANAGEMENT)

Requirement 5.2(e)

68. The issue is whether CFP's tender response ought to have been evaluated as having failed to describe how the anticipated outputs and benefits from its approach to risk management would contribute to the successful delivery of the SLCA and the Client Specification.

NODE 405 (SPENT FUEL AND NUCLEAR MATERIALS MANAGEMENT)

Requirement 5.3(k)

69. The issue is whether a score of 3 was lawfully awarded to CFP on the basis that its assumptions did not fully bound the scope of work in relation to the completion of

the projects, or whether CFP's tender response should have been evaluated as containing material omissions in this respect such as to lead to a score of 1.

NODE 406 (ASSET MANAGEMENT)

Requirement 5.1(d)

70. The issue is whether a score of 5 was lawfully awarded to CFP on the basis that its response to this requirement described a structured approach to managing threats including determining risk tolerance.

NODE 411 Dungeness (SAMPLE PROJECT 2)

Requirement 5.3(c)

71. The issue is whether a score of 3 (as opposed to 1) was lawfully awarded to CFP.

72. Specific sub-issues are:

(i) Did the fact that RSS's tender response was awarded a score of 1 because it did not identify the AETP and saline groundwater pumping system as key critical assets mean that the same score should have been awarded to the CFP tender response, which also did not identify those assets as key critical assets?

(ii) Should CFP's response in relation to the management of the assets that it identified have been treated as failing to explain how those assets would be proactively managed having regard to its past performance, future demand and capability, and whether such an explanation was required in relation to each asset identified?

26. There are therefore 72 different issues to be decided, which number rises to 108 if the different sub-issues are counted separately. Due to this number of different issues and sub-issues, this judgment is at the limit of what would be considered a reasonable length. Agreed Issues 1 and 2 are general issues that applies to each of the Requirements to be considered. Agreed Issues 3 and 4 can only be addressed once the detailed findings in Agreed Issues 5 to 72 have been made. Appendix 3 is the Confidential Appendix that deals with the detailed criticisms of how the NDA evaluated the CFP Tender Submission.

27. I now turn to the CFP Tender in general terms, and in particular confidentiality.

III Confidentiality

28. Energy Solutions made applications for disclosure and, as sometimes happens in procurement cases, these included material relevant to the tender of the successful tenderer CFP. Due to the nature of the material, certain elements of that material emanating from, and in respect of, CFP were confidential. Some was confidential to the parties; and some was commercially confidential and therefore not freely distributable to the personnel employed by Energy Solutions. Two orders were made in respect of confidentiality, both by Akenhead J. The first was in relation to the First and Second Claim on 31 March 2015 {F/19/1}. The second was in relation to the Third Claim on 30 April 2015 {F/21/1}. Both orders are in like terms. They define Confidential Information in the following way:

> "Confidential Information means the tender response of Cavendish Fluor Partnership ("CFP") and any extracts from it or any other document or identified parts of a document agreed between CFP and the Claimant to be Confidential Information as set out from time to time in Part A of Schedule 3 to this Order. The meaning of Confidential Information, or the contents of Schedule 3 to this Order, may be amended by agreement between CFP and the Claimant or by Order of the Court"

The terms of the Orders therefore define the whole of the CFP tender response as Confidential Information. Two further orders were made by me during the trial on 25 November 2015 {F/36/1} and {F/37/1} in respect of the CFP tender response to Node 408.

29. There is no doubt that truly commercially sensitive information within that document ought to have its confidentiality preserved, so far as that does not conflict with or override the important principle of open justice. The principle that confidentiality is not a bar to disclosure in procurement cases is well established; ***Amaryllis Ltd v HM Treasury*** [2009] EWHC 1666. However, other bidders are entitled to have their confidentiality respected and so-called "confidentiality rings" are usually established for this reason, such as in ***Croft House Care Ltd v Durham County Council*** [2010] EWHC 909 and ***Mears Ltd v Leeds City Council*** [2011] EWHC 40. Some of the evidence had to be heard in camera, although that was kept to the absolute minimum in order to comply with the principle of open justice. The trial also made use of an electronic trial bundle, or e-bundle. To adopt a phrase used by Briggs LJ in his Civil Courts Structure Review: Interim Report, this freed the case "from the stranglehold of paper" and enabled a vast amount of material to be accessible very promptly. Without an electronic bundle, the hearing would have taken very much longer. The electronic bundle also made control of the confidential material a more manageable task; unless one had the necessary authorisations, it was not possible to access documents, statements or pleadings that contained the material that was subject to either of the two levels of confidentiality (the "confidentiality ring" and "lawyers-only confidentiality ring"). I have therefore, with the express permission of the Judge-in-Charge of the Technology and Construction Court, produced this judgment making use of the technology available to produce a judgment hyper-linked both to relevant authorities (which is in no way novel) but also to contemporaneous documents in

the trial bundle where relevant. For a reader of the judgment without authorisation to view any of the confidential material, some of the hyperlinks will work – for example those to the authorities on the bailii website – but the links to truly confidential material will not be enabled. The lack of a functioning hyper-link will not prevent a full understanding of those public parts of the judgment, which will be the majority. However, a reader with the necessary authorisation – for example, more senior judges should this judgment be subject to appellate review, or partners at the solicitors' firms for the parties, who will have the necessary authorisation – will be able to use the hyperlink function to access the relevant documents (or parts of documents) identified. This will preserve the necessary confidentiality and will also have the added benefit of providing ready access to those parts of the underlying documents relevant to different passages.

30. Confidential Appendix 3 deals with the details of the challenges that Energy Solutions has made to the scores given to the CFP tender which should remain confidential. The solicitors acting for CFP were given the opportunity to make submissions on any elements of Part X Section C1 that should have been included instead in Confidential Appendix 3 to preserve confidentiality. CFP is also invited to make submissions (if it wishes to do so) as to which hyperlinks should be disabled within the main judgment.

IV The Procurement Competition and the SORR

31. As is widely known, nuclear operations produce radioactive waste, and cause contamination, not only relating to the spent fuel itself but of everything exposed to radioactivity. Decommissioning of nuclear facilities is a term that refers both to the decontamination and dismantling of both buildings and facilities at nuclear sites. Modern nuclear facilities are constructed with decommissioning requirements very firmly in mind, and operational records are also comprehensive. It might seem surprising looked at with the hindsight of the 21st century, but earlier nuclear facilities did not approach record keeping in the same way, and also did not take decommissioning into account. The reason for this was that priorities were very different in the earlier days of the nuclear industry, from development and research in the 1940s, through to energy production in the 1950s onwards. The result of this earlier approach means that there is often only limited information available about the nuclear waste currently stored in some of the older facilities, and there are few reliable design drawings available of the facilities themselves.

32. A White Paper was published in July 2002 by the Secretary of State for the Department of Trade and Industry called "Managing the Nuclear Legacy; a strategy for action" {V/4/1}. That set out the Government's approach to fulfil its earlier stated intention "to make radical changes to current arrangements for nuclear clean up funded by the tax payer" and to improve them. This stated the Government's intention was "through competition, to ensure that the best available skills and experience, from the public and private sectors, are brought to bear on the task" {V/4/10}.

33. Inventories of waste are incomplete, and (as the White Paper stated) "many facilities are one-offs, built to test the feasibility of, or prove the commercial viability of, different technologies" {V/4/12}. As a notable example, at Hinkley Point A there is a particular issue regarding the composition of fuel element debris waste within the temporary storage vaults. Mr Rankin, the Head of Competition at the NDA at the time, gave evidence that:

> "Estimates can be made of the volume of waste that is in the vault; however, the actual amount of waste will only be known precisely once the material has been retrieved. In addition, the fuel element debris waste contains springs from the fuel assembly that are highly radioactive and have an important influence on how the waste is managed. Whilst the springs are known to be present, the exact number of springs and their level of radioactivity can only be estimated until the vault is emptied." {C/7/6}

In other words, nobody knows how much radioactive waste is present in the temporary storage vaults, how radioactive it is, nor how many highly radioactive springs are stored there. This information will only become known once the vaults are emptied. Factors such as this obviously have an important effect upon decommissioning.

34. The process of decommissioning can require the construction of new buildings and facilities at a nuclear site, which are used in the retrieval and treatment of nuclear

waste. These new buildings and facilities will then, once they are no longer required, themselves need decommissioning. There are three different categories of nuclear waste. High level waste (HLW) has high levels of radioactivity that generate significant heat. This heat has to be taken into account when designing storage and disposal facilities. Sellafield is the only site in the UK that manages HLW. Intermediate level waste (ILW) is radioactive waste which has radioactivity levels which exceed the upper boundaries for low level waste, but which does not require heat to be taken into account in the design of storage or disposal facilities. ILW is stored in tanks, vaults and drums. Most of this type of waste requires concrete to shield operators from the radiation. Both HLW and ILW emit large amounts of harmful radiation and require large amounts of shielding for protection. Low level waste (LLW) is the lowest category of radioactive waste, and constitutes in excess of 90% of the UK's radioactive waste legacy by volume, but is responsible for less than 0.1% of the total radioactivity. (By definition therefore, HLW and ILW constitutes less than 10% of radioactive waste legacy by volume but is responsible for in excess of 99.9% of radioactivity.) Some LLW is sent to the UK's dedicated repository for lower activity waste, the Low Level Waste Repository (LLWR) near the village of Drigg, Cumbria. Other LLW, at the lower end range of the range of radioactivity, can be disposed of in specific landfill sites soon after it is produced. All nuclear facilities require regulation by the Office for Nuclear Regulation ("ONR").

35. The radioactive fuel itself can be removed from a nuclear facility once it is spent, and this removes a great deal of the radioactive hazard (about 99%) but what is left behind can still be highly contaminated. One example stated in the evidence in the trial was the ponds. These are concrete-lined ponds of water, which have a two-fold function in relation to spent fuel. The water in them is used to cool the spent fuel, which is highly radioactive, before the spent fuel is sent to Sellafield. The water also acts as a barrier against radiation. Even after the spent fuel, which is kept in what are called "skips" (although these are specialised containers) is removed, the ponds remain highly contaminated. Sludge (again, itself highly contaminated) will have accumulated over time, as well as debris from the fuel elements and other items which are referred to as "furniture". Decommissioning involves dealing with all aspects both of the ponds themselves, and all that is within them, including the water, the sludge, the debris and the furniture.

36. Decommissioning of a nuclear facility will ultimately reach what is called an End State. Although a nuclear site licence under the Nuclear Installations Act 1965 can be surrendered whenever there are no longer licensable activities on site, an End State could have requirements following surrender of the site licence. Depending upon the site, the extent of the facilities and their use, it can take years to achieve End State.

37. The procurement process that is the subject of these proceedings was in relation to the decommissioning for the Magnox sites and the two research sites, and the competitive dialogue process was almost certainly the only viable method of procurement, given the complexities and difficulties of the decommissioning process.

38. The competition for these sites was originally to be held, in accordance with the NDA competition programme, with its completion scheduled for 2012. In January

2011 (after Magnox North and Magnox South were recombined) the NDA notified interested parties that the NDA was planning to delay the competition for the Magnox Sites to start in 2012 and conclude in 2014. The competition had the following stages:

1. Publication of the Prior Information Notice ("PIN");
2. Formal market engagement;
3. Publication of the contract notice;
4. Submission of responses to a pre-qualification questionnaire ("PQQ");
5. Issuance of an Invitation to Participate in Dialogue ("ITPD") to the bidders who prequalified, which included both RSS (the consortium in which Energy Solutions were involved) and CFP (the successful bidder);
6. The dialogue phase;
7. Notification of the closure of dialogue;
8. Issuance of an Invitation to Submit Final Tenders ("ITSFT") to the Bidders;
9. Submission of final tenders;
10. Evaluation of final tenders by the NDA; and
11. Announcement of the preferred bidder.

39. The most important stages for the purposes of these proceedings are those at (6) to (10), but in particular stage (10). Appendix 11 of the ITSFT contained the Statement of Response Requirements, or SORR {J/10/1}. This document was developed by the NDA in conjunction with the parties during the dialogue phase. The final version of the SORR was therefore one arrived at following a process of evolution in which the bidders and the NDA participated. The SORR contained the scoring criteria against which the different tender submissions were to be evaluated, and represents the most relevant rules of the procurement competition for the purposes of the trial. The dialogue phase was one which would have imposed a burden upon members of the teams assembled by the bidders, due to the number and intensity of the meetings. However, given the NDA were dealing with *all* of the bidders, in my judgment it could safely be said that the burden during this period upon the individuals within the NDA acting as SMEs was probably about three or four times as heavy as those within the bidders' teams for each Evaluation Node. The term "Node" was used to describe different components or sections of the bid. The dialogue phase ran from January 2013 to September 2013 and included the different bidders having the opportunity to make site visits. During this process, the different bidders also received what was called by all the witnesses "feedback" on their proposals which included drafts of their likely tender responses, which were called "Interim Submissions" or "Interim Drops".

40. As the dialogue developed, the bidders made three "Interim Drops". This had been set out in the Invitation to Potential Bidders {L/10/1} which was sent to those

bidders who had successfully pre-qualified. These were made by RSS on 18 April 2013 (First Interim Drop Part A) {N/1/1}, {N/2/1}, {N/3/1}, {N/4/1}, {N/5/1}, {N/6/1}, 16 May 2013 (First Interim Drop Part B) {N/7/1}, {N/8/1}, {N/9/1}, {N/10/1}, {N/11/1}, {N/12/1}, {N/13/1}, {N/14/1}, {N/15/1}, {N/16/1}, {N/17/1}, {N/18/1}, {N/19/1}, and 25 July 2013 (Second Interim Drop) {N/20/1}, {N/21/1}, {N/22/1}, {N/23/1}, {N/24/1}, {N/25/1}, {N/26/1}, {N/27/1}, {N/28/1}, {N/29/1}, {N/30/1}, {N/31/1}, {N/32/1}, {N/33/1}, {N/34/1}, {N/35/1}, {N/36/1}, {N/37/1}, {N/38/1}.

The Interim Drops were not scored. However, Energy Solutions submits, and I accept, that they were an important mechanism for ensuring that the NDA could have confidence that bidders would provide solutions that would meet its requirements. Also, their function included making sure the bidders knew that they were developing solutions which were fundamentally acceptable to the NDA. Indeed, the solutions were being proposed, and were evolving, throughout the dialogue process for precisely this purpose. For the Second Interim Drop, as well as setting out its proposed solution, RSS also provided supporting evidence.

41. There were some changes to the scoring matrices made after the Second Interim Drop, and after the dialogue process had come to an end on the Technical Nodes (the expression used for this was that dialogue had "closed"). "Face to face" dialogue on the Technical Nodes closed on 19 September 2013 {C/10/38} (although the dialogue process as a whole was brought formally to an end on 1 October 2013). On 20 September 2013, there were changes made by the NDA to the scoring matrices contained in Table K (Critical Assets) in Appendix 2 {J/9a/409}. Changes were made to the description of what would justify a score of "5- Excellent" for two of the five bullet points. These were (showing deletions as struck through and amendments underlined):

> *"* Identifies the key critical assets necessary to deliver the Bidder's strategy and provides the rationale as to why they are critical;*
>
> ** Demonstrates ownership and monitoring of critical assets such that they are managed throughout the duration of the strategy ~~/ approach~~ to ensure ~~delivery of the approach to implementation~~ the required level of performance is achieved."*

42. Similar changes were made to the same table for a score of "3- Fair":

> *"* Identifies the key critical assets necessary to deliver the Bidder's strategy and provides the rationale as to why they are critical;*
>
> ** Demonstrates ownership and monitoring of critical assets such that they are managed throughout the duration of the strategy ~~/ approach~~ but may not explain how this will ensure ~~delivery of the approach to implementation or how the critical assets~~ that the required level of performance will be monitored."*

The introduction of the word "key" therefore changed the description necessary for scoring this important provision from "critical assets" to "key critical assets". There was no opportunity for there to be any guidance from the NDA on this change, because it was made so late in the process, and this was accepted by Mr Rankin {Day9-NC/14}. Six of the challenges brought by Energy Solutions relate to Critical Assets and the evaluation by the six teams of SMEs on six different Nodes. These are Nodes 405, 408, 410, 411, 412 and 414. The effect of "key critical assets" and how this was interpreted are dealt with further in greater detail in Section B1 below. I was not given any particularly detailed explanation about why such a change, so very late in the lengthy dialogue phase, was necessary. It might be a coincidence that so many areas of challenge relate to such a very late change to such an important area of the bids.

43. The ITSFT was provided to the bidders under cover of a letter dated 2 October 2013 {P/1/1}. This confirmed that the "Dialogue period of the competition has now closed" and also that the NDA had "secured the necessary governance approvals to be able to enter into the formal ITSFT period". The letter requested that the documentation – which was the "Formal ITSFT Documentation" – be reviewed and invited "any clarification questions that you believe are unanswered by the final drafting of all of the documents. For the avoidance of doubt these submissions should be limited to matters of clarity, not to reopen dialogue on any subject matter contained within." The letter therefore made it clear, not that any of the parties at the time would have been in any doubt about the matter, that the final drafting of the ITSFT had gone as far as it was going to go, and the ITSFT documentation was at that point in its final form.

44. The competition devised by the NDA was evidently complex, and required tenderers to submit very detailed tender responses on many different matters. These tender responses were to be scrutinised by the SMEs and scored against the detailed scoring criteria contained in Appendix 11 to the ITSFT, namely the SORR. The tenderers were required to submit responses addressing a series of topics called the "Evaluation Nodes" or "Nodes". Each Node comprised a number of individual stated requirements ("Requirements"). The final version of the SORR was also dated 2 October 2013 and was headed "ITSFT Release Version" {J/10/1}. There had been nine earlier versions, namely those dated 3 December 2012 {J/1/1}; 15 February 2013 {J/2/1}; 15 March 2013 {J/3/1}; 12 April 2013 {J/4/1}; 10 May 2013 {J/5/1}; 7 June 2013 {J/6/1}; 26 July 2013 {J/7/1}; 23 August 2013 {J/8/1} and 20 September 2013 {J/9/1}. After each issue, the bidders had been invited to comment and were then told by the NDA whether their comments had been taken into account or rejected. A data room was made available to the bidders containing material which could be studied, in addition to the opportunity to make site visits.

45. The final version of the SORR was therefore a document of central importance in the procurement exercise, and hence in these proceedings. It is against that document that the different elements of the different Evaluation Nodes (both of the RSS and the CFP bids) were evaluated, and that document which must be considered when the allegations of breach of statutory duty on the part of the NDA come to be examined in the evidence.

46. Teams of Subject Matter Experts ("SMEs") were appointed to evaluate each Node and score each Requirement according to the scoring criteria specified in the SORR. The NDA deployed substantial resource in order to conduct this exercise, and recognised that this would be a heavy workload. The SMEs were all given training for the task. In the training material considered at the trial, which were PowerPoint graphics or slides, the SMEs were told by the NDA "personal demands on you will be high – very limited schedule contingency is available" {R/8/3}. This meant that there was little room in the programme for any overrun in terms of how much time was available for the SMEs to accomplish the evaluation. There was therefore a degree of time pressure upon the SMEs.

The Evaluation Nodes

47. The purpose of the Competition was to identify the Most Economically Advantageous Tender ("MEAT"). This identification was to be accomplished by evaluation of the different tenders using the Evaluation Framework. MEAT was referred to as Level 1 on the Evaluation Framework, which then had four Level 2 Evaluation Nodes. These were Cost; Commercial; Key Enablers; and Technical Scope and Methodology Underpinning (which was referred to generally as Technical Underpinning). Each Level 2 Evaluation Node was sub-divided into a number of Level 3 Evaluation Nodes. Each Level 3 Evaluation Node was allocated a reference number in the Evaluation Framework. The Cost Evaluation Nodes were numbered 100 onwards, Commercial Evaluation Nodes numbered 200 onwards, Key Enabler Evaluation Nodes 300 onwards and Technical Underpinning Evaluation Nodes 400 onwards. So for example, Nominated Staff is numbered Evaluation Node 303, and all the Technical Underpinning Evaluation Nodes are numbered 401 and so on. Each Level 3 Evaluation Node was then made up of a number of different Requirements.

48. The Level 2 Cost Evaluation Node was divided into two sections, namely Target Cost, and Cost and Programming Underpinning (which was also called Cost Underpinning). The Cost Evaluation Node represented 64% of the overall score. Within that, Target Cost was allocated 48% of the total score. Bidders were asked to provide a Target Cost for Phase 1 of the work which fell within a specified minimum and maximum range and equalled the total of the estimated cost values for each contract year in Phase 1. The bidders were then scored on their Phase 1 Target Cost.

49. Bidders could achieve the maximum score for the pricing element by bidding a Phase 1 Target Cost which represented savings of 35% against the available funding. Bidders also had to propose a Phase 2 Target Cost, which was capped at 60% of the Phase 1 Target Cost, although the Phase 2 Target Cost was not itself scored.

50. The second part of the Level 2 Cost Evaluation Node was called Cost Underpinning. This represented 16% of the overall score. The bidders had to provide a detailed breakdown of costs for their proposed solution for each of the Technical Underpinning Evaluation Nodes. The bidders had to demonstrate that the costs they proposed in the relevant Cost Underpinning Evaluation Node of their bids aligned with the scope of work set out in their corresponding Technical Underpinning Evaluation Node, and were also consistent with the scheduling for

the work set out in the Overall Schedule Summary and the costs in the Overall Cost Summary. Both aspects of the underpinning – Technical Underpinning and Cost Underpinning – were important. There was a capping mechanism which meant that the bidders could not score more for their responses to a Costs Underpinning Evaluation Node than for their response to the equivalent Technical Underpinning Evaluation Node. The rationale for this was that the technical approach of the bidders had to be sound in order for the cost and schedule proposed to be realistic.

51. The Commercial Level 2 Evaluation Node was concerned with contractual terms and is not in issue in these proceedings. The total percentage weighting attributable to the Commercial Level 2 Evaluation Node was 10%.

52. The next Level 2 Evaluation Node was the Key Enablers. These comprised 11 different areas where the NDA needed to establish that the bidders had a good level of competency in order to be able to operate effectively as the PBO. Not all of the Key Enablers are directly relevant to these proceedings but I set them all out for completeness.

1. Health Safety Security Safeguards and Environment ("HSSSE"). This is self-explanatory.

2. Socio-Economics: Socio-economics was about understanding the impact of the NDA, the PBO and the SLC's activities on its local communities. As part of the Evaluation Node bidders were required to submit their socio- economic strategy and plans at PBO level and explain how they would flow down to SLC level and individual site level.

3. Nominated Staff Appointments: this is dealt with further in relation to specific Requirements under consideration in these proceedings, namely 303.5.2 and 303.5.3 (on both the RSS and CFP bids) and 303.5.4 (for the CFP bid). This was explained as dealing with "the ability of a PBO to select, maintain and refresh Nominated Staff to deliver the Magnox & RSRL contract" {C/7/26}.

4. PBO Governance: This concerned how the PBO would manage the Magnox & RSRL SLCs in an effective manner and ensure compliance with various requirements.

5. Transition In of New PBO: The purpose of this Key Enabler was to ensure that the bidders understood the steps that needed to be taken during the transition.

6. Supply Chain Management: The NDA supply chain refers to the companies and organisations that provide goods or services to the NDA, its subsidiaries and the SLCs. One quarter of the "total spend" of the NDA is spent on the supply chain. This Node therefore was aimed at ensuring effective processes would be in place to manage all aspects of the supply chain.

7. Portfolio/Programme/Project Management (PPPM): Bidders were asked to explain their strategy to managing a portfolio, programmes and projects, explaining why they had adopted this strategy and its expected outputs and benefits, together with examples of how its proposed strategy had been applied in practice.

8. People: This was based upon the NDA Strategy for identifying and managing resources, delivering and maintaining skills and capability and developing networks and collaborating with other parts of the NDA estate.

9. Technical & Engineering: The Key Enabler for Technical Engineering was focussed on understanding the bidders' general proposed Technical and Engineering approach and strategy and why that had been adopted. Part of the Key Enabler also dealt with the bidders' approach to Research and Development.

10. Consolidation: This concerned how a bidder would move from the existing Magnox & RSRL structure to the new one, including obtaining all the necessary regulatory and NDA approvals.

11. Stakeholder Engagement and Public Relations: The purpose of this Key Enabler was to test whether the Bidders' stakeholder and communication strategies would meet all the requirements set out in the NDA Strategy for Public and Stakeholder Engagement and Communications and demonstrate how they would implement their strategies.

53. The majority of the Key Enablers were to be evaluated on a purely "threshold" basis. This meant that a bidder's response to an Evaluation Node had to meet the "threshold" otherwise it would be deemed non-compliant and the bidder could be excluded from the Competition. Provided the bidders met the relevant threshold, it was decided that those Key Enablers should not be a differentiating factor. For the purposes of the evaluation, bidders' responses to pure threshold Evaluation Nodes were still scored for the purposes of assessing whether they met the "threshold" but bidders were not allocated any percentage weighting against those scores.

54. However, four of the Key Enablers were of sufficient importance that they were scored, as well as having threshold status. These were Nominated Staff, PBO Governance, Supply Chain Management, and PPPM. These Key Enablers were subject to a “threshold test” and then bidders who achieved the "threshold” were allocated a percentage weighting according to their score. Nominated Staff was allocated 4% of the overall percentage weighting; this was seen as more important than the others, and the NDA wished to send a clear message to bidders about this importance which is why it was given this percentage weighting. The other three scored Evaluation Nodes were allocated 2% each.

55. The Level 2 Technical Evaluation Node comprised 15 Evaluation Nodes. Evaluation Node 401: Overall Scope Summary was at a high level and was scored on a threshold basis. It was not possible within the time available in the Competition to evaluate the bidders' proposals for delivering the entire Client Specification. Therefore, a number of outcomes from the Client Specification were selected for closer scrutiny in the Technical Underpinning Evaluation Nodes. At Level 3 within the Technical Underpinning Evaluation Nodes, the Overall Scope Summary Evaluation Node was a pure threshold Evaluation Node. The purpose of this Evaluation Node was to test the bidders' understanding of the scope of the Client Specification and for the bidders to set out at a high level the approach they would adopt to delivering the outcomes in the Client Specification. It also acted as the benchmark for ensuring that a bidder’s responses to other Evaluation Nodes were consistent with its response to the Overall Scope Summary.

There were seven weighted Evaluation Nodes. These were:

(a) Spent Fuel and Nuclear Materials Management: Bidders were required to set out their strategy for de-fuelling the Magnox nuclear reactors and for managing nuclear material and fuels.

(b) Asset Management: The assets, some of which were already quite old, had to be maintained in an appropriate condition for the decommissioning processes and programmes.

(c) Integrated Waste Management: This was concerned with the management of all waste (both radioactive and non-radioactive) at the different Magnox & RSRL sites.

(d) Delivery of Winfrith Interim End State: Winfrith was to be the first site to achieve Interim End State during Phase 1.

(e) Common Support Functions and Services: Since the point of the competition was to have the Magnox & RSRL SLCs dealt with together (or as a single portfolio), this Node was about managing Common Support Functions and Services and what these function and services would cover. Examples of these functions were the finance and Human Resources function of the organisation.

(f) Sample Projects 1 to 6: The Sample Projects were six of the technical aspects of the decommissioning. The NDA used these to test the bidders' approaches for the different challenges presented by those projects. The Sample Projects selected were:

i. Project 1: Preparing Chapelcross Processing Plant and building B141 at Chapelcross for “interim Care and Maintenance” and the Chapelcross site Interim State;

ii. Project 2: Preparing the reactor building complex for both reactors at Dungeness Site for the Dungeness Interim State;

iii. Project 3: Preparing the fuel storage ponds at the Sizewell A site for the Sizewell A Site Interim State;

iv. Project 4: Completing the retrieval, processing and packaging of historic ILW arisings at the Hinkley Point A site and Oldbury site;

v. Project 5: The management of active effluent at the Sizewell A site; and

vi. Project 6: B462 Head End Cell operations and Decommissioning of the B462 Complex at Harwell.

(g) Alternative Strategies (1 to 3). This dealt with three particular areas or scenarios where there were alternatives. These were:

A. A plan for a de-designation of the Winfrith Site at Interim End State;

B. A plan for the reduction of the Care and Maintenance period for the Magnox sites; and

C. A plan for managing variation to the Magnox reprocessing rate for all of the spent Magnox fuel (known as MOP 9).

56. The weightings between the Technical/Costs Underpinning Evaluation Nodes were different. The highest individual weighting of 2.4% was given to Common Support Functions and Services. This was the Evaluation Node where the differentiation between bidders was expected by the NDA to be the greatest. Although each Sample Project was only worth 0.8%, collectively the Sample Projects accounted for 4.8% of the overall percentage weighting. Integrated Waste Management and Delivery of the Winfrith Interim End State were the next highest individual weightings at 2.24% each. Asset Management, and Spent Fuel and Nuclear Materials, though important were not as important as the other Evaluation Nodes, so were allocated 1.92% each.

57. The percentage weightings for the Alternative Strategies were small, at 0.16% each. This was because the bidders were only required to develop plans that supported how they would approach the development of the strategies were these to be required. The bidders did not need to set out the strategies in detail. The bidders were all identified by number starting from 2. Bidder number 1 had been the Bechtel/URS consortium, and after URS withdrew the number 1 was not re-allocated. Each of bidders 2 to 5 submitted their tender bids by the date required, namely 1 November 2013. The Award Notification was dated 31 March 2014. Simply by considering the dates it can be seen that the process of evaluating, scoring, and satisfying the internal procedures necessary before announcing the outcome of the competition, was performed to a timetable that was very tight. In fact, the evaluation process itself was shorter than that, and lasted less than four months; it started on 11 November 2013 and was supposed to end on 4 March 2014 {C/7/50}. This is less than half the period allocated for the dialogue process. The evaluation period was in fact extended, but only by half a day at the request of the SMEs doing the Overall Cost Summary Evaluation Node, and it finished on 5 March 2014. It was the evaluation process that was crucial to two important matters. Selecting the tender who had submitted the most economically advantageous bid; and complying with the statutory duties upon the NDA to do so in accordance with the Regulations so that the procurement was conducted lawfully.

V The Revelations of July 2016

58. My view of the witnesses can only fully be given after outlining what occurred in July 2016, just before the intended handing down of the judgment. The last day of submissions on the substantive issues had been 23 March 2016 when further submissions were required on one particular area, namely the disqualification provisions of the SORR. The draft judgment then continued to be written over the next three months, and a draft was issued to the parties under CPR Part 40 in the usual way on 6 July 2016. During May 2016, a date in July had been chosen for the formal handing down of the judgment, to suit the availability of the parties, that date being 14 July 2016. Typographical and other clerical corrections were received from both parties in the usual way and these were incorporated.

59. However, on the morning of 13 July 2016 a letter was received by the court from Freshfields Bruckhaus Deringer LLP ("Freshfields"), Energy Solutions' solicitors acting in the litigation. The letter was dated 12 July 2016 and had been sent the evening before, and involved the revelation of a highly unusual state of affairs. This had only come to Freshfields' attention shortly before the letter itself had been written. To put it at its shortest, Freshfields had just discovered that their client, Energy Solutions, had entered into a written agreement with Ian Bowes, one of its witnesses, whereby Mr Bowes was to be paid a bonus of £100,000 in the event that Energy Solutions was successful in the litigation. This agreement was dated 13 July 2015, coincidentally almost exactly one year before Freshfields discovered its existence. That agreement ("the Bowes Supplemental Agreement") had not been disclosed to the NDA (although it was disclosed under cover of the letter of 12 July 2016) and the arrangement whereby Mr Bowes was to be paid this sum dependent on the litigation outcome had not been made known to the court, and had not been (prior to July 2016) known to Freshfields. Freshfields accordingly asked that the formal handing down be adjourned so that investigations could be undertaken. The NDA's solicitors, Burges Salmon, acceded to the request to postpone the formal handing down.

60. I therefore did not hand the judgment down on that date, but a hearing did take place on 14 July 2016. Very shortly before that hearing, further information was provided by Freshfields to the NDA and to the court. By the time of the hearing at 2.00pm on 14 July 2016 it had been discovered that similar arrangements appeared to have been made also for Philip Colwill, Andrew Davies, Johanna Wilson, and Nigel Board, as well as for Mr Bowes. I therefore gave directions for evidence to be served by the partner in charge of the case at Freshfields, Ms Sally Roe, explaining how this state of affairs had come to her knowledge; from personnel at Energy Solutions responsible for these Supplemental Agreements; and from the witnesses themselves who were affected by these arrangements.

61. I also set down a two day hearing for 25 and 26 July 2016, the intention being that the NDA could, if so advised, further cross-examine such witnesses as they wished on this state of affairs, details of which were still emerging. This point can be summarised as Energy Solutions having entered into agreements with each of these five witnesses, promising to pay them what were referred to as "win bonuses" dependent upon the outcome of the litigation. Evidence was served in accordance with my directions during the week commencing 18 July 2016 from all five of these witnesses who had given evidence earlier in the trial, together with witness

statements from Ms Roe {D/6/1}, Simon Stuttaford {D/18/1} and Tim Joyce {D/20/1}. Mr Stuttaford is a solicitor whose job title was Senior Vice President Legal at Energy Solutions, and he was the sole lawyer there, and in-house counsel. He had already served a witness statement in October 2014 relating to the preliminary issues {D/2/1}. He had, at the time the first Supplemental Agreement had been entered into (which was with Mr Board), still been employed by Energy Solutions, although he left and went to a law firm called DWF LLP on 22 June 2015 {D/18/2}. He had been in-house counsel at Energy Solutions from 11 August 2011 to 12 June 2015. He was therefore directly employed at the time the agreement with Mr Board was executed ("the Board Supplemental Agreement"), and he had also been involved in drafting the other agreements. After he left Energy Solutions' employ he continued to provide services to them as a DWF partner and would work typically one day a week out of the Energy Solutions' offices. Tim Joyce {D/20/1} is a main board member, chartered accountant and had been the signatory to the agreements. He had also been the person who had instructed Simon Stuttaford to draft them, and hence had direct knowledge about them. He had also given a witness statement earlier in relation to an earlier interlocutory application {D/3/1}.

62. On 20 July 2016 the NDA issued an application seeking dismissal of the whole claim and/or striking out of the whole claim, alternatively seeking a declaration of mistrial in relation to all the proceedings before me that are the subject of this judgment {F/44/1}. Each of the witnesses I have identified in the preceding paragraph were cross-examined on 25 or 26 July 2016 by either Mr Hapgood QC (who appeared for the first time at this stage in the trial) or Mr Giffin QC. The NDA also cross-examined Ms Roe, the Freshfields' partner. I deal with that application in Part XI of this judgment, and for the reasons given there I dismiss it. However, I have evidently revisited both my view of each of the five witnesses who had such an agreement, and also revisited each of my factual findings and my analysis of the case brought by Energy Solutions on each of the issues in this case as a result of these events, and these agreements. My analysis of the witnesses in the subsequent section of this judgment, Part VI, contains my views on the totality of what I have heard in the whole of these proceedings from, and about, these witnesses including the events of July 2016. I have also considered the situation in respect of each of the witnesses who had Supplemental Agreements containing "win bonuses", and the effect such an arrangement might have had on their evidence, separately from one another. It is not the case that the same conclusion has to be reached for all of them, or that the same weight has to be given to each of their evidence either on that particular point, or indeed on any point.

VI The Factual Evidence and the Witnesses

63. Given the approach to challenges of this type in procurement proceedings, there is obviously some scope for disagreement between witnesses (and counsel) about what documents such as the SORR (and also the bidders' Tender Submissions themselves) actually mean. Although this was guarded against, from time to time it was inevitable that some witnesses found themselves explaining what they believed particular text really meant, or should be interpreted as meaning. There was a great deal of technical subject matter and as could be expected, all of the witnesses on both sides seemed suitably qualified and experienced in their roles, both in the bid and indeed generally. There were however important differences between them and I address these in the relevant parts of the judgment when dealing with specific Nodes.

64. The Claimant's witnesses were as follows. I deal with them in the order in which they were called at the trial, which remained the same order when those who had Supplemental Agreements were recalled on 26 July 2016 to be cross-examined on that issue.

Ian Bowes

65. Mr Bowes was, until 31 March 2016, the Senior Vice President Business Services at the Claimant, responsible for the commercial activities of ES both in the UK and mainland Europe. He has worked in the nuclear industry for 34 years and is evidently a man of considerable experience. For 20 of those years he worked for BNFL, predominantly at Sellafield. He led the BNFL team in a successful bid for the contract (together with Lockheed Martin Corporation and Serco Group plc) to manage and operate a joint venture company called AWE Management Ltd. This company managed and operated AWE plc, a company whose main activity is to manufacture and maintain the UK's nuclear warheads which form the UK's strategic nuclear deterrent. Mr Bowes was a main board member of AWE plc. He worked in the division of BNFL that facilitated the handover of the nuclear sites to the NDA. When the NDA parent body agreements and management and operation agreements came into effect on 1 April 2005 he moved into Magnox Electric, the body that operated the Magnox sites. When Magnox Electric was split into Magnox South and Magnox North, he became the Commercial Director of Magnox South. When Energy Solutions acquired a subsidiary of BNFL in June 2007 he was responsible on behalf of BNFL for agreeing with the NDA certain amended, restated and consolidated parent body agreements, and site management and operations contracts that had to be put in place. In October 2007 he moved into what is called a commercial development role, and became a Senior Vice President of Energy Solutions in 2010. He was involved in commercial dialogue with the NDA for a consortium bid Energy Solutions entered into (with AMEC Nuclear Holdings Ltd) for a PBO for Dounreay. In this bid the subject of these proceedings, he was the commercial lead for the RSS bid team, and was also a lead author, and reviewer, of particular sections of the RSS bid.

66. He was the first witness to be called at the trial, and is one of the only two witnesses for Energy Solutions (the other being Mr Board) permitted to view the confidential material relating to the CFP tender under the confidentiality arrangements agreed by the parties to the litigation and ordered by the court ("the

Confidentiality Ring"). As part of being included within those confidentiality arrangements he gave undertakings to the court about restricting his future involvement in any bid involving CFP or any of its members until six months after the litigation was over, or until 10 June 2017. The rationale for this was that, by being within the wider Confidentiality Ring, he would see certain commercially sensitive financial information relating to CFP's bid.

67. I formed the view, prior to the revelations of July 2016, that he was an impressive witness with considerable depth of knowledge. He answered the questions put to him clearly and sensibly in all respects and the whole of his evidence appeared to me, then, entirely uncoloured by any partisan view. That remained my view after the Supplemental Agreements came to light, and after he had been cross-examined on 26 July 2016. Mr Bowes, having worked in the industry as he had for so many years, had become something of a specialist in bidding for new contracts. However, absent specialist (or indeed any) legal knowledge about the nature of such agreements, he could not be expected to know of the policy considerations that have an effect upon their legal status, nor could he (or the other witnesses) be expected to know that such agreements are contrary to public policy.

68. The notable feature of this case so far as the Supplemental Agreements are concerned is that once Energy Solutions, by definition, lost the procurement competition, the US-based parent company decided to re-organise the business with many employees becoming redundant. Mr Bowes had his employment terminated on 31 March 2016. He had signed a Supplementary Agreement on 13 July 2015 {D/11/133}, well before he came to give evidence before me in the trial, but only the day after his first witness statement was signed {D/10/1}. The reason that these "litigation win bonus" agreements are all called Supplemental Agreements is they were supplemental to, and not included within, the terms of the Settlement Agreements by which these personnel were made redundant or had their employments terminated. The only exception to this is the agreement with Mr Davies, who was not made redundant. The fact that they are separate to Settlement Agreements is a point relied upon by the NDA in its application in Part XI, but I find there is nothing in that point because they are in fact referred to within the Settlement Agreements themselves, for example at {D/17/27} by the words "save as provided within a supplemental agreement between the Parties of even date".

69. Mr Bowes was the person at Energy Solutions who, to use his own words {D/10/6}, said that "the claim was essentially run by me". He had been the leader of the bid team, and he was effectively the leader of those personnel at Energy Solutions who were involved in the litigation too. He liaised extensively with Freshfields, and gave evidence. As he explained to me "reward and recognition including using incentive payments was part of the overall reward structure adopted by the Claimant". He had qualified for a bonus upon submission of the RSS tender itself (which was the product of a great deal of work) in the sum of £24,778. Had the RSS bid been successful, he would have been entitled to a "win bonus" of £63,072, although he told me that he had only done that calculation recently, and had thought it was about £75,000.

70. Mr Bowes therefore knew that he would have no, or only an extremely limited, future with Energy Solutions, even though Energy Solutions needed his help and continuing input into the litigation. His confidentiality undertaking would restrict

his future employability in his specialist field. An arrangement was therefore reached with him contained in the Supplemental Agreement whereby he would be paid a certain amount for his time going forwards from 1 April 2016 following his termination, together with a win bonus of £100,000 if Energy Solutions were to be successful, which was defined as Energy Solutions being "the recipient of damages whether by way of a settlement or court judgment in its favour".

71. He was also then involved in organising, or helping to negotiate, similar though not identical arrangements with the other witnesses who had such agreements.

72. Mr Bowes is not a lawyer and could not be expected to know that such agreements are wrong. I find that he had no knowledge of the public policy against such agreements – or indeed towards any similar arrangements to pay sums to witnesses dependent upon the outcome of litigation.

73. It was put to him by Mr Hapgood QC that the suggestion that he had made in his written evidence, namely that the existence of such a bonus had no influence on his evidence, was "completely unrealistic" {Day22Z-CON/46/7}:

> "Q.…Now, I must put it to you that that is completely unrealistic. If you are giving evidence and you stand the chance to gain a bonus of £100,000 if the evidence is accepted, it must influence your evidence, and I put it to you that it did?
>
> A. I would – I would say no to that, and I think you just have to look at what was presented to the court. A large amount of my evidence related to what was in the CFP proposal, what was in the NDA's -- in the SORR, how the NDA evaluated it, and I fundamentally had – I presented that in all factually based documents. So I have no evidence of anything else, bar the documents that were put in front of me. So I stand by what I say there. It's that I purely put in what was truthful in relation to reading what was in the CFP proposal, reading what was in the NDA's evaluation, again it's the SORR, and those facts are clearly laid out, and that is what I did."

74. This attack by Mr Hapgood QC concerning this point could be described as having two parts, namely "everyone has their price" and "£100,000 is such a high figure it must have been your price" – although he did not use those words. Mr Bowes firmly rejected that suggestion.

75. Mr Bowes also explained that {Day22Z-CON/45/8}:

> "A. Well, the point of the – I think one of the points of the payment was to actually ensure that I remained – I was retained to continue working on the actual proposal, you know, the actual litigation. And so if I was required, I would still be there. I clearly believed, and actually, I think, although not subject to this, I have had to turn down jobs that I would have been able to do, and so therefore it was part of an overall arrangement to ensure that I actually continued supporting the

> actual, you know, this litigation if so required, and that was something that the company agreed to do."

76. Mr Bowes' evidence on these points was wholly compelling and I accept it. I found him to be truthful and impressive when he first gave evidence, and this was reinforced when he was asked about the Supplemental Agreement. I find that the truthfulness, and content, of his evidence was not affected either by the existence of such an agreement, or the possibility of such an agreement, either during the preliminary discussions about such an arrangement (which commenced on about 29 April 2015 {D/10/11}) or after it was executed.

77. There is a further factor that affects both Mr Bowes and Mr Board, but none of the other witnesses. On 1 July 2016 a further agreement was entered into between the US parent company and each of them, although the legal entity contracting with Energy Solutions LLC was, for each of Mr Bowes and Mr Board, a limited company through which they provided consultancy services. Mr Bowes' company was called IJRB Ltd. This agreement was of a similar nature to the Supplemental Agreement, although it was far more detailed and the payment terms were different (and far more generous). The win bonus in this agreement (which I will call "the Percentage Recovery Agreement") consisted of two elements, one of £100,000, and the other of 0.5% of the amount recovered in damages. The Percentage Recovery Agreement with Mr Bowes has been terminated. The reason that the Percentage Recovery Agreement was with the US parent was due to the claimant entity having been disposed of to Atkins Ltd, another major company in the sector, with the benefit of the litigation being retained by the US parent. Given the potential scale of damages, the percentage element of this bonus could amount to up to £500,000.

78. There is nothing to suggest that Mr Bowes knew that the Percentage Recovery Agreement or anything like it was possible, or available, when he gave evidence at the trial. The services to be provided are included in Schedule 1 {D/11/178} and include giving evidence "if required" but also go wider than that, including working with Mr Board on management of the claim and instructing Energy Solutions' legal advisers. This agreement was also formed at a time when it must have been becoming obvious to all at Energy Solutions that the litigation was potentially going to take far longer to resolve than perhaps had been anticipated during 2015. The Supreme Court had given permission to appeal on the preliminary issues, and this first instance liability judgment had taken some months to draft (and, as at the date of the Percentage Recovery Agreement, had not even been distributed). An appeal by either party, or even both parties, may occur. I find that the formation of this agreement had no effect whatsoever either on the evidence given to me by Mr Bowes on the substantive issues in the trial in November/December 2015, nor at the hearing before me on 26 July 2016. Further, the litigation win bonus of £100,000 (which was known to him when he signed his first witness statement) does not, in my judgment, alter my view of him as a witness or diminish the weight which I have given to his evidence.

Philip Colwill

79. Mr Colwill has worked in the water, oil, gas and nuclear industries for in excess of 25 years, in project management and commercial management. He has an MBA

from Exeter University. He has worked for the Claimant since 2007, firstly as Commercial Director for Magnox South and then Head of Commercial Delivery for Magnox Ltd. Prior to joining Energy Solutions he had been Commercial Manager at Hinckley Point A from 2005. Prior to that, he had been on assignment at Hinckley Point A as interim Head of Contracts for Mott McDonald, a well-known construction consultancy where he was an associate director. Mott McDonald also seconded him to Shell Global Solutions for a US$5 billion project in Qatar prior to sending him to Hinckley Point A, which was his final assignment with them before he joined BNFL at the same location. It was this that evolved into his role at Magnox South. He joined the RSS bid team in 2012 and was closely and comprehensively involved in the prequalification stage and bid stage.

80. He assisted with the RSS Tender Response relating to the supply chain management and asset management Evaluation Nodes (Nodes 306, 406 and 106), including what was called cross-cutting in respect of asset management. Essentially, this meant an approach whereby the responses to asset management (which were required across a number of different Evaluation Nodes) were used across different Nodes in similar terms. He was responsible for the overall strategy for (and preparation of) the cost and technical nodes that concerned both supply chain management and asset management.

81. Mr Colwill adopted a style of giving evidence that became increasingly common throughout the trial for the majority of the witnesses for Energy Solutions. I was unaware of the architect of this when I drafted the judgment distributed to the parties on 6 July 2016, although in further disclosure in July 2016 following the Supplemental Agreements and win bonus issues, it appears that witness training was provided by a company called Bond Solon. Whether that training was responsible for the style of giving evidence, I do not know. Mr Colwill was the first to use it. This was, at times, to avoid the question and embark upon something of a corporate presentation. The linguistic device adopted for this approach was, usually, to state that it was necessary to put a question "in context" and then embark upon an exposition that was essentially sketching out the Claimant's case, and avoiding giving a clear answer to sensible questions from Mr Giffin QC for the NDA. I found this increasingly unhelpful. In my draft judgment of 6 July 2016, I expressed the view that particularly in a procurement case, where the content of the tender submission essentially speaks for itself, evidence from a claimant's witnesses is not as crucial as it is in other cases where there might be more stark disputes of primary fact. That remains my view, and indeed appeared to be the view of Leading Counsel for the NDA in its Note of Oral Closing Submissions {AA/21/17} when it was said "So far as the ES witnesses are concerned, it is common ground that in reality their evidence is of secondary importance to a challenge of this kind". That view on the part of the NDA changed dramatically by the time of the hearing on 25 and 26 July 2016, which is a point to which I return in Part XI of this judgment dealing with the application to dismiss the claim. Despite that change of view by the NDA, I remain of the view expressed in my draft judgment – namely, that in a procurement case, where the content of the tender submission essentially speaks for itself, evidence from a claimant's witnesses is not as crucial as it is in other cases where there might be more stark disputes of primary fact.

82. However, even though it is correct that in procurement cases a claimant's witness evidence is not necessarily so crucial as in other cases (where there may be, for example, issues about what was actually said at a meeting, or what in fact happened on a particular occasion) the approach to giving evidence adopted by the majority of the Energy Solutions' witnesses (with the exception of Mr Bowes, Mr Peel and Mr Matthews) is to be discouraged. Mr Colwill was the first proponent of this technique, and other witnesses for Energy Solutions adopted it to a greater or lesser degree, such that a pattern seemed to emerge. This had obvious disadvantages. Preparation by a witness is undoubtedly necessary in a case such as this with so much material, covering so many different technical areas, but if preparation involves refining an approach to keep witnesses' oral evidence as close to a pre-ordained script as possible, it risks being counter-productive. This became more pronounced (or noticeable) during the evidence of the different witnesses, and it approached its nadir during Ms Wilson's evidence. I do not consider that it had a determinative impact upon my findings on any of the areas in dispute, but it would be detrimental if such an approach were to be adopted in future hearings in this (or indeed any) litigation.

83. Ironically, I found Mr Colwill's style of giving evidence when he was cross-examined on 26 July 2016 (about matters which could potentially go substantially to an attack on his credit) to be far more persuasive than it had been during the trial in November 2015. Perhaps the lack of time for extensive preparation, or witness training, was a good thing. Certainly where before there had been long pauses, requests to put matters "in context", careful consideration of questions and equally careful non-answers, on 26 July 2016 he answered promptly, candidly and openly, and I found what he had to say wholly convincing.

84. He was made redundant with effect from 31 January 2016. He now provides consultancy services to Atkins Energy Canada Group, another company extensively involved in the nuclear field. He had been informed of his redundancy in May 2015. His Supplemental Agreement was dated 27 January 2016, although such an arrangement was first discussed in October 2015 {D/16/10}. This therefore post-dated his witness statements of 13 July 2015 {B/7/1} and 21 August 2015 {B/12/1}. Mr Colwill had known since about October 2014 that he would be giving evidence, and indeed he considered that his preparation and involvement in the case was impacting upon his ability to look for another job with another company. The sum included as a litigation win bonus in his Supplemental Agreement was £22,000.

85. Mr Colwill made, in my judgment, rather a good if not overwhelming point in his third witness statement, which could be said equally to apply to the other witnesses with litigation win bonus arrangements. This related to the personal consequences of the failed bid. In his view, the NDA had made significant errors in the evaluation of the RSS tender but the litigation would only remedy the consequences of that so far as the company was concerned. He was expected to put in a considerable amount of work to help Energy Solutions correct this wrong, yet he had suffered personally to a considerable degree – he was being made redundant rather than taking up a senior role in the PBO. Also, and again this applies to all the other employees, he would have been entitled to a substantial bonus had RSS won the bid in the actual competition. He and his colleagues were therefore

suffering a double impact due to what they saw as the wrongful evaluation of the bid. They had lost the bonus they felt should have been paid; and they had to work very hard in the litigation as well. He considered that his role up to October 2015 had cost him both in family and career terms, and he explained his views in a letter dated 2 October 2015 to Mr Bowes {D/17/52}. Ms Wilson sent a similar letter dated 3 October 2015, which I deal with below. In his letter, Mr Colwill suggested a further payment in respect of his involvement in the litigation, and notably in my judgment his first option was one regardless of outcome.

86. He also sought to have this resolved in early October 2015. It was not resolved by that time, and his Supplemental Agreement was not signed until 27 January 2016. That was well after he had given evidence in the trial.

87. I find that neither the terms of the Colwill Supplemental Agreement, nor the terms requested by him of Energy Solutions in his letter dated 2 October 2015, nor the possibility of similar terms, had any effect on the truthfulness of the evidence that he gave before me either in the trial on the substantive liability issues, or on 26 July 2016. I also find, should it be necessary, that there was an entirely understandable personal purpose behind Mr Colwill seeking some further remuneration from Energy Solutions in terms of his extra involvement in the litigation. The litigation win bonus does not, in my judgment, alter my view of him as a witness or diminish the weight which I have given to his evidence.

Marcus Peel

88. Mr Peel has been employed by Energy Solutions since 2007. He is resident in the United States of America and travelled to London for the trial. He has over 30 years of experience in fields of engineering, construction, maintenance and operation of large commercial and government facilities. He has a Bachelor's degree in Business Administration and an MBA, both from Augusta College in the USA. He is also qualified as a Certified Cost Consultant for the Association for the Advancement of Cost Engineering. He has been involved in many project proposals for competitive tender processes and has prior experience of the nuclear sector including having been employed by Fluor Enterprises (when it was known as Fluor Daniel Inc). He joined Energy Solutions in 2007 and was at the time of the trail a Cost Proposal Group Director for Energy Solutions and has been since 2010. In October 2012 he became part of the RSS Bid Team assembled by Bechtel and Energy Solutions. He has been involved in every large project or competitive tender process in which Energy Solutions has participated in the last seven years, and on this tender he led the preparation of the cost proposal for the RSS Tender Response. He took part, again as the lead of the cost proposal, in Energy Solutions' tender for the appointment of the PBO for the Dounreay Site Restoration Ltd, the entity (also an SLC) that manages and operates the Dounreay nuclear site on the NDA's behalf. In that competition, Energy Solutions was unsuccessful. He had been involved in a great amount of preparation work for this procurement exercise, performed in parallel with his work on the Dounreay competition. Mr Peel was a helpful witness and provided me with useful evidence to the part of the Energy Solutions' bid upon which he was questioned. Some of his involvement went to issues not being dealt with in this trial, but so far as Node 113 was concerned, he was very helpful and I found his evidence of considerable assistance. He frankly accepted some of the shortcomings identified concerning the risk register.

89. He did not suffer from the "corporate style" of giving evidence to which I have referred concerning Mr Colwill. This may have been because, as he lived in the United States, he may not have been given the same witness training. He did not have a Supplemental Agreement with a win bonus dependent upon the outcome of the litigation, and he was not recalled for further cross-examination on 25 or 26 July 2016.

Andrew Davies

90. Mr Davies was at the time of the trial a Project Manager of European Major Projects at Energy Solutions. That job involved what is called scope development for major reactor decommissioning projects across Europe. He was part of the bid team from July 2012. He has both a BSc and MSc from Imperial College in London, the former in chemistry and the latter in Nuclear Fuel Technology, and he has worked in the nuclear industry since 1982, including at the UKAEA from 1982 to 1985 at Dounreay as a Development Chemist. He became a First Engineer at CEGB and Nuclear Electric plc in 1988, and in 1996 became Team Leader at Magnox Electric plc. Over time he has moved roles and is now in senior project management. He was Head of the Strategy Group at BNFL from 1998 to 2000 and was responsible for preparing and developing a new decommissioning strategy. Whilst at Magnox Electric from 2004 he was responsible for the Lifetime Plans for all ten of the Magnox reactor sites, and from 2006 he was Head of Lifetime Planning for Magnox North Ltd. He joined a consortium bid team in 2010 for the Dounreay competition. In July 2012 he commenced work full time on the bid the subject of these proceedings for Energy Solutions, and developed the broad strategies and approaches to the competition.

91. He was the lead author responsible for Node 405 Spent Fuel and Nuclear Materials Management, and also was lead author for two of the three Alternative Strategies, namely Nodes 417 and 418. He was responsible for various technical elements that applied across different Nodes; the so-called cross-cutting Nodes because their content cut across the whole bid. He was responsible for text, graphics and templates provided to the authors of specific nodes. He gave evidence predominantly concerning asset management and criticality. He worked together with Mr Colwill to prepare aspects of the bid, and his evidence involved a degree of technical debate (principally based on Mr Grey's evidence for the NDA) about asset management. The subject matter of his cross-examination on the substantive issues principally involved movement of nuclear waste material and the flasks utilised for such operations. I found his evidence, based as it was upon considerable experience and good sense, very helpful, not least his frank acceptance that (as he admitted, with hindsight) things could always have been done differently and "there was always room for improvement" {Day5-NC/41}. Where he disagreed with Mr Grey's evidence he was careful and measured, although he was not in the confidentiality ring and so could not deal with the points that were raised by Mr Grey concerning the CFP Tender Response.

92. He has not been made redundant, and when Energy Solutions' ownership changed as part of a wider acquisition his employment transferred to Atkins Ltd under the TUPE regulations that apply in such situations. He did have an agreement to receive what was called "a bonus premium" in a letter dated 4 February 2016 {D/13/6} of £15,500 if Energy Solutions were to receive damages in the litigation.

This letter was not signed by him and was not supplemental to any redundancy or severance agreement, and so was different in character from the Supplemental Agreements, although the basic principle remained the same, namely payment of a bonus dependent upon litigation outcome. This had been first discussed in October or November 2016 at a lower level of £11,000. He had earlier received a bid submission bonus in November 2013.

93. He had not requested the bid submission bonus, it was just offered to him. Similarly, he had neither sought nor requested the litigation win bonus; that too was just offered to him. Initially Mr Bowes mentioned this to him in conversation, and Mr Davies then forgot about it until the letter arrived in February 2016. He had always found Mr Bowes reliable, but did not think the decision would be entirely within Mr Bowes' control and so he had not given the suggestion of such a bonus much credence. He was "not confident about his [Mr Bowes] ability to influence things going forward" given the uncertain future of the company. He had no knowledge of the litigation win bonus arrangement, nor anything similar, when he signed his two witness statements in the substantive proceedings in July and August 2015.

94. He explained to me in his evidence for the hearing on 25 and 26 July 2016 that he had actually been hoping to be made redundant. He also explained that he was fully aware of the need to tell the truth throughout, and the litigation win bonus made no difference to that at all. He rejected the suggestion put to him by Mr Giffin QC that the amount "may have made you a little keener that the trial should go a particular way?" I will return to this again below. However, Mr Davies not only rejected this, but said it never really crossed his mind and that it "had no effect, even if it was intended to." It was not put to Mr Bowes that he had mentioned this to Mr Davies in order to influence the truthfulness of Mr Davies' evidence.

95. There is a further point to be made about Mr Davies. He, as with so many of the witnesses at the trial for both parties, is highly technically qualified, and his evidence on the substantive issues principally concerned the intricacies of the movement of nuclear waste. The suggestion that someone involved in the nuclear industry since 1982 would give the court untruthful evidence about the movement of nuclear waste, a highly hazardous operation, in exchange for the possibility of a payment of £15,500 is something that, in my judgment, would need substantial material to justify it. It is also something that in my judgment would be inherently unlikely, given the nature of the industry and the potential consequences for technical inaccuracy. The NDA did not put a single point to Mr Davies (or indeed to any of the re-called witnesses) that his (or their) evidence on any particular item was technically wrong, incorrect or untruthful. The highest it was put to Mr Davies was that the litigation win bonus made him "a little keener" that the trial should go a particular way.

96. I found Mr Davies's explanation in respect of the arrangement entirely truthful, and I also find that his evidence before me was not affected in any way by the potential for, or existence of, a litigation win bonus. The litigation win bonus does not, in my judgment, alter my view of him as a witness or diminish the weight which I have given to his evidence.

Johanna Wilson

97. Ms Wilson was a Human Resources specialist at Energy Solutions and had been employed there since 2011. She was made redundant at the end of January 2016. She has over 25 years of experience in this field, having worked at the CEGB, and running her own consultancy which was hired by the NDA in 2005. She therefore had considerable experience of the energy and nuclear sectors when she was hired by Energy Solutions in 2011. She had oversight of the training, development, resourcing and talent management of individuals employed by Energy Solutions and has worked on various public sector tender processes in which Energy Solutions had been involved. She became involved in this competition in September 2012 and was the lead author of Node 303, Nominated Staff Appointment. She was chosen for this based on her expertise, and was based in the UK head office at the time. In her view, the RSS Tender Submission should have received the maximum score for all the requirements relevant to the Nominated Staff node. She was also the lead author of another Node, namely People Strategy, although the subject matter of that Node did not form part of the subject matter of the proceedings before me.

98. I deal with the specifics of Node 303 under the individual Requirements below. In my draft judgment, I had expressed the view that I did not doubt at that time that Ms Wilson genuinely held the views that she expressed when cross-examined by Mr Giffin QC. However, she did very often ask to see particular documents before she would answer even the simplest of questions. Her answers would also usually be very lengthy, again even to the very simplest of questions. This made her evidence somewhat less helpful than it might otherwise have been, simply because it came across as a prepared and careful exposition of Energy Solutions' case, rather than as answers to the questions that were being put to her. This, again, may have been as a result of the witness training that she had undergone. She gave her evidence on 26 July 2016 in a far more helpful way.

99. Ms Wilson had a Supplemental Agreement which included a litigation win bonus in the sum of £15,500. Her situation was rather different to the other witnesses. When she was assigned to the RSS bid team, she was classified as a Category B participant rather than a Category A participant, which was the highest category and for those playing a more significant role, such as leading parts of the bid. It had been intended that Bechtel would provide the Category A participant for these two Nodes, and Ms Wilson would support that person. However, no such participant appeared or was assigned by Bechtel, and so Ms Wilson performed a Category A role whilst being recognised as only Category B {D/14/4}. This affected her bonus arrangements. She raised dissatisfaction about this, and the multiplier applied to her bid submission bonus, at the time in 2013, which resulted in an offer of something called a "President's Award" {D/15/9} of £1,000. It should also be noted that when Ms Wilson was assigned to the RSS bid team, she was required to work in the Manchester office full time. She then lived in Gloucestershire and had dependent children. Her involvement in the bid therefore required her children living with another family member whilst she was away. This is an obvious personal sacrifice, which Ms Wilson, it might be thought entirely understandably, did not feel was suitably recognised.

100. She therefore felt, prior to her involvement in the litigation, that she was treated differently and less favourably than others who had been lead authors of other Nodes. She had a substantially lower salary; she was assigned a lower Category; and she was paid a lower multiplier than other lead authors. Accordingly, these factors together meant she experienced substantially lower remuneration. She discovered in June 2015 that she was to be made redundant. She found out in September 2015 that some of the other participants in the litigation had been granted litigation win bonuses. She had not.

101. She described the factors that already affected her – lower salary, lower categorisation, lower multiplier – in a letter dated 3 October 2015 to Mr Bowes {D/15/127} as a "triple hit". She also complained in that letter about lack of equality of treatment. I do not know if any of the other lead authors were also women. Ms Wilson, a HR specialist, would have been unlikely to feel that there was a lack of equality had she not been the only female lead author. I therefore consider that I can safely assume she was the only female lead author.

102. It cannot pass without comment in the modern age that the first litigation win bonus offered to Ms Wilson, after her letter of 3 October 2015, was also somewhat lower than the figures offered to her male colleagues who were involved in the litigation in a similar fashion. She was offered a sum of £8,500 only after she had written the letter of 3 October 2015, which she did as part of her wider attempts to obtain suitable recompense and equality of treatment generally. This stands starkly in contrast, in my judgment, to the higher figure offered to Mr Davies, for example, who did not even have to ask for such a bonus. Eventually the figure agreed with Ms Wilson was £15,500 and a Supplemental Agreement was executed with her on 26 January 2016. This was the same amount as that given to Mr Davies. Indeed, and without dwelling on the irony inherent in this, Mr Davies' litigation win bonus amount was increased to £15,500 because Mr Bowes and Mr Joyce did not feel he should be offered a lower win bonus than Ms Wilson (who managed to negotiate her figure upwards) for reasons of equality of treatment and fairness. Those principles do not seem to have been foremost in their minds when the initial offer was made of a litigation win bonus to Ms Wilson that was lower than any of the other (male) witnesses.

103. However, regardless of that, Ms Wilson's letter of 3 October 2015 which led to the lower offer of £8,500 set out various options, as she saw them, available to Energy Solutions to remedy her situation generally. Only one of them, the third in a list of five, seeks a litigation win bonus. She described this as a "win-type bonus", having obtained this wording from Mr Colwill. Other options she suggested included both a salary increase and/or payment in lieu of notice ("PILON" in the letter). As she said, she was proposing a number of ways in which she could be compensated for a pay package that was considerably lower than it ought to have been. I find that this letter was sent by Ms Wilson for entirely understandable and perfectly proper reasons as part of a legitimate attempt to remedy what she saw as her historic treatment, to avoid being treated less favourably than other colleagues going forwards, who already had such agreements by that date (namely Mr Broad), and to improve her package with the company. I reject the notion that she sent it as part of some sort of coercion of Energy Solutions in advance of giving her evidence.

104. I also fully accept that she gave evidence truthfully and professionally throughout the trial and on 26 July 2016. She told me that she was well aware of the need to tell the truth and I believe her. I find that the existence of a litigation win bonus did not play any part in, or influence the content of, her evidence. Her witness statements pre-date her knowledge of such arrangements in any event. The litigation win bonus does not, in my judgment, alter my view of her as a witness or diminish the weight which I have given to her evidence.

Robert Matthews

105. Mr Matthews is semi-retired and now works as a consultant in the nuclear industry. For about six months in 2013 he was engaged as a consultant by Energy Solutions as a member of its bid team for the RSS Tender Submissions. He had been employed in the nuclear industry for in excess of 30 years, with particular experiences in nuclear decommissioning. He commenced in the industry in 1982 at nuclear sites such as Dounreay, Sellafield and Chapelcross, employed by WS Atkins. Over time, he was seconded to BNFL and also managed the decommissioning of the Windscale Pile Reactors in the early 1990s for the UKAEA at Windscale, which is an enclave of the Sellafield site. He was the Senior Manager for the decommissioning of Dounreay, and from December 2004 until he commenced his semi-retirement he was Chief Consultant for Nuvia Ltd, and led a team working for RSRL in relation to the decommissioning and removal of the nuclear reactors at Winfrith and Harwell. It can be seen therefore that not only does he have considerable experience of nuclear decommissioning, but also specific experience at some of the sites that form part of this procurement competition.

106. In this competition, he was involved as a member of the bid team on that part of the RSS Tender Submission that dealt with Winfrith, namely Node 408. Due to the particular nature of this site (which was never a power station but used for experimental and research reactors) decommissioning commenced in 1990 and the last operational reactor closed in 1995. Decommissioning was therefore at an advanced stage compared to the other sites. Mr Matthews had a depth of knowledge of Winfrith in particular, and his evidence concerning Figure 408-25 and the development of the tender submission so far as the plans for fencing was concerned was illuminating. He was helpful in the way he gave his evidence, and did not seem as committed as other witnesses from Energy Solutions to stick to a particular script, which is to his credit. As a consultant, he was paid his usual rate for assisting on the litigation, and had no payment arrangements contingent on litigation outcome. Freshfields gave Energy Solutions some advice on this in relation to Mr Matthews in 2014, to which I will return in Part XI of this judgment dealing with the NDA's application to dismiss the claim. He was not recalled to be cross-examined on 25 and 26 July 2016, and the NDA did not seek to have him recalled.

Nigel Board

107. Mr Board was a Commercial and Technical Manager at Energy Solutions, having been employed there since 2007. He was the other member of Energy Solutions' staff, together with Mr Bowes, who was within the Confidentiality Ring and permitted to consider the CFP Tender Submission. He was made redundant on 31 March 2016 and now operates as a consultant through a limited company. He has a

degree in Physics and a Master's degree in Radiation Protection, and commenced work initially with Nuclear Electric in 1991. He was Head of Emergency Planning for BNFL from 1996 to 2002, and then a Commercial Manager for BNFL. He has worked on the different predecessor companies involved in the Magnox sites prior to Energy Solutions. In 2006 he became Head of Lifetime Planning for Magnox South, and in 2011 (having been Project Controls Director for Magnox South Ltd) he became Head of Strategy and Development for Magnox Ltd and worked on the revised future decommissioning plan. He was part of the bid team from June 2012 until conclusion of the competition and was Head of Strategy for RSS for the competition. He was also part of the RSS management team, and was the lead person for the Supporting Evidence part of the bid, which included in excess of 100 detailed case studies. He also provided advice to lead authors for each of the individual elements of the Tender Response and was the lead author for Node 307 Portfolio Programme and Project Management.

108. Mr Board was the final witness to be called by Energy Solutions, and he was cross-examined for the better part of two full days during the substantive trial. During the substantive trial some of his answers from time to time could descend to making counter-points to counsel, by quoting Mr Grey's written evidence back to Mr Giffin QC for example, which is never particularly helpful. However, he did not argue the case too often and for the most part his evidence was useful. He doubtless had a considerable grasp of all the material in the case. Although, as the last Energy Solutions witness to be called, he may have felt a greater urge to make sure that all of the good points in Energy Solutions' favour were put forward in oral evidence, he resisted this urge for the most part. Again, as with Mr Colwill and Ms Wilson, his evidence when he was re-called suffered from none of the lengthy explanations in which he had engaged during the substantive trial. He also, both in November 2015 and July 2016, came across as entirely honest.

109. He too had a litigation win bonus arrangement. His was the first Supplemental Agreement to be executed, on 20 May 2015, which was before his first witness statement which was signed on 13 July 2015. The sum was £30,000. He also (through his consultancy company Bluedoor Associates Ltd) on 1 July 2016 executed a Percentage Recovery Agreement with Energy Solutions LLC (the US parent company) on similar terms to Mr Bowes, which included a further bonus of 0.5% of damages recovered. That agreement, as with Mr Bowes' Percentage Recovery Agreement, has been terminated by agreement of the parties.

110. He had become concerned in April 2015 about the impact upon him personally and professionally of being required to enter into an undertaking as part of being admitted to the Confidentiality Ring. Those restrictions meant he was restricted in Japan, the UK, the USA and Canada until 6 months after the end of these proceedings or 10 June 2017. As he put it {D/8/8}:

> "As a commercial and technical specialist working in the nuclear decommissioning sector the Restriction severely curtails my potential employment options until it expires. At the time I was concerned (and continue to be concerned) that this undertaking limits my job opportunities for a potentially significant period of time."

This is, in my judgment, an accurate summary of the effect of the undertaking.

111. Mr Board always knew that failure by RSS in the bid would be likely to lead to his becoming redundant. He wished this to happen as he had attractive terms, based on the TUPE transfer of his rights to Energy Solutions from his previous employer. He was not, however, placed in the initial pool of potential redundancy candidates. This led to discussions with Energy Solutions which, in turn, led to the Supplementary Agreement and also his Settlement Agreement also dated 20 May 2015. He was told that the signing of his Settlement Agreement was conditional upon his signing the Supplementary Agreement. He had not specifically requested a premium (by which he meant bonus) linked to the outcome of the litigation. He did, however, explain that Energy Solutions had a "culture of shared success" and in his oral evidence {Day22Z-CON/89/23} said that the nuclear industry was used to paying on the "end milestone" and Energy Solutions had a "long history of paying us reasonably large contingent amounts". His employment package entitled him to an annual bonus of up to 50% of his salary, which given his high salary was a sizeable amount. He also had received a bid submission bonus of approximately £20,000, and in 2014 had received a payment of £72,820 under a long term incentive plan.

112. He explained the Percentage Recovery Agreement as being made in "different circumstances" to the Supplemental Agreement and the realisation that the continuing litigation would be "a substantive piece of work going forward … potentially over a couple of years" {Day22Z-CON/89/15}. He said the case "looked longer in potential duration" {Day22Z-CON/90/13}.

113. Looked at from the perspective solely of an employee, with no legal qualifications, who comes from a career background such as the one from which Mr Board and the other witnesses come, I find that there would have been nothing inherently objectionable with either the Supplemental Agreement or the Percentage Recovery Agreement. Not only that, but the payment of sizeable sums (whether called bonuses, premiums, long term incentive plans or otherwise) in addition to base salary was entrenched within the culture of the company. That is made clear, if it could be in any doubt, by the payment to the employees of bonuses for submitting the RSS bid. I am fairly confident that Mr Board would have been more than happy with an agreement that promised, for example, to pay him £30,000 for his involvement in the litigation regardless of its outcome. He took what he was offered and had no reason to know, or even suspect, that this was contrary to public policy.

114. As with Mr Bowes, there is nothing to suggest that Mr Board knew that the Percentage Recovery Agreement or anything like it was possible, or available, when he gave evidence at the trial. In my judgment the Percentage Recovery Agreement can have had no effect whatsoever either on the evidence given to me by Mr Board on the substantive issues in the trial in November 2015. Nor did that agreement, in my judgment, have any effect on his evidence at the hearing before me on 26 July 2016. Further, the litigation win bonus (which he had executed well before he signed his first witness statement) does not, in my judgment, alter my view of him as a witness or diminish the weight which I have given to his evidence.

The NDA's witnesses

115. Turning to the NDA's witnesses, most of them suffered from what, on occasion, bordered upon an almost obstinate refusal to accept that any mistakes or errors had been made at all by the NDA, in any respect, concerning the marking of the tender bids either of RSS, or of the successful bidder CFP. They were each cross-examined in conventional and perfectly logical fashion by Mr Hunter QC. His approach was to use as a starting point the reasons given by the NDA in the consensus rationale (prepared by the SMEs during the evaluation) for the particular score that RSS had obtained, for each of the different Requirements under the different Nodes that were the subject of the proceedings. He would then compare those reasons with the contents of the RSS Tender Submission, to demonstrate that (for example) if it had been said that a particular matter had not been included and this omission had affected the score, in reality it had been included and was to be found in a particular place within the Tender Submission. Such an exercise, with logic at its core, too often foundered due to illogicality by the NDA witnesses, in claiming that the NDA's own stated reasons did not mean what they, on the face of the words, in fact stated. Accordingly, logic became an early casualty during the NDA evidence. At times, the degree to which the different NDA witnesses sought to explain the contemporaneous reasons as meaning something quite different from their natural words became an extraordinary exercise in the tortured misuse of the English language. It was therefore often the case that the reasons relied upon in oral evidence by any particular witness bore little, or no, resemblance either to the pleaded case, or to the reasons given by the NDA in its letter of 11 April 2014 to RSS with its appendices, or indeed to the notes made at the time in the AWARD system entered by the SMEs. This was usually explained away by the witnesses by suggesting that the words in AWARD really were intended to mean (or encompassed) the new reason given in oral evidence, even though they were often entirely different.

116. Semantic debate about the meaning of words between counsel and witness in this context is rarely of assistance to the court. Occasionally, witnesses would recall very precise discussions that they said had taken place between the SMEs contemporaneously, as to why a particular score had been given or what was wrong with, or missing from, the RSS bid. This clear recall was on occasion remarkable, given the contents of the witness statements, and was only rarely reflected in the stated reasons. I believe that the different NDA witnesses were, both collectively and individually, all highly defensive of the NDA, and this defensive nature led to their evidence being, at times, of extraordinarily limited assistance in the task upon which the court was engaged. It is of course understandable up to a point that those involved in the evaluation exercise were defensive of their own position; people do not always readily admit if they have made a mistake, and the essence of procurement challenges generally is to demonstrate manifest error in evaluation. It is also difficult in a case such as this, which must inevitably have involved considerable preparation by the different witnesses prior to their giving evidence, to differentiate between their contemporaneous behaviour (namely how they evaluated the tender submission at the time) and what they *now* believed they did or thought at the time. However, even making allowances for these natural human reactions, the NDA witnesses

gave the impression that they had come to court wholly committed to defending the NDA's position, come what may. I found this unhelpful.

117. The witnesses called for the NDA were (again, in the order in which they were called):

Graeme Rankin

118. At the time, Mr Rankin was Head of Competition at the NDA. He was by the time of the trial the Head of Strategy, Commercial at Sellafield Ltd. He too has worked in the nuclear sector for over 30 years, including on operations and project management as well, latterly, on procurement competitions. Over his career, he has worked for BNFL at Sellafield as well as in Denver, Colorado at the Rocky Flats Environmental Technology Site. He joined the NDA in 2005 when it was established, initially as the Site Programme Manager for highly hazardous facilities at Sellafield called the Legacy Ponds and Silos. He became lead Programme Manager and then worked on the Sellafield, Dounreay, Magnox and RSRL PBO competitions. He was the Competition Programme Manager for the Dounreay competition and became the NDA Head of Competition in October 2011 part of the way through the competition at Dounreay. He joined Sellafield Ltd in January 2015 after the outcome of this competition and the award of the Transition Agreement to CFP.

119. As Head of Competition at the NDA at the time Mr Rankin had overall responsibility and accountability for the management and delivery of the competition. He was obviously assisted by others, notably the Core Competition Team which comprised six core employees and a wider team which included the SMEs. A great deal of his evidence, as one would expect of someone in such a senior role, revolved around what "the NDA" or as he would put "we decided" to do, and how they did it. He was also the lead SME for the PBO Governance and Consolidation Evaluation Nodes. The former Node was the only one that had fewer than three SMEs, and Mr Rankin evaluated that Node with one other person, namely John Butler the Head of Internal Audit. Mr Rankin explained in some detail the way the competition was established. The six other members of the Core Competition Team were Andrea Livesey, Steve Dixon, Clare Poulter, Tony Godley, Andrea Graham and Claire Russell (who managed the AWARD system as well as having other duties). He was therefore the only member of the Core Competition Team who gave evidence at the trial. Steve Dixon no longer worked for the NDA at the time of the trial but Andrea Livesey, Clare Poulter and Tony Godley were all still employed by the NDA during these proceedings.

120. Mr Rankin explained that there were strict procedures put in place and training sessions were held which were mandatory for the SMEs. He attended various dialogue sessions during that phase of the competition, but during the evaluation phase his evidence was all at a higher level than the evidence of the SMEs whose marking of the bids was being challenged. Those SMEs were obviously giving evidence to demonstrate that they had not made any errors, or certainly no manifest errors, in arriving at any particular score. Mr Rankin could not give evidence about their particular thought processes at all, and did not attempt to do so. He did however explain that:

> "The evaluation schedule was kept under review to ensure that the SMEs had sufficient time to complete the task and were not becoming stressed or under pressure. In the event other than for the Overall Cost Summary Evaluation Node which I mention above, there were no requests from the SMEs to extend the schedule and through my close observation of the process I decided that no such extensions were required." {C/7/50}

That succinct statement of "sufficient time" does not accord with my view of the process, certainly as far as Mr Grey is concerned. It is also rather surprising given that the SMEs were "continuing their day jobs during the evaluation process" as Mr Rankin put it. It may be that some of the SMEs had sufficient time, and avoided "becoming stressed or under pressure" to use Mr Rankin's words. Some pressure is inevitable in any event. However, the impression given by Mr Rankin in his written evidence was of a smooth evaluation process conducted entirely free of manifest error and entirely under control throughout, properly recorded and with ample records. My view of the matter is somewhat at odds with this, as will be seen from the substantive findings in this judgment. Given the amount of material the SMEs had to work through in evaluating the bids, the period of time for the evaluation was shorter than I would have expected. Also, given my findings in this judgment, it may be the case that the mistakes that were made could be at least partly explained by excessive workload. This is a subject to which I return when considering the other witnesses.

121. There are three areas in which Mr Rankin could have provided very useful direct and explanatory evidence going directly to the heart of some of the central issues in the case. The first was the approach to documentation, and the presence in various training materials prepared for the SMEs of express references to shredding of notes by the SMEs. This is considered in detail in Part VII below. I do not consider that I was ever given an adequate explanation by Mr Rankin regarding this subject. Reliance is put by the NDA upon the fact that the version of training slides that was actually used had deleted references to shredding. However, Mr Rankin told me that shredding was directly contrary to the NDA policy on record keeping; if this were the case, I do not see how such clear express references to shredding could have been included in the training Power Point slides for the SMEs, even if deleted in a later version.

122. This point remains troubling, regardless of the fact that the AWARD system was said to be used for record keeping. There is no doubt that the NDA were acutely aware that an unsuccessful bidder might challenge the outcome of the competition. In my view, this sensitivity to potential challenge led to the NDA adopting a defensive approach to how the evaluations would be performed. Restricting note taking by the SMEs, which Mr Rankin did (and considering whether to shred notes) was in my judgment part of that overly-defensive approach.

123. The second relates to the statements provided about "strict procedures" for the evaluation process, and the way that the SMEs were to reach consensus in the correct scores to be awarded. I find that such strict procedures, and the "audit trail" of decision making, were breached on a number of occasions. AWARD was accessed and scores were changed after evaluation was completed; Mr Grey changed scores and sought agreement of the other SMEs to the changes ex post

facto; and numerous times I was told by different witnesses that changes were made to the scoring and/or rationale following unrecorded conversations with Mr Rankin and/or following the Burges Salmon Review. One very important decision on whether to evaluate the CFP Tender Submission as failing Requirement 401.5.1(b)(ix) (which I deal with in the Confidential Appendix 3), which could have meant the whole CFP bid being disqualified, was conducted "off-stage" orally between Mr Godley and Mr Rankin and does not appear to have been recorded in any way whatsoever. Although the phrase "closed down" was used to describe the point at which the scoring of a Node was supposed to be complete, the following two statements stand in direct contrast to one another in Mr Rankin's first witness statement:

> "The lead SME had the ability to make changes in the AWARD system to a Requirement in a particular Evaluation Node until the Evaluation Node was formally "closed down" in AWARD. In order to close down an Evaluation Node in AWARD each member of the SME team had to sign a form to confirm that the scores and consensus award notes were complete. The form was then passed to Claire Russell who would close down the AWARD system for that Evaluation Node. This meant that the lead SME no longer had access to that Evaluation Node on AWARD." {C/7/53}

124. However, in relation to objections by Energy Solutions in its pleadings complaining of changes to scores that had been made by the SMEs after a Node had been "closed down", Mr Rankin said this:

> "….there was nothing untoward about changing scores or consensus comments after an Evaluation Node had been closed down. Indeed, as far as I was concerned, it was further evidence that the SMEs were carrying out a prudent, diligent and consistent evaluation of the bids. In my view, it would have been inappropriate if we had not let SMEs reflect on points, respond to challenges, and reconsider scores and comments, throughout the process."

This latter evidence {C/7/53} seems to me rather to miss the point, and be almost entirely contradictory to the first passage. If the scoring was complete and the Node "closed down", it is not clear why any of the SMEs would be "reflecting" upon what would (or should) be by then a finally agreed score reached consensually by all the SMEs tasked with the evaluation. Nor is it clear to me who would be challenging them, and why, why the question of "responding to challenges" from people who were not SMEs should have arisen at all, or why the SMEs would otherwise be reconsidering their scoring after the score had been "closed down". Closing down would only occur after the three SMEs, tasked with the evaluation, had jointly decided exactly what the correct score should be, after reflection, consideration, discussion and decision by the three of them. I do not consider that I ever received a satisfactory explanation about this. Particularly as the score for a Requirement or Node was one that was supposed to have been reached jointly by the SMEs working together, a single SME later deciding "upon reflection" that a "closed down" Node needed to be re-opened so its score could be

changed – which in the RSS Requirements under consideration here means reduced - (with the obvious potential consequence of changing the outcome of the whole procurement) seems to me to be directly contrary to the ethos of a joint decision leading to a score that was supposed to have been finally agreed and "closed down".

125. One aspect of this competition with which I deal in Part VIII of this judgment is the involvement of Burges Salmon in the Burges Salmon Review. I was left, having read the material, which demonstrates how sensitive the NDA was to a potential challenge concerning the outcome of the competition – which was highlighted as a high risk at an early stage – with the suspicion that deflecting any legal challenge to the outcome of the competition was foremost in the collective mind of the NDA at all stages of this competition. At least part of this strategy to deflect any challenge was directed towards restricting the amount of material available to be scrutinised by an unsuccessful bidder. Whatever the primary purpose of the Burges Salmon Review, it has had this restricting effect. Whether this has been accomplished by accident or design does not matter, as the obligation of transparency is upon the NDA in any event. Mr Rankin was intimately involved in the decision to involve Burges Salmon to an increasing degree during the evaluation.

126. He was not particularly enthusiastic about the SMEs recording their own views during evaluation to any great extent either. He stated in his cross-examination that:

> "I wasn't particularly keen on additional notes being placed in AWARD, but I had to balance that with these guys were doing a long, hard difficult job, they were trying to do it to the best of their ability, and if I had come along as the heavy handed head of competition and said "Don't take any notes additionally", then my risk was it would demotivate a team that were already working very hard by almost draconian application of the rules." {Day9-NC/171-172}

This led to my asking him why this was.

> "Q: Firstly, why weren't you keen on them putting additional notes in AWARD?
>
> A: Well, it can lead to confusion when you actually have to give feedback. So when we issue the feedback letters, with the supporting information in AWARD, if a particular evaluator has said "I have scored it 5" and the rationale was whatever the rationale is, and then they almost undermine that comment with "We will need to look at x, y and z", if they do get into contract, you know, I was very aware that could attract the attention of disappointed bidders. So you scored it 5, you have given a rationale and then you have got a comment that undermines that rationale, which was not the intent.

> THE JUDGE: In your earlier answer……. your actual answer was, you used a phrase "draconian application of the rules". Which rules are you talking about?
>
> A: Not to record notes." {Day9-NC/172}
>
> [emphasis added]

127. Given the obligation upon the NDA to perform the evaluation transparently, such evidence from the Head of Competition is most disappointing. I find that there was at the very least strong discouragement of the SMEs taking comprehensive notes, and Mr Rankin's own evidence described not to record notes (another way of saying taking notes) as a "rule". This can hardly have helped a process that is required to be transparent, and it can hardly have helped such a complicated factual evaluation of the tender submissions either.

128. It is also surprising that the Burges Salmon Review could have led to such changes in the scoring as it did. I was told in evidence by SMEs that the Burges Salmon Review would highlight certain points, and this would lead to those SMEs being invited to reconsider what was described to me as a "misalignment" of consensus rationale and scores. Mr Rankin said that "one or the other would possibly need to change because of that. But it wasn't an absolute requirement on them by any means at all" {Day9-NC/72}. When he was asked if Burges Salmon had ever spoken directly to the SMEs, Mr Rankin said "they may have done". Again, in a situation with a legal obligation of transparency, this is disappointing. Further detail regarding this was not available due to the assertion of legal privilege by the NDA over the Burges Salmon Review.

129. Finally, there is a third area in which Mr Rankin could have provided very helpful direct evidence on an subject worthy of note. The SMEs, whilst in the room set aside for the purpose of reaching consensus and scoring, were not given any access to emails. This meant that they could not send any. However, they could, and did, personally approach members of the Core Competition Team if matters arose, who would then assist. Mr Rankin did this four or five times, but said he would not become involved in scoring and simply act as a "sounding board" and to provide gentle encouragement. He also performed his own personal review; this led to "conversations in the office" about the consensus rationale and the scores that led to Dr Clark and Mr Grey adding comments as a result. Mr Rankin was also involved in some most important conversations, which in my view he tried to play down, which were not recorded anywhere and of which no notes exist. One was with Dr Clark in relation to the fencing at Winfrith on Requirement 408.5.1(a) and the evolution of the score given to RSS downwards to 1, the lowest score. Another very important one concerned the CFP Tender Submission and Requirement 401.5.1(b)(ix). This concerned a part of the Response that stipulated a graphic and the necessity for information to be provided. The initial view of the SMEs (led by Mr Grey) was that the terms of this Requirement were *not* met by CFP. Because this was a threshold Requirement, that would have led to CFP being disqualified. The SMEs' collective view was changed following a conversation with Mr Rankin – which I find must have taken place with Mr Grey, even though neither could recall it - to the quite opposite conclusion that the Requirement *had been* met. Had the SMEs' view remained as the former, on one interpretation of the SORR, CFP

should have been excluded from the competition. None of these conversations were recorded, or even had notes made of them. This has obvious consequences when the NDA is under an important obligation of transparency. It is also directly contrary to the approach adopted on the very same item, which was to send emails dealing with this matter on 29 November 2013 {T/36/2} between people who already knew about what had happened, and who were involved in and knew the solution chosen, to what was a dilemma. Mr Grey sent an email to Mr Rankin asking for permission to reopen the CFP consensus answer book on AWARD. Even though Mr Rankin would, and must, have known (and did in fact know) about this important matter already – and indeed had been involved in at least one conversation about it, leading to a way around the problem of potentially disqualifying CFP – he replied in an email in potentially misleading terms. In his reply giving permission he said (in an email copied to Mr Tait the NDA Internal Audit Manager) "Thanks for making me aware of this situation". I find that email to be misleading in the circumstances. It suggested that Mr Rankin was not aware of the issue, absent the email; he was not only aware before he received the email, but I find that he had been centrally involved. There is no reference at all in that email to the conversation that had already taken place in which Mr Rankin was instrumental in arriving at the solution.

130. This shows, in my judgment, that Mr Rankin was highly aware of the importance of record keeping and the nature of an audit trail, and was prepared to take relevant steps to accomplish this, but only some of the time. In my judgment he made sure matters were recorded when it suited him (for example in this email of 29 November 2013 {T/36/2}) but was also perfectly happy to conduct unrecorded, though very important, conversations which led to the SMEs changing scores or deciding on threshold issues, knowing these were *not* recorded (and without taking even the most basic steps to have such conversations noted, even in headline or bullet point terms). I doubt that there can be any sensible explanation for prohibiting email use by SMEs during closed evaluation sessions on the one hand, yet permitting unrecorded oral conversations on such important topics with the Head of Competition on the other.

131. This demonstrates, in my judgment, two important matters. Firstly, the NDA was prepared to pay lip-service to the obligations upon it of transparency, yet Mr Rankin and others in the CCT attempted to keep transparency to the absolute minimum, in order to avoid exposing the NDA to a claim by a dissatisfied bidder. Although I did not hear from any other members of the CCT, Mr Rankin could not have adopted this approach on his own, or unbeknownst to the other members of the CCT. References in the training material (even earlier versions) to the shredding of notes, and the general ethos of restricting note taking by the SMEs, were part of this approach. Secondly, Mr Rankin and the whole CCT were acutely aware of the difficult issues that arose during the evaluation process, such as the potential disqualification of CFP due to the terms of the SORR. The solution they adopted was to try and navigate a way around such issues, in a non-transparent way, to avoid scrutiny being brought to bear upon the evaluation (and the SMEs' reasons) and to put the NDA in a position that could be more easily defended in the event of a procurement challenge. The conversations with Mr Rankin when evaluators "left the room" to discuss matters with him were part of this. Hardly any

of this could be (or was) recorded in emails, because the SMEs did not have access to emails. No attempt was made to record them.

132. Oral and unrecorded conversations such as those with Mr Rankin were not only permitted, they were the only way that the SMEs could obtain any guidance. However, individual paper note-taking and email discourse were either discouraged or prevented. Indeed, given the three SMEs were in a room together, the only way they could seek assistance from Mr Rankin was for one of them to leave the room and speak to him. They could not record their concerns in an email to him from their consensus sessions. Because of this, very important aspects of the evaluation process were wholly lacking in transparency, in breach of the obligation of transparency upon the NDA. Decisions on what to do about scoring that could lead to a bidder being disqualified were made "off stage", and consciously so in my judgment.

Matthew Clark

133. Dr Clark has a first class honours degree in geology, and a PhD in plate tectonics, graduating in 2002. He has worked in the nuclear field both for companies providing services to the nuclear industry, and with the Environment Agency. At the relevant time, he was employed by the NDA, starting with that Authority in 2007. He became the Strategy Implementation Manager for the NDA in 2012. He was the Lead Evaluator on a number of nodes, including one which figured heavily in the oral evidence, namely Node 408, Winfrith Interim End State. His wife is also Dr Clark and where necessary to differentiate her, I shall refer to her as Dr Anna Clark – she was also an SME on some of the same nodes as Dr Clark. On occasion Dr Anna Clark was referred to in evidence as she had been involved in the evaluation too. He gave oral evidence for approaching two days of Court time. He is, obviously, a highly intelligent person, although he did occasionally prefer to fence with counsel rather than give a straight answer to a straight question. Often introductory or scene-setting questioning could become bogged down due to the approach he adopted to oral testimony. His approach was probably due to the same desire to defend the NDA's position that affected almost all of the NDA personnel. He could not always resist the opportunity to comment on text in documents, if that would either dilute the force of the question or, as he saw it, help the NDA. However, when he did answer he was frank and when he told me he could not remember some details, I accept that was his genuine evidence. His explanation at the end of his evidence concerning the application of the threshold, or Pass/Fail criteria, I found particularly helpful and illuminating. He was on holiday with his wife Dr Anna Clark when the 11 April 2014 letter was drafted for the NDA to respond to the concerns raised by RSS. He was adamant that he had not been involved in drafting the response by the NDA to the letter of challenge sent by Energy Solutions as he had been on holiday with his wife.

Martin Grey

134. Mr Grey had been the Engineering and Technical Lead Role for the entire Competition. He has been involved in the civil nuclear sector for his entire working life since 1976. He started as a reactor physicist at Calderhall, and has held numerous roles in operations, engineering and health physics at Sellafield, Torness and Chapelcross. For the bulk of his career he has been based at nuclear reactor

sites. He holds an honours degree from the Institute of Physics and a Master's degree in Manufacturing Systems Engineering from Warwick University, and both of these qualifications were obtained by studying part-time alongside his full-time employment, which in my judgment shows a high degree of professional dedication. He joined the NDA in January 2005 as a Programme Manager for Calderhall and Chapelcross. He led a team monitoring and overseeing the performance of the Management & Operations (M&O) Contracts for those sites. These contracts were the precursor to the SLCAs, which were first introduced at Dounreay. His first role was therefore monitoring and overseeing the implementation of these contracts in practice. He then moved to another Programme Manager role at Sellafield, where he oversaw all the elements of contract, performance and investment for support services. These included HR, health physics and safety, security, engineering and finance. A key area of his focus in this position was the Sellafield central engineering function. He had a lead role in the asset management improvement project at the NDA. In this he worked alongside John Inkester, NDA's Head of Engineering, and this was because at that time, there had been concerns expressed by the regulators and the NDA about the standard of asset management practices at Sellafield. He played a key role in a joint project to drive improvement based around an agreed set of asset management principles which were jointly signed-up to by all the relevant parties and agreed by the regulators.

135. For this procurement competition he was the lead SME on eight technical nodes and at least four cost nodes – he could not remember the exact number of nodes in which he had been involved. During the lengthy dialogue stage, which occurred prior to submission of the bids when there were four bidders, he was extensively involved in dialogue with all of the different bidders, on all the nodes in respect of which he was involved. He told me that this part of the process had involved him in having four meetings a day, four days a week, over a period of eight months. (This was an approximation as Ms Thomas' written evidence said it was seven months, but this is a minor difference and in my judgment does not matter). After that, as part of the evaluation process, Mr Grey was then involved in evaluating all the different Requirements by each of the bidders on all the different nodes in which he was involved. This was a period of approximately four months for individual evaluation followed by the consensus evaluation. For the lead evaluator of at least 12 of them, this would have been a very considerable task. Needless to say, therefore, he was also very closely involved in the litigation when the challenge to the outcome of the competition was commenced by Energy Solutions. He was the only witness called in the trial by either party who had prepared five witness statements on the substantive issues, and two of these statements were extraordinarily detailed, even by the standards of this case (Mr Bowes and Mr Board also served five witness statements, their fifth statements in July 2016 dealing with the Supplemental Agreements and win bonus situation). His cross-examination took place over four court days and this inevitably involved bringing a great deal of close scrutiny to his evaluation decisions, throughout what had been a very long and highly detailed process. On a great many occasions, he simply had no recollection of what had occurred. Sometimes, he would remember conversations that he said had taken place, or which he thought had occurred.

136. Without wishing to over-emphasise the human element of both the evaluation process on so many nodes and also the litigation, Mr Grey seemed to me during his evidence to be a man who was under very considerable strain. It became necessary to have more frequent breaks than usual in order to preserve the quality of his evidence. On some days, breaks became necessary after only about 45 minutes. Mr Grey seemed to me to feel, most heavily, the potential impact that many of his answers might have on the NDA's case in the litigation, particularly towards the end of his oral evidence. No doubt out of an urge to justify what had occurred, and loyalty to his colleagues, he would not readily admit deficiencies or errors.

137. In my judgment Mr Grey gave his evidence truthfully, and such mistakes as he did make (which I deal with further below in the body of this judgment) were probably simply a factor of his extraordinary workload, and the curious features of the system that was established by the NDA to evaluate the tenders. When I explored with Mr Grey at the end of his evidence the extent to which he had been so centrally involved in so much of the procurement process, and whether he ought to have had further resources put at his disposal, he explained that Mr Rankin had been interested in this very subject throughout the whole process. Mr Grey told me that Mr Rankin had constantly checked that Mr Grey had not taken on too much responsibility, and whether he needed any help. In my view – and this is plainly one based on hindsight and the proceedings – Mr Grey very obviously did need assistance in the enormous task which he was given to perform. However, as is often the case with people who work very hard, which Mr Grey obviously did throughout this entire process, they may be the last to admit that they have been given far too much for them to do. Throughout the dialogue and evaluation process, Mr Grey's workload must, in my judgment, have been so vast that, regardless of what Mr Grey said when asked by Mr Rankin, it was verging on, if not completely, unmanageable. In my judgment the CCT should have realised at an early stage that they had, in fact, given Mr Grey far too much to do during this period. That objective assessment should have been done regardless of Mr Grey's own views as to whether he could cope with the workload.

138. This obvious failure by the NDA in terms of Mr Grey's workload was then, in my judgment, if anything exacerbated during the litigation itself by the fact that other witnesses who could have given useful direct evidence of technical aspects of the evaluation of some of the nodes (such as Mr Harrop, who retired in February 2015, or Dr Rhodes) were not called to appear as witnesses at all. This meant that Mr Grey, having borne the lion's share of the burden of the dialogue and evaluation stages of the procurement, then found himself in an equally (if not more) unenviable position regarding the burden of the litigation, including seeking to defend evaluations where other SMEs, not called as witnesses, had far more knowledge of the subject than he did.

139. In these circumstances, it is perhaps not surprising that during the evaluation SMEs such as Mr Grey made the mistakes that I find were made; for example on critical assets, to which I return in section B1 below, Mr Grey applied a test *contrary to his own* published material on the very same subject. He also had no real explanation for later changes of score, which led to the RSS score in some Requirements being reduced after consensus. For example, for Requirement 414.5.1(a) the RSS went

from 5 (the highest) to 1 (the lowest) and the approval of the other SMEs was sought after that score of 1 had been arrived at unilaterally by Mr Grey.

140. I deal elsewhere with the principles that apply concerning the drawing of adverse inferences from failures to call particular personnel as witnesses. However, regardless of those legal principles, the NDA's decision in this respect had the following effect. Mr Grey commenced his cross-examination on Day 11, and finally finished towards the end of Day 14. Some of the NDA personnel involved in the specific evaluations being challenged gave no witness statements, and so were simply not cross-examined at all. It is entirely a matter for any party to litigation to decide upon whose evidence to rely. However, in this case Mr Grey found himself at the very centre of a great many of the challenges alleging manifest error. That was, in my judgment, directly as a result of the different decisions taken by the NDA.

Andrew Ridpath

141. He is currently the Head of Portfolio Scheduling and Capability at the NDA. He has considerable experience in the cost estimating field in particular, and joined BNFL as a Senior Estimator in 1999, following several years with the well-known company AMEC which (amongst other things) is a supplier of consultancy, engineering and project management services. When BNFL changed its name in 2003 to BNG, he worked as an Estimating and Scheduling Business Lead and was involved in the setting up of a programme office for Sellafield. He left BNG in 2005 and moved to Franklin Andrews, part of the Mott MacDonald Group, as Associate Director. Mr Ridpath was seconded during this period to the Atomic Weapons Establishment, and in 2011 seconded to the NDA as Lead Project Control Manager within the non-NDA liabilities oversight team involved in the decommissioning process for various sites that had been purchased by EDF. He is also a lead member of the NDA review team for the UK Department of Energy and Climate Change of Hinkley Point C EPR's decommissioning plan and cost estimate. He was lead evaluator for two of the costs nodes, namely 103 and 104. He also then became the lead evaluator for nodes 106, 114, 116, 117 and 118, and also a support evaluator for nodes 101, 102, 406 and 414. On Node 414 in particular, on Requirement 414.5.1(a) the score awarded to RSS had been 5 (the maximum) and this had then been changed, towards the end of the evaluation process, to a score of 1 (rather markedly lower) in AWARD by Mr Grey on 25 February 2014 at 11.09 hours. Mr Ridpath was a support evaluator on this node. His evidence was to this effect; he accepted the points put to him by Mr Hunter QC {Day14Z-CON/109} to {Day14Z-CON/113} that he had signed the sheets signifying approval {T/74/1} to changes after Mr Grey had made them, but he could not recall any detail as at the time there were "quite a number of these changes going on", and although he remembered conversations taking place about changes, he could not recall the particular one.

142. In my judgment, whether what occurred can be explained by pressure of work or not, instead of the SMEs all arriving at a score consensually, on some occasions (and the one on 25 February 2014 at 11.09 hours is one of the more stark examples) Mr Grey simply accessed AWARD and changed the score for some requirements unilaterally. The other SMEs were then asked after the event if they agreed with those changes, which had already been made. Pieces of paper were

printed out for the other SMEs to sign to demonstrate approval after the event. This was not in accordance with the way that scores were supposed to be arrived at, and also had the disadvantage that the other SMEs were being presented with a fait accompli. Human nature being what it is, they tended to agree with Mr Grey after he had changed the score. Indeed, there were no examples in the oral evidence of the SMEs refusing to agree to the unilaterally awarded different score. This effectively granted the lead SME the ability to arrive at a different score than the one that had initially been reached in consensus. When those changes were explained by Mr Grey as having been made as a result of the Burges Salmon Review, and that document had privilege asserted over it, it can be seen that the NDA were not in a readily defensible position when the scores were challenged in these proceedings as being manifestly erroneous.

143. Mr Ridpath answered questions put in a conventional manner. This had the effect of his evidence being readily digestible and helpful. As an example, having taken Mr Ridpath through an analysis, Mr Hunter QC demonstrated that in his earlier evidence Mr Grey had been mistaken about the total for subcontractor costs in the CFP Tender Submission {Day14Z-CON/120}, and Mr Ridpath agreed. Mr Ridpath would agree to points being put when they were clearly right. He was also most helpful in identifying the effect of the information provided by CFP regarding subcontractor costs, provided in the response to the BCR raised by the NDA {XD-CON/66/2}.

Gillian Thomas

144. She has worked in the nuclear industry since leaving school in 1990, and is now an Estate Deployed Programme Controls Manager at the NDA. She has 25 years of experience in the nuclear industry. She commenced her career with what was then BNFL, which at that time was owned by the UK Government. Ms Thomas was with BNFL in a variety of roles over the years, including periods in some of its subsidiaries such as BNFL Instruments Inc, BNFL Inc, BNFL Engineering, BNF plc and International Nuclear Services (known as INS). Whilst at INS in 2008 she applied for, and obtained, a post at the NDA. Being what is called "estate deployed" she can be assigned anywhere in the country to cover sites within the NDA estate, which means that she has a good knowledge of all the sites the subject of this competition. She was involved in different areas over the years, both at BNFL and its various subsidiaries, working both on new build operations and construction projects and international and national nuclear transport and spent fuels management. Many of her different roles over the years have involved her in Business Strategy, and Project and Programme Management disciplines. She had drafted competition criteria before whilst she was at BNFL Engineering. She joined NDA in 2008 as a Programme Control Manager (known as a PCM) and is still employed by the NDA. She has a good knowledge both of the Magnox and RSRL sites and over the years has been the designated NDA PCM for all of the Magnox and RSRL Reactor Sites. Currently, she is the designated NDA PCM for Harwell, Winfrith, Magnox Support Office, Bradwell, Oldbury, Berkeley, Wylfa, and Trawsfynydd.

145. She was an SME in the Procurement Competition and was the Lead Evaluator for the Costs and Programme Underpinning Nodes for the following nodes: (i) Node 105: Spent Fuel and Nuclear Materials Management; (ii) Node 107: Integrated

Waste Management (or IWM); (iii) Node 108: Winfrith Interim End State; (iv) Node 109: Common Support Functions and Services; (v) Node 111: Sample Project 2; (vi) Node 113: Sample Project 4; and finally (vii) Node 115: Sample Project 6. She was also the Lead Evaluator for the Overall Costs Summary.

146. She was a frank and helpful witness and I am sure she was doing her best to help me where she could. However, even by her own admission during cross-examination, she was apt to become occasionally confused. Although her recall was on occasion sketchy on some of the areas upon which she was questioned, if she did remember what had occurred, she would tell me. Other NDA witnesses claimed to have almost startling recall of actual conversations during the consensus stage of evaluation which were not referred to in any contemporaneous documents, but to have no recall whatsoever of more recent events, such as any involvement in the NDA 11 April 2014 Letter of Reasons or pleadings. Ms Thomas did not fall into this category. She was wholly helpful. She did not seek to argue the NDA's case.

Natasha Hanson

147. Ms Hanson is the Head of Human Resources ("HR") Strategy and Delivery at the NDA. The majority of her career has been in human resources. She qualified in the Chartered Institute of Personnel and Development in 1993 and became a Fellow in 2000, one of the requirements of Fellowship being prior experience of holding a board level position. She had worked as a consultant for a variety of organisations before joining the NDA, including for example working as HR Director for BAE Systems on the Eurofighter Typhoon programme. She had worked for Serco in its nuclear business and was involved in an intended bid by that organisation for the PBO role at Dounreay. In the event that bid was not made. However, she had prior experience of NDA procurement before becoming involved in this competition. She joined the NDA in May 2010, initially in an interim role and from November of that year she occupied a permanent position. Initially she was Head of Employee Relations but on 1 July 2012 that changed to Head of People Relations. On 1 April 2014 her job title changed again and she became what she now is, namely Head of HR Strategy and Delivery. She was therefore Head of People Relations during the Evaluation. She explained in her evidence that her job had three main parts, namely HR Strategy, Employee Relations and as an SME. HR Strategy involved developing the People Strategy on behalf of the NDA and working collaboratively with HR colleagues across the SLCs (in her own words) to "deliver the People and Skills outcomes identified by the Strategy". She was also responsible for Employee Relations across the NDA Estate and worked with local and national trade unions to understand the industrial relations environment both in the SLCs and the NDA's subsidiaries. Thirdly, as an SME, she was the lead evaluator on any People and Nominated Staff matters relating to the employees and the Executive teams in the SLCs. This required her to give advice:

> "…on suggested people-related commercial contractual changes and to support the NDA's SLC Facing Teams (the teams that interact with each individual SLC) to try to ensure value for money for the tax payer".

148. She was involved early on in the competition as she had helped to design sections of the SORR. These sections designed by her were the Nominated Staff and People Nodes for the Key Enablers section of the SORR. She is obviously a senior member of staff, and a person of considerable experience and expertise. She had used the approach that the NDA had adopted in the Dounreay competition as a starting point and then developed this further using her own knowledge and experience. The Key Enablers were the 11 Evaluation Nodes intended to test the bidders' proposals in relation to some of the areas that the NDA considered to be most important for the successful delivery of the contract.

149. As a witness she gave me the impression that she had already decided, prior to giving her evidence, that she would not accept any of the points put to her by Mr Hunter QC for Energy Solutions, even when these were obviously right. There was also an air of unreality about some of her evidence. The following is also dealt with in respect of Node 303 in section B4 below, but is a good example of her approach. One of the criticisms made by the NDA of RSS'S response to Node 303 was the reference within it to MCP10 – this was said by the SMEs to be something that was not explained in the tender response, as a result of which the RSS bid was marked down. MCP10 was however an *existing* policy document, and was in fact made available by the NDA to all the bidders, as it was contained within the data room. It was the Management and Control Procedure 10 (hence MCP10) in force at the time of the bid for the Magnox sites, and was necessary to comply with the site nuclear licence conditions. One would have thought the SMEs would have known this, or certainly it was reasonable for the bidders to have expected at least one of the SMEs evaluating the Node to have known this. The field of nuclear decommissioning (and hence also this judgment) is replete with acronyms and three letter abbreviations ("TLAs"), and on occasion four or five letter abbreviations. Ms Hanson would not accept in cross examination that she should have known what MCP10 was, and she expressly stated that she had "no idea" what was in the data room. This did not seem to give her the remotest concern. She said:

> "Do we know every document that is there? No. Do we have a general overview of the requirement by the site licensing company, not by the NDA, of the issues that relate to SQEP? Yes. Did I know in detail what the MCP10 process was? No. Should I have? No." {Day15-NC/124}

However, as she must have known when she was being cross-examined about this, the point was not that she did not know the MCP10 process in detail, it was that she did not know what the descriptor "MCP10" referred to *at all*, and that it was this lack of knowledge on the SMEs' part that had resulted in RSS'S bid being marked down. She was not being criticised in cross-examination for not knowing the detail of MCP10. When Mr Hunter QC put to her that at least one of the SMEs should have known what the current procedure in relation to this was, and that MCP10 had been provided to the bidders by the NDA itself in the data room, she expressly would not agree with these obvious points in Energy Solutions' favour.

150. Further, it was not clear whether the NDA's position was that none of the three SMEs knew what the reference "MCP10" meant, or that none of them could be expected to know the detail. Later during this same passage of evidence, Ms

Hanson stated that she did in fact know, but was not allowed to use her existing background knowledge in this respect during evaluation, and that was the reason why the RSS bid was marked down. This was not persuasive, and is in any case highly artificial and wrong. In my judgment it is also verging on the ridiculous. An SME is expected to have a certain amount of existing knowledge, and to apply it; it is integral to being a SME. It would be rather odd for a Subject Matter Expert not to be permitted to apply the knowledge in which they were expert. Mr Rankin in his first witness statement explained that the SMEs were "selected based on their experience and knowledge of the nuclear sector as a whole, the particular sites within the Magnox & RSRL SLCs and projects that were the focus of the Competition" {C/7/39}. There is no point in doing this, yet prohibiting the SMEs from using that very background existing knowledge in the process of evaluation. I consider this was a shift by Ms Hanson of her position during difficult questions to which there was only one sensible answer, which was that the SMEs had made an obvious and manifest error by not realising to what MCP10 referred. I found this evidence of considerable interest. It demonstrated, in my judgment, what was endemic throughout the evidence of most of the NDA witnesses, namely that they were prepared to defend what had been done in the evaluation process, regardless of logic. It is plain to me that the SMEs, at least in this respect, did not know what was in the data room, and had not understood the reference to MCP10. When confronted with this, Ms Hanson shifted her ground to find a different basis to justify marking the requirement as the NDA had at the time.

151. The correct point in law is, in my judgment, whether a reasonably well-informed and diligent tenderer (what is sometimes called an "RWIND tenderer") could reasonably have expected that at least one of the SMEs would know to what MCP10 referred, such that this could be used as a descriptor in the Tender Submission without explanation being required. Given MCP10 was placed in the data room and was provided by the NDA to the bidders, in my judgment that point should be answered with a rather obvious "yes".

152. Ms Hanson was another of the NDA witnesses who was unable to provide any meaningful assistance to the drafting of the Letter of Reasons in April 2014 with its 11 appendices. She simply could not remember being involved. I do not criticise her for this. She explained to me that she had certain serious family issues in April 2014 as her mother had become terminally ill at the time. However – and this is to be taken as a criticism of the NDA, and not in any way a criticism of Ms Hanson – there was no formal (or even informal) handing over of her responsibility or involvement in drafting the relevant appendix, to anyone in particular, during what was obviously a difficult time personally for her, and a most important period for the NDA and the procurement. Ms Hanson assumed Sara Johnston, one of the other evaluators, had done this in her absence. She described Sara Johnston as the "port of call" when she, Ms Hanson, was not available. She therefore assumed that Ms Johnston had been involved but did not know. The precise authorship of the relevant appendix (and so many of the other appendices) therefore remained unclear. This is because the NDA did not properly organise (or if it did, that organisation was not explained, at least not to the court) the responsibility for drafting the detailed appendices that accompanied that letter.

153. Such a statement of reasons is an important document in a procurement challenge. The NDA approach to it was rather haphazard. The precise authorship of the different appendices is still unclear even after this trial. Very few, if anyone, at the NDA was prepared to accept primary (or any) responsibility for drafting the appendices that responded to the concerns raised by RSS over its tender. In my judgment, the letter was something that the NDA witnesses, as a whole, were not particularly enthusiastic with being associated with, and as individuals they readily disassociated themselves from it.

Stuart Miller

154. Mr Miller lives in Cumbria and it was necessary to change the day of his attendance very late in the trial due to the extraordinary flooding that occurred in that part of the country in December 2015. Mr Miller made considerable efforts to attend court during that period and it is only right to acknowledge that in this judgment. Mr Miller is a Chartered Engineer and holds a first class honours degree in Civil and Environmental Engineering, having graduated in 1999. He is currently a Lead Programme Manager for the NDA, overseeing capabilities improvements at Sellafield and before that he was a Programme Manager, within the Portfolio Management Office. He joined the NDA in October 2011, having before that been with Scott Wilson and Capital Symonds, during which he had built up considerable experience of managing projects and programmes. During the competition he was an SME in relation to Node 307 Portfolio, Programme and Project Management. This was a Key Enabler Node. Andrea Livesey was the lead SME for this Node, project managed the competition and was on the Core Competition team. She was not called to give evidence. In the 11 months that Mr Miller was at the NDA prior to becoming involved in the competition, he had not managed any NDA projects or programmes. He was therefore relatively junior when he was involved in the competition.

155. The RSS Tender Response to the node in which he was involved was identified by the SMEs (predominantly Mr Miller and Mr Edwards) as having omissions. A conversation took place between all three of the SMEs and Mr Rankin due to concern that RSS might justify a score of 1, and this point was discussed. This discussion also included consideration of whether to raise a BCR. No BCR was raised of RSS, although Mr Miller told me that serious consideration was given to doing so, and the Requirement in question, namely 303.5.2(d), was given a score of 2. Changes were made to the consensus rationale by Ms Livesey on 5 December 2013, essentially to delete the word “fundamentally” in the phrase,

> “We feel that the above observations are material omissions and fundamentally undermine the Authority's confidence in the Bidder's approach to deliver the requirement”.

By doing so, the entry became:

> “We feel that the above observations are material omissions and undermine the Authority's confidence in the Bidder's approach to deliver the requirement”

This change was made by Ms Livesey on the second day of the first Burges Salmon review process. Although Mr Miller said the change would have been made with all three of the SMEs in the room and in agreement, he also said he "can't comment on why that happened" but that it did not change his position {Day16X-CON/122}. The particular word "fundamentally" was important because of the definition of material omission in the SORR. An omission was material if it fundamentally undermined confidence. Even though this single word was expressly removed by – on Mr Miller's account – all three SMEs acting in agreement, he insisted that the nature of the omissions was such that the confidence of the NDA was indeed "fundamentally undermined". In other words, his evidence was that the removal of the word, agreed by all three of the SMEs, did not represent their final agreed view in evaluation. I reject that evidence. In my view, this was a clear mistake at the time by the SMEs as to what constituted a *material* omission. The removal of the word "fundamentally" strongly suggests that the omission(s) were not material. The scoring criteria for a response that contained omissions that were not material omissions provided for a score of 4.

156. Mr Miller did have a tendency to go wider than the questions asked for him, but he was far from unique amongst the NDA witnesses to do so. He refused to accept, however, that any mistakes had been made in the evaluation. In this, he was adopting the same approach as the majority of the NDA witnesses.

Samantha Dancy

157. She is the Supply Chain Manager at the NDA, and was one of the SMEs who were responsible for evaluating the bidders' responses to Node 306: Supply Chain Management. Ms Dancy has spent 20 years in procurement and supply chain management in the nuclear decommissioning industry. She began in the industry with the United Kingdom Atomic Energy Authority (UKAEA) in the early 1990s and was based at Winfrith. She then moved to Harwell and began her career in procurement. She became a member of the Chartered Institute of Procurement and Supply, and holds qualifications for both procurement and management. She joined the NDA in 2005 as Contract Manager for Berkeley, Hinkley and Oldbury; in this role she was involved in the commercial aspects of the Management and Operations ("M&O") contracts. In June 2006 she became Contract Manager for Magnox South. This was following a change in the NDA competition strategy – initially all contracts for decommissioning the Magnox sites were arranged on a site-by-site basis. This was changed, and the strategy became one whereby the Magnox decommissioning sites in the south of the UK were to be completed as the second PBO competition after the Low Level Waste Repository or LLWR. To this end, the sites were grouped into Magnox North and Magnox South. Magnox South was however then suspended when the strategy changed again, with Sellafield being brought forward and run as a separate competition. When Energy Solutions purchased the Magnox management organisation from the UK Government, Ms Dancy was involved in negotiating the PBO and M&O contracts on behalf of the NDA.

158. In 2010 she became the NDA's Supply Chain Manager. She is involved, amongst other things, in supply chain relationship management across the SLCs, and simplification and standardisation of contract and tendering processes. She also has oversight of the Collaborative Procurement Programme, or CPP. This has a total

programme worth of £2.6 billion, and there are approximately 60 contracts in the programme which involve sizeable annual expenditure, in the order of £400 million. These comprise contracts both for specialist nuclear services such as low level waste management and health physics, as well as other items of non-nuclear common supplies like stationery, and other services such as hire cars.

159. Supply Chain Management (or "SCM") is further explained in the section of this judgment dealing with the challenges to the evaluation of Node 306. As with most of the other NDA witnesses, Ms Dancy was not prepared to accept that the ordinary reading of the consensus comments reflected her view at the time (or the views of her co-SMEs). The comments in relation to Requirement 306.5.1(n) stated that sufficient information in relation to improvement outcomes was not provided by RSS, and also specified that it did not appear "elsewhere in their response". In cross-examination, her explanation for this shifted and I will return to this later in the judgment when I deal with the detail of the evaluation for that specific Node. However, it transpired that her evidence was that this entry did *not* mean that the information was not to be found elsewhere in the response, but rather it did not appear in the relevant section. This amounted to meaning the information did not appear "here", which was rather different to stating that it did not appear "elsewhere in their response". This is a good example of the kind of semantic gymnastics necessary to reconcile the NDA evidence by witnesses who were SMEs with their contemporaneous entries in the AWARD system.

160. I found Ms Dancy's evidence of great interest for this reason, and her approach further entrenched or established what might be called the NDA house style of giving evidence in these proceedings.

161. Ms Dancy was not however the Lead SME for Node 306. The Lead Evaluator for this Node was Mr Godley. He was the Contract Manager for the Competition and was also on the Core Competition Team. He was also the person, according to Ms Dancy, who was responsible for preparing Appendix 9 to the Letter of Reasons, which was the appendix of detailed reasons that deals with this Node. He still works for the NDA and I was not given any explanation as to why he did not give evidence. At least so far as the CFP response to this Node is concerned (in distinction to the RSS response) a marked change in the scoring of that response in respect of Requirement 5.1(j) occurred during the evaluation phase. Initially, at the earlier stages of the consensus process, CFP had been given a mark of 1 by the three SMEs, which would have been a "below threshold" score leading to disqualification. Upon reflection by the evaluators, consideration of the same material saw this considerably improve to a mark of 4. The reflection, however, followed a conversation between Mr Godley and Mr Rankin. Mr Rankin was not an evaluator, lead or otherwise, and told me he had no input into the scoring. He said he could not remember the conversation. The best – indeed only – direct evidence from an evaluator of that important conversation would obviously have come from Mr Godley, given Mr Rankin appeared to have forgotten all about it. It is surprising that Mr Rankin would have no recall of such an important discussion, although the extent of his poor recall was not pursued to any great extent in cross-examination. Although he still works for the NDA, Mr Godley was not called as a witness.

VII The AWARD system

162. AWARD was an electronic software system used for evaluation. It had been configured by QinetiQ Group plc for the NDA, and was managed by Claire Russell, the Competition Project Adviser, who also managed the data room (she had other duties as well). AWARD had been used by the NDA for the previous competition for Dounreay. The electronic tender responses were uploaded into AWARD on 2 and 3 November 2013.

163. Once the SMEs had undergone their training they were given the appropriate passwords. Individual SMEs could only access and input into the "AWARD Notes Answer Book" their own individual entries until they reached the consensus meetings, which were held with the other SMEs on the particular Node. The lead SME for an Evaluation Node had access to all the individual award notes, so he or she could read them, but was unable to edit them. When the SMEs were working through the Requirements in a particular Evaluation Node, the screen would only show an individual Requirement, the scoring criteria (both as worded in the SORR) and a space for entering the note for one Requirement at a time. Mr Rankin explained in his evidence that there was a curiosity of the system as follows. Within the AWARD system, there were two options when an SME wanted to move to another Requirement, either to press the "Complete" or "In Progress" button. However, one function of the software was that AWARD would default to marking a Requirement as "Complete" if an individual SME pressed "Next" without marking it as "In Progress".

164. He therefore explained that because of this he believed that sometimes Requirements were marked as "Complete" even though they had not been completed. He said that this happened even if an SME:

> "…. had intended to return to it. I say this because I discovered this when carrying out the evaluation of the Evaluation Nodes for which I was responsible (PBO Governance and Consolidation) and I suspect that others did too. In reality how it was described in AWARD was not relevant, evaluation did not finish until each member of the evaluation teams had signed the evaluation close out documentation as I describe below." {C/7/51}

The NDA evidence, predominantly given by Mr Rankin, was that this use of "Complete" by AWARD could appear to be misleading and give the impression that the SME team had changed their minds on a score or comment, whereas in reality they might not have done, and just needed either:

> "…further guidance on the scoring, further clarification, or just more time to consider a point with a view to coming back to it later". {C/7/53}

165. It is not clear to me why any SME would fail to mark an entry as "In Progress" if they genuinely did intend to return to it. When the changes of score that occurred in respect of some of the Requirements come to be considered in detail, the status of the earlier entries as "Complete" is relied upon by Energy Solutions to

demonstrate that the concluded view of the SME in question was a particular score. I deal with each of these instances individually. Regardless of that, however, if Mr Rankin is right and the SMEs did need "further guidance on the scoring, further clarification, or just more time to consider a point with a view to coming back to it later" then in my view this would have made it more, not less, likely that the SME in question would – and should -- have marked the entry as being "In Progress". I find that the purpose of Mr Rankin's evidence on this point was to try and dilute the force of any criticism by Energy Solutions concerning scores for entries that were marked "Complete" at the time, but then changed later. There is no particular reason to conclude generally that entries were accidentally marked as "Complete" because of Mr Rankin's quirk of the system, rather than the SME choosing to mark it as "Complete" at the time (or not choosing to mark it as "In Progress", which amounts to the same thing). Given this was purpose-designed software specifically for the NDA that had been used by the NDA before, unless there is other evidence from a SME that a particular entry was incorrectly labelled as "Complete", I find that the way the AWARD system identified an entry as either "Complete" or "In Progress" constitutes an accurate description of the stage of evaluation that had been reached by that SME. That is not to say that "Complete" makes the view at that time wholly determinative; SMEs can change their minds and often did so. However, the lack of any explanation as to why such changes of mind occurred is something that in my judgment can be taken into account when considering whether any particular score has been reached manifestly erroneously.

166. When the SMEs for a particular Evaluation Node met at the consensus stage, to discuss their comments and agree scores for the Requirements within that Evaluation Node, a consensus award entry was made to explain the comments for the score. The lead SME was responsible for entering the scores and the consensus comments into the Consensus Answer Book within AWARD. When the SMEs met in consensus, they met in specially allocated rooms with a single laptop, with the AWARD programme projected onto a screen. In this way all of the members of the SME team could see the entries. They had no access to email during this process and were all together for the specific purpose of reaching a consensus view on the correct score.

167. The lead SME had the ability to make changes to the entry for a Requirement in AWARD until it was formally "closed down" in AWARD. This was, or should have been, the final stage in evaluation on any particular Requirement. In order to close down an Evaluation Node in AWARD, each member of the SME team had to sign a form to confirm that the scores and consensus entries were complete. That form was then passed to Claire Russell who would "close down" AWARD for that Evaluation Node, which meant that the lead SME no longer had access to it and could not make any further changes. In order to make any further changes, the lead SME was obliged to obtain authorisation from Mr Rankin to do so, and if that were given, Mr Rankin would instruct Claire Russell to open the Node again on AWARD so that changes could occur. There is a contentious point between the parties concerning this. Mr Rankin's view is that this was perfectly permissible – as he put it:

> "If, after an Evaluation Node had been closed down, a lead SME wanted to reopen it to further consider any issues raised

> or, if an error had been spotted that needed to be amended, it was technically possible to do this. In order to do so the lead SME needed to obtain authorisation from me. If I thought it was appropriate I would authorise Claire Russell to open the Evaluation Node again. Until the evaluation period had ended, it was entirely right that SMEs could reflect, think again, and respond to challenges about their original scores and comments. That is all part of a thorough and diligent process. The important safeguard was that, at the end of the evaluation, all SMEs had to (and did) sign to confirm agreement with the final scores and comments." {C/7/53}

168. The position of Energy Solutions to the acceptability of this is somewhat different, and raises two important points. I summarise them. The first is that the consensus procedure was supposed to be used so that the SMEs would jointly arrive at the correct score. Once AWARD was closed and a particular score arrived at, that was prima facie the correct score. The second point is that once AWARD was closed, there was nowhere for any SMEs (or indeed anyone else) to record even the most basic thought processes that would, or in fact did, lead to a particular score being changed. Energy Solutions described AWARD generally as "a limited vehicle for recording individual views", an expression I endorse and adopt. It should be remembered that after consensus had been completed, AWARD was formally "closed down" with each SME signing a sheet to that effect for a purpose. That purpose must have been to demonstrate that it was, indeed, "closed" and that the score had been finalised by the SMEs responsible. I find Mr Rankin's attitude to the later changing of "complete" scores somewhat cavalier, if not glib. Indeed, his evidence that it was right that the SMEs be entitled to "respond to challenges about their original scores and comments" introduced a wholly new, separate and informal stage of the process that was never intended, namely the involvement of people other than the SMEs into the scoring process. The reason for having three separate SMEs independently considering the tender responses against the SORR at different stages (initial and final), with those SMEs then arriving at a consensus score, was so that the final score would be the independent conclusion of their separate and collective judgement. That was how the evaluation process was carefully designed. The "post-closed down" final, new, separate and informal stage permitted by Mr Rankin so that this consensus view could be changed (whether it is described accurately as a change, or as he did by way of "challenge") was, in my judgment, not part of the process of evaluation as it was designed. It was also an extra stage fraught with danger for the NDA in this sense; it ran the obvious risk that depending upon who was doing the challenging, and why, and which parts of the consensus results were being challenged, and in respect of which bid, this informal stage may not have been applied equally to the different bidders. It is also not transparent because no records are available of it.

169. Mr Rankin's approach is also, in my judgment, wholly illogical. Given the AWARD system would, by design, designate a Node as "Complete" once it had reached that stage in consensus, it would be more important (not less) that changes *after* that stage by the lead SME would be recorded properly so that the final score was only reached after a fully transparent process. The system described by Mr Rankin had the result (whether by accident or design) that the most important step

in reaching the final score, namely a change from a fully consensual score, to a different one, after completion of the consensus process, was a step taken with the reasoning for it recorded nowhere at all. This is contrary to the whole ethos of the evaluation process as designed.

170. To have the independent conclusion of the whole team of SMEs on a particular Evaluation Node changed would, provided it were done in compliance with the obligations upon the NDA, be entirely permissible. It is the proviso in the preceding sentence that is the important one, however. In this case the whole process and rationale for the changing of the consensus scores *after* AWARD had been closed is shrouded in mystery. This is because the post-AWARD closure discussion, who was involved, and their reasoning, was not recorded, or if it was, the records have not been made available. This whole episode in terms of evaluation appears to me to be contrary to the restrictions imposed by the NDA, for example, on the SMEs at the Final Review stage. The SMEs were instructed that they were only permitted to discuss the matter with the other SMEs and only in the Competition Office. This was perfectly sensible; it prevented the views of those who were not SMEs from being taken into account in the evaluation. But if such an instruction or rule is imposed, it is directly contrary to that to have unrecorded oral discussions leading to changes in the score *after* AWARD was closed (when final consensus score had been reached and signed off by the SMEs).

171. This point was put with some force in Energy Solutions written submissions in the following terms:

> "The NDA's disclosure does not include any such records, nor any written communications between SMEs. Accordingly, it would appear that the SME evaluators did not communicate with each other at any point during the evaluation process save in physical meetings or by telephone. That includes during the whole process of revisiting consensus scores and rationales following the Burges Salmon Review, a time at which the AWARD database was supposed to have been closed, and so even that limited vehicle for recording individual views ceased to be available. This suggests that these late revisions were discussed and agreed orally without any record being made of such discussion. The effect of the NDA's approach was to limit the permanent record of what occurred to the absolute minimum of information."

172. I accept those submissions. I find as a fact that the NDA's approach was indeed "to limit the permanent record of what occurred to the absolute minimum of information". I find that was the intention of Mr Rankin; but even if it were not his intention, it was the effect of the steps taken by him in any event, and the end result was the same.

173. It is therefore necessary to compare the way the evaluation process was intended and designed to work, with the way that it in fact did work.

The evaluation process in theory

174. The bidders made presentations to the NDA just after submitting their bids, but these were not evaluated. There were the following key stages to the evaluation process, which were done on the detailed material submitted by the bidders against the SORR contained in their different Tender Submissions. These stages were as follows:

i) Initial Review by the SMEs. This review was done individually and no scores were given – indeed, the SMEs were instructed not to give scores at this stage. At the end of this stage, the teams of SMEs met to discuss any clarification requests. Any such requests that were agreed upon by the team were passed on to the administration team for approval and (if approved) were then sent on to the bidders. As well as asking themselves whether clarification was needed, the SMEs were told to ask themselves "where would you place the Bidder with regards to the scoring matrix/table (without actually scoring)." {R/32/29}

ii) Final Review by the SMEs. Any clarification provided by the bidders would be reviewed and discussions were permitted with the other SMEs, but only the other members of that evaluation team and only in the Competition Office(s). There would still be no scoring applied.

iii) Consensus. This was a meeting (or series of meetings) of the SMEs and would be chaired by the Lead SME for that Node. The Lead Evaluator would input the score – reached, as one would expect from the title of this stage, consensually – and supporting rationale into AWARD. The scores and supporting rationale would be printed and signed by all of the SMEs to signify their agreement with it. If consensus could not be achieved, then there was a consensus reconciliation process that could be used, but in practice this never occurred {C/7/52}. After this stage, AWARD was "closed" for that Evaluation Node.

175. The instructions to the SMEs included these: "if you are at all unsure, you must score up"; and "are there any points where you would like to check consistency with other nodes?" This was reinforced by Mr Rankin who expressed it in these terms:

> "One message that we included in the training was that, if the SMEs were in genuine doubt about whether a bid was a lower or a higher score (for example, between a 3 and a 5) they should score the Requirement with the higher score." {C/7/49}

The SMEs were also told to "ensure that the notes reflect the scoring table for that score." {R/32/33}

176. Clarifications were not to be used to solicit additional information. In the training material used to train the SMEs {R/32/28}, the following was stated with examples:

> "Clarification questions must not be used to solicit additional tender information from Bidders – this would be contrary to procurement regulations.

> For example: A perfectly legitimate request for clarification may read "On page XX of your bid submission you refer to a project worth £50M whereas on page W of your bid submission you refer to the same project with a value of £60M.
>
> Please could you clarify which figure is correct"

An inappropriate request for clarification may read:

> "On page XX of your bid submission you refer to a project worth £50M. Please could you provide the following additional information about this project: Scope summary, Schedule Information and a breakdown of the costs."

177. The clarification requests that were approved by the administration team would be sent on to the bidder in a BCR to be answered. The answer from the bidder would be reviewed, and if it was thought this contained additional information, that would be redacted and only such information as the Competition Team (headed by Mr Rankin) considered appropriate clarification would be uploaded onto the AWARD system. It would not be possible for the SMEs to tell if extra information had been provided by a bidder, and redacted by the Competition Team. This is because the redacted parts would simply be omitted with no sign of any redaction having taken place. The SMEs would then take the answer to the BCR as uploaded into AWARD into account in arriving at the consensus score.

The evaluation process in practice

178. Initial Review, Final Review, and Consensus were broadly followed as intended, and led to a score being agreed and AWARD being closed in the way intended. The individual entries on AWARD were supposed to be notes, but in a great many instances are simply recitations of the scoring criteria in the SORR, or versions of that wording. It is possible to see the date and time of entries, but in many instances the entries are extraordinarily brief. Mr Hunter QC put to Mr Grey that he had just used the "cut and paste" function to replicate text against different requirements, but Mr Grey denied this. There is nothing inherently wrong with using "cut and paste", in some circumstances, particularly when as here the SMEs were under pressure of time. However, it does have some inherent risks in that if an error has been made initially that led to the first iteration of the text being produced, without separate consideration that same error can creep into each subsequent "cut and paste" entry.

179. However, there was then introduced into the evaluation procedure two other stages of further review. One was the informal and unrecorded "conversation" with Mr Rankin. The other was more formal, as a specific step in the process, and this was carried out by Burges Salmon. I deal with this in the following section. This was a step in the process that could be described as "planned", but does not seem to have been fully planned at the beginning to the same extent as it was in fact used. Exactly what its results were is not before the court as privilege is claimed in respect of it.

180. Further, there were also some admitted errors in the score and comments recorded in AWARD. In an email of 24 March 2014 {T/126/2} Mr Rankin was told the following:

> "As part of the Burges Salmon audit of evaluation, they have discovered a discrepancy whereby a Bidders score and comments for 1 requirement seem erroneous. The requirement in question is Technical Underpinning, Sample Project 5, requirement 414.5.1 (a) for Bidder 5.
>
> Upon investigation with AWARD it seems that the score and comments were correct until the 25th February. It seems that on this date an accidental error occurred and the score and comments were attributed erroneously.
>
> I would like permission for the lead SME to open up this nodes answer book and change the score and comments back to its original score and comments that were agreed during the consensus meeting.
>
> Kind Regards
>
> Steve Dixon"

That approval was given by Mr Rankin {V/243/1} but there has been no real explanation of how, *after* AWARD was closed, and on 25 February 2014, a previously agreed and accurate score and comment on this Evaluation Node were subject to:

> "…an accidental error….. and the score and comments were attributed erroneously".

There has also been no explanation about how such an error was even technically possible. I simply do not see how such an error could in fact have occurred if AWARD could not be opened without permission. In evidence Mr Rankin said this was a "transposition error" that had been made by Mr Grey but Mr Dixon (who sat about a foot away from him) had told him about it {Day9-NC/92}. The correction of the error increased the RSS score by 0.24%, narrowing the margin between RSS and CFP to 1.06%. It does not seem to have led to any specific review of the way that scores had been entered into AWARD after Nodes had been closed generally, or specifically by Mr Grey. If the closure of AWARD was to have had the effect explained, namely that no access would have been possible absent Competition Team approval, such an error simply could not have occurred. This troubling occurrence seems to me to have been simply glossed over by the NDA.

Consistency

181. One of the complaints by Energy Solutions in these proceedings (which has a particular impact upon the Nodes dealing with Critical Assets) is that the SMEs failed to evaluate the RSS tender consistently with what RSS had been told by the NDA during dialogue, in the feedback on the interim drops. There are the

following areas, Energy Solutions submitted, where consistency should have been present but was not:

i) SMEs should have evaluated RSS and CFP's tender responses consistently one with another;

ii) SMEs should have been personally consistent in their evaluation of Nodes that had identical requirements, hence the same response to the same requirements should have been given the same score across different Nodes;

iii) SMEs should have performed their assessments consistently with the feedback given to the bidders during the dialogue phase;

iv) Clarification of the different bid responses by the SMEs through the BCR process should have been consistently applied to different bidders. This could be seen as a more specialist sub-set of point (i).

182. One of the purposes of the dialogue stage, as stated to bidders in the ITPD {L/10/8}, was "to allow the Bidders to discuss their proposed Solutions". Appendix 4 of the same document {L/10/30} stated that:

> "…the NDA may require Bidders to submit interim submissions during the course of Dialogue to provide feedback to Bidders on their solutions and to ensure that only credible Solutions are progressed to final tender."

It is correct to state that the NDA in paragraph 14 also stated that:

> "…nothing said or intimated by the NDA at these meetings will constitute an approval of their proposals or an acceptance of their adequacy in meeting the Competition requirements. However, the NDA will endeavour to indicate to Bidders whether it believes the proposed Solution(s) are unlikely to meet its objectives".

183. In his oral Closing Submissions, Mr Giffin QC accepted that as a general point of principle, feedback should be consistent with evaluation, but did so in the following terms:

> "But the broader point about feedback is this: we would accept that, in principle, it is capable in a procurement for an authority to be guilty of a breach of transparency if it says one thing to bidders in the course of dialogue or negotiation, if it is that kind of procedure, and then acts in a different way. Because if you lead a bidder up the garden path, that is likely to amount to a breach of transparency, so if they act in reliance on what's been done. But whether that is true in a particular case or not, does depend, critically, upon the nature of the meeting and what bidders are told about the process that is going on." {Day18-NC/63}

184. I do not consider that the passage set out in paragraph 14 of Appendix 4 of the ITPD entitles Energy Solutions to a particular score as a result of what occurred during dialogue, as though the NDA had approved the specific contents against the SORR during that process. Although it is one thing to state that something is *not* acceptable or does *not* meet the requirements, the converse cannot be relied upon to justify a claim that a particular score should have been given because one part of the bid was not indicated as not being acceptable (using the double negative specifically). To hold otherwise would be to impose an obligation upon a contracting authority to notify a potential bidder (or all the potential bidders) where in their draft submissions they could or should improve the content. To do this would be to impose an impossible burden upon contracting authorities. There was a requirement for consistency, such that the NDA were not entitled to state one thing concerning proposed solutions to the bidder in the dialogue process, but then evaluate the tender submitted on a wholly different basis. However, in my judgment the challenges to the scores do not fall into that rather stark category.

185. Two points can however be made in respect of the complaints by Energy Solutions about consistency. The first notable point is that Mr Grey, the main witness called by the NDA in these proceedings and the person most heavily involved as an SME in the whole procurement exercise, did not agree that he had to be personally consistent at all. The following exchange took place on Day 12 {Day12-NC/25-26} when Mr Grey was asked by Mr Hunter QC for Energy Solutions:

> "Q. Do you accept that you personally had to be consistent, Mr Grey?
>
> A. I don't. That wasn't in the scoring criteria."

I do not accept that Mr Grey was permitted or entitled to be inconsistent, either between bidders, or across the different Requirements for which he was responsible in evaluating. I cannot understand how Mr Grey could interpret the SORR as entitling him to be inconsistent, which was what his evidence stated. Mr Rankin, who was the Head of Competition at the time (although he told me his involvement with the NDA ended in November 2014) {Day9-NC/28}, did at least accept that consistency was required {Day9-NC/22}:

> "Q. Another purpose *[of dialogue]*, particularly in the later stages, during the interim drops, was that bidders could discuss their draft proposals to obtain feedback from the NDA as to whether those proposals were acceptable or needed to be improved, or whatever?
>
> A. That is also correct, yes.
>
> Q. You agree that where SMEs gave feedback to bidders the evaluation of the bidders' final tenders had to be consistent with that feedback?
>
> A. I think broadly, yes. The only qualification I would put in that is – as you noted earlier on – our thinking was evolving all the way through dialogue. So what may have been a position

> say, for example, at interim drop 1 may not have necessarily been a position at interim drop 2 and at final tender stage. But with that qualification, yes, broadly I would agree with that.
>
> Q. In fact, that was something you made clear to all the evaluators before they started their evaluations, wasn't it?
>
> A. It was."

That is sensible, but the problem with the totality of this evidence is that Mr Rankin (who accepted consistency was required) was not evaluating the Nodes under challenge in this litigation, and Mr Grey was. Mr Grey's evidence on this is rather telling. Not only is it directly contrary to that of the Head of Competition, it is also at odds with the express terms of the training materials which were used to brief and train the SMEs. The second bullet point in the Introduction states "Integrity of evaluation pivotal to success – design, implementation and consistency from dialogue phase" {R/8/2}.

186. The reason that this is, in my judgment, a notable point is Mr Grey was performing evaluations on more individual nodes than any other single SME, (and who at one stage was planned potentially to be doing all the evaluations on all of the nodes). He plainly did not believe that he had to be personally consistent. He therefore did not know (or if he did know, did not apply or follow that knowledge) that the NDA required the SMEs to be consistent in their evaluations with the feedback given to bidders. Also, inconsistency in treatment of different bidders can amount to unequal treatment. One specific example of this concerns Requirement 411.5.3(c), and Dungeness. RSS was marked down, and given a score of 1 not 3, for not identifying either the AETP or the saline groundwater pumping system as key critical assets. However, CFP did not identify either of those as key critical assets either. It is a point for consideration as to whether either were key critical assets. But if they were, then they must have been key critical assets for both bids, or not key critical assets for both bids. Both bids should have been marked on the same basis. There can be no justification, in my judgment, where there is an obligation of equal treatment, for scoring the RSS bid as though these were key critical assets that were missing (justifying a 1) yet overlooking that omission in the CFP bid (and giving that bidder a score of 3).

187. The second notable point is that the NDA personnel kept no records of the dialogue. Given that no records were kept of this important period which lasted several months, the only way in which the consistency sensibly required by the NDA and of which Mr Rankin told me the SMEs were aware (because he had told them) would have been their memories. Mr Rankin accepted that the way that the SMEs would achieve consistency would be by memory, as there were effectively no notes kept {Day9-NC/30}. Given the breadth of material, I find this evidence verging on incredible. Mr Rankin explained in his evidence that the four tender responses comprised some 84 boxes of material, or 364 files {C/7/49}. Mr Rankin stated that such an exercise required "significant project management" and I agree. However, that project management does not seem to have involved any mechanism or process whereby there was any proper record available to the SMEs of what had occurred during the dialogue process. It is difficult to see how consistency was going to be achieved in those circumstances.

188. It is however consistent with the NDA's attitude towards keeping records of the evaluation, which I deal with elsewhere. A major aspect of the explanation for this given by the NDA in closing submissions was that it would have been too logistically demanding to record anything that took place in the dialogue meetings. I find this explanation as weak as it is surprising. A summary should not have been too difficult to prepare, and there would not necessarily have been any need to have such a summary formally agreed with each bidder, which was one of the "logistical difficulties" identified. Not only that, but preparation of separate records would not necessarily have been required in any event. Digital recording devices are widely available and inexpensive. Simply recording what was said would not have been too difficult. In the 21st century, there must have been a better way of ensuring consistency from the dialogue stage than the SMEs' memories.

189. Personnel from Burges Salmon were present at some of the dialogue meetings and may have made notes of their own. There was no clear answer to whether they did or did not. However, there is no evidence at all that, even if members of Burges Salmon did take notes, these notes were made available to any of the SMEs either for the evaluation process, or at all. Accordingly, regardless of their status as potentially subject to legal privilege or not (because legal professional privilege has been claimed by the NDA for all documents created by Burges Salmon) the existence or content of such notes does not have any effect upon this unsatisfactory aspect of the way this phase of the competition was organised.

VIII The role of Burges Salmon

190. The NDA knew that it had certain responsibilities and obligations in the procurement and took steps to ensure that it was advised about them. It was also subject to different levels of what Mr Rankin described as internal and external governance.

191. There were general arrangements for this governance which were set out in a paper entitled "Parent Body Organisation Competition Programme Governance Arrangements PBOC – 019" {W/91/1}. That made clear that the "Good Governance Standard for Public Services" applied, which is based on Nolan principles. These were summarised and included "taking informed, transparent decisions and managing risk" as well as others such as maintaining strict commercial confidentiality and avoiding any actual or perceived conflict of interest. There were three main levels of internal governance – the Competition Programme Board (CPB), the Project Board and the NDA Board of Directors. The CPB included, as well as NDA Executive Team members, members of the Shareholder Executive (which exercises the governance function over NDA on behalf of DECC), HM Treasury and the Scottish Government. The CPB was chaired by someone called the Senior Responsible Owner (SRO) who is the individual at executive level who is responsible for delivering competitions. The SRO until December 2013 was Sean Balmer, Commercial Director, who was then replaced by Dr Adrian Simper, Director Strategy and Technology. The Project Board for this competition was also chaired by Sean Balmer and then Dr Adrian Simper. Mr Rankin was, as well as the Head of Competition, also a member of the Project Board.

192. For key approvals, such as the issue of the Final ITSFT, the CPB provided recommendations to the NDA Board. The Competition was also the subject of internal and external independent scrutiny and assurance. Internal assurance was provided by the internal audit function of the NDA. In light of the findings arising from the Laidlaw Report which examined the Department for Transport's West Coast Mainline railway franchising exercise and which reported while the Competition was running, Mr Rankin requested the internal audit function of the NDA to undertake an audit of the conduct of the Competition against the lessons learned from the Laidlaw Report. The results of this audit were that there were a number of areas of good practice and the processes set up were sound.

193. It also included the following comments:

> "The NDA consistently and transparently declares its evaluation approach and methodology to bidders and ensure [sic] it is understood via the dialogue process. The NDA also has procedures in place to ensure that the evaluation is in accordance with the declared approach."

194. There was also an internal audit of the evaluation process itself carried out by NDA's internal auditor, Lee Tait. The purpose was to ensure that the approved procedures governing the process had been complied with and the audit focused on the process rather than the substance of evaluation. The scope of the audit included looking at the clarifications raised by SMEs on the bidders' tender

responses, attending consensus meetings as an observer and checking the scoring for the consensus award meetings to ensure that the scoring agreed at the meetings was reflected in the entries entered into AWARD.

195. Mr Rankin also stated in his written evidence that because of the high profile, high value and high risk nature of the Competition the Government was also involved. At certain points, namely those that represented a significant transition from one stage to another, approval had to be sought from HM Treasury to proceed. These were called Treasury Approval Points (TAPs). The Major Projects Authority (MPA) of the Cabinet Office also undertook what were called gateway reviews at key stages of the Competition. This is because this project was a major UK Government project which was part of the Government Major Project Portfolio. There were two additional interim reviews conducted by the MPA during the dialogue period (Gate 3) in July 2013 and a Transition Readiness Review, also referred to as a Project Assessment Review during the evaluation period in February 2014.

196. At the conclusion of all MPA reviews a "Delivery Confidence Assessment" is given as a summary of the state of the project in question. The Delivery Confidence Assessment uses a five point "traffic light" system known as the RAG (Red–Amber–Green) scale. Green indicates that the successful delivery of the project to time, cost and quality appears highly likely and that there are no major outstanding issues that appear to threaten delivery of the project significantly. Amber/Green means successful delivery appears probable but constant attention would be needed to ensure risks did not materialise into major issues threatening delivery. For the Competition, the Delivery Confidence Assessment given by the MPA was either "Green" or "Amber Green" demonstrating a high level of confidence in the delivery of the Competition.

197. Mr Rankin and the NDA were obviously drawing my attention to this to demonstrate that the “audits” or checks upon how the NDA had run the competition were satisfied. However, I do not accept that such audits would, or could, have considered the material in the same way that was done at the trial. Energy Solutions had to demonstrate manifest error in order for any of its challenges to succeed. The consideration of that meant that the court heard submissions and evidence based on the scoring criteria in the SORR, the content of the Tender Submissions, the reasons provided by the NDA and the entries in AWARD. I do not believe that any of the governmental steps to which Mr Rankin referred would have looked at the same material in the same way. Therefore, the “green lights” in the Delivery Confidence Assessment or approvals by HM Treasury for expenditure, whilst a good thing, do not provide any defence to the substantive challenges by Energy Solutions.

198. So far as external advisers are concerned, the NDA appointed Deloitte LLP to provide financial advice to the NDA on specific aspects of the procurement and the competition, but Deloitte did not participate in the dialogue phase. QinetiQ Group plc provided the electronic evaluation software which was called AWARD, or the AWARD system, which I have dealt with in section VI above.

199. Burges Salmon LLP was appointed as the NDA’s legal adviser. It also represented the NDA in these proceedings. I was assured by Mr Giffin QC at the beginning of

the trial that Burges Salmon had satisfied themselves there was no conflict of interest in this case arising from acting in the litigation and also having been involved in the competition at the time. Conscious thought had therefore been given by the NDA and Burges Salmon earlier in the litigation to this important matter, and both the NDA and Burges Salmon had satisfied themselves that it was proper for Burges Salmon to continue to act.

200. The NDA knew that a legal challenge was possible from an unsuccessful bidder, if not potentially likely. All of the SMEs were given training. The graphics used in the presentation given in that training told the SMEs that there was a risk of legal challenge in the following terms {R/8/3}/{R/32/3}[2]:

> "Evaluators carry a heavy responsibility:
> – appointing the right contractor
> – high profile and expensive procurement process
> – susceptible to legal challenge – heightened risk in this competition
> – Rigorous governance review of outcome
> – Confidentiality and discretion absolutely paramount – people will want and may seek information. They mustn't get it"

201. The final bullet point refers to the strict need for confidentiality between the different bidders. The third bullet point refers to what was seen as the increased risk in this particular competition of a legal challenge to the outcome of the procurement process. Burges Salmon were part of the team involved in training the SMEs. A partner, and a senior associate, gave part of that training that was called "A reminder of the legal context!" which reminded the SMEs of the obligations of transparency and equality of dealing. The graphics in this part of the training seem to have been prepared by Burges Salmon as under "Reasons to be careful" the following were listed:

> "Commission investigation
>
> Ineffectiveness
>
> Fines
>
> Cost
>
> Damages
>
> Delay
>
> Contract shortening
>
> Automatic injunctions
>
> Set aside decisions

[2] There were two versions of the slides but there is no notable difference in this entry between the different versions.

Adverse PR"

202. Under "Evaluation and award – what is happening?" {R/32/16} one of the following four items shown under "Authority" was "Preparing for debrief – mitigating risk of challenge". On the next page, which related to the stage at which the Preferred Bidder would have been chosen, under "Authority" is shown "Mitigating risk of challenge!" and under "Losing Bidder" there is, shown in a red box, "Looking to overturn decision!"

203. The biggest risk was identified as follows:

> "Biggest risk……not doing what we have said we would do!"

204. In terms of note keeping, the following appeared in a section headed "Evaluation Notes". This was not a section prepared by Burges Salmon, or at least it is on a page that does not show, as those pages with more obvious legal content do, the logo of Burges Salmon on the page. It therefore appears to be a page of the training pack (which was shown in the usual way using slides or in a pictorial presentation) prepared by the NDA itself {R/8/38}.

> "As a matter of policy, only the electronic notes in Award (those made during initial/final review and consensus) will be retained; all other notes pertaining to evaluation must be destroyed
>
> All evaluators will be provided with hard copies of the appropriate parts of the tender and may make notes on the hard copies during the initial/final review stage as these will be used to inform consensus. Any hard copy notes will be shredded at the end of evaluation."
>
> [emphasis added]

205. Some other important messages were communicated to the SMEs in the training slides. These were {R/8/20}:

> 1. "Mark what you see – not what you think";
>
> 2. "Only apply the scoring schemes";
>
> 3. "Comments to be consistent with scoring";
>
> 4. "Anticipate audit";
>
> 5. "If in doubt clarify";
>
> 6. "Read the requirement".

I have numbered these for convenience but they were not numbered in the training slides. They are all relevant, but points 3 and 5 have particular direct relevance to the issues in these proceedings.

206. There were also Clarification Notes produced by way of pro forma in the training materials, that had the following printed at the foot of the page:

> "The Lead Reviewer to produce a single consolidated list of questions using this proforma
>
> All clarification Notes Sheets to be returned at the end of evaluation for shredding.
>
> Revision 1 – October 2013."
>
> [emphasis added]

207. When cross-examined about these materials, Mr Rankin explained that there had been another version of the training slides and the ones that included the comments about destruction of notes, and shredding of hard copy notes, were not the ones that were used. Rather, the approach which was settled upon by those at the NDA tasked with training the SMEs was not that notes taken by the SMEs would be destroyed, but a different approach {Day9-NC/44-46}.

> "Q: ……If we could move forward, please, past the reconciliation process to page {R/8/38}, and this is about evaluation notes. Again, I'm not going to read out what's there. Essentially what this says is that, whilst evaluators were free to make manuscript notes on the tender responses, those had to be destroyed on conclusion of the evaluation. Isn't that right?
>
> A. No, evaluators were not free to make notes on tender responses. We specifically asked them that the only place they should make notes is actually within the AWARD system. No, I think there are a couple of versions of these training slides within the bundle. One, as I understand it, does refer, as you have said, Mr Hunter, to the destruction of any notes made, but for clarity, the hard guidance that the evaluators were given: don't make notes anywhere except in the AWARD system.
>
> Q. This one in the second bullet point does say that they can make notes and that those will be shredded; isn't that right?
>
> A. It does say that, but that wasn't the version that we used.
>
> Q. You are saying there was some further guidance saying that they shouldn't even make notes at all?
>
> A. They should make notes only in the AWARD system, is the guidance that we gave them. As I say, I think there is somehow found two versions of these slides into the bundle.
>
> MR JUSTICE FRASER: Well, then, the AWARD system is electronic, isn't it?
>
> A. It is indeed, my Lord, yes.

> MR JUSTICE FRASER: When you say "make notes straight into the AWARD system", you mean can't physically write anything down at all?
>
> A. That is correct, my Lord."

208. The SMEs were therefore not allowed to write anything down at all. It is correct that there were two versions of the training slides, and the references to shredding notes were removed in the version Mr Rankin said was used. Rather, the following was stated in a version of the slides amended on 18 October 2013 {R/32/38}:

> "As a matter of policy, evaluators must only use the Award system to record notes. They must not record paper notes either on the copies of the bid that are provided or in their own notes books. Structure your notes with the following points in mind: Be consistent with the Evaluation Meth & Scoring Tables – In the event of legal challenge, your notes will potentially be subject to disclosure
>
> Your notes are likely to be used directly in Bidders debriefs".
>
> [emphasis added]

209. There is a further step in this process that ought to be considered, and which the NDA rely upon in the Closing Submissions on this subject. On 28 October 2013, very shortly before the evaluation process itself was to commence, Claire Russell on behalf of "Steve and Andrea" within the CCT sent out the following to the SMEs following the training {R/49/1}:

> "**Handwritten notes**: there was some discussion on whether the hard copies of the tender could be written on and shredded at the end of evaluation. We have sought legal advice and anything that is written on must be kept for audit purposes in the event of a legal challenge. We therefore insist that you do not write on the hard copy tender documents and to ONLY USE the award software to record any notes that you wish to make whether this be initial thoughts during the initial review phase, including navigational notes and questions, which can then be deleted from the system if no longer required/answered during final review stage."

210. There are a considerable number of worrying aspects to this email. Firstly, it demonstrates that, contrary to the evidence of Mr Rankin that shredding was "contrary to policy", it was still a live subject just a few days before the evaluation commenced. That would be surprising, if not inexplicable, were shredding contrary to policy as Mr Rankin said. Secondly, the use of the word "therefore" means that the decision that the SMEs should not write on hard copy documents was (at least in part, if not wholly) motivated by the knowledge that if a document were written on, it must be kept for audit purposes. Thirdly, part of the attraction of keeping notes in AWARD rather than in hard copy was that these could then (using the NDA's own phraseology) "be deleted from the system if no longer

required/answered during final review stage". "Steve and Andrea" must mean Steve Dixon and Andrea Livesey. Neither were called by the NDA, although both were members of the Competition Team, and so no questions could be asked of them about this email. Steve Dixon no longer worked for the NDA at the time of the trial but Andrea Livesey did. No explanation was given for their absence.

211. In circumstances where there is an express obligation of transparency upon the NDA, this approach to note and record keeping, and sensitivity about retaining written material, simply does not seem to me to be justified. That is putting the point at its most favourable for the NDA.

212. It is also my view that even by the time of the trial itself the NDA still did not grasp the importance of transparency. The section of the NDA's Closing Submissions that deals expressly with note-taking, paragraphs 48 to 60 in particular, are entirely dismissive of the legitimate concerns raised by these contemporaneous documents and their contents. The express submission is made in paragraph 60 of the NDA's Closing Submissions in the following terms:

> "The records provided go far beyond recording the conclusions of the evaluators. Any suggestion that the process was not appropriately or sufficiently recorded and documented cannot be entertained."

However, that submission seems to me to fly in the face of reality when one considers the wholly unrecorded oral conversations on very important topics, such as the one between Mr Godley and Mr Rankin concerning potential disqualification of the CFP bid in relation to Node 306, the first of the CFP Threshold issues dealt with in Confidential Appendix 3. There is no record of the conversation between Mr Godley and Mr Rankin that led to the SMEs moving, in just a few minutes, from a conclusion that there was no necessary process or evidence such that CFP should be given a score of 1, to a conclusion that the necessary references could be "inferred" and the correct score was one of 4. Even without the obvious impact upon the overall score of the CFP bid, which would determine who would be the winning bidder, that conclusion helped CFP to avoid being disqualified entirely. Mr Rankin even said he had no recollection of this conversation at all. How that can be reconciled with a submission by the NDA that the process was "appropriately or sufficiently recorded and documented" is a mystery to me.

213. It is therefore clear that at one stage (and the relevant version of the training slides is dated October 2013, which is very close to the beginning of the evaluation phase) it was obviously intended by the NDA that any hard copy notes that the SMEs took during the evaluation process would be shredded. This is in the context of a major procurement competition of public importance with a very high financial value measured in billions of pounds, with clear obligations of transparency upon the NDA. That intention, which is expressed within a sentence that starts "as a matter of policy", was sufficiently well-developed to make its way into training materials for the SMEs, and also to be printed on the foot of the Clarification Note sheets themselves. In my judgment it is wholly unacceptable for a publicly funded body such as the NDA ever to consider a policy of shredding notes because they may become subject to disclosure in subsequent legal

proceedings. This was then changed, and on 18 October 2013 the slides were amended. In this version SMEs were told they were only to keep notes on the AWARD system, which is an electronic package for evaluating the tenders. The SMEs were told they "must not record paper notes either on the copies of the bid that are provided or in their own notes books". However, the end result of that different approach was essentially the same so far as paper notes were concerned – there were to be none available. None of the SMEs were allowed to keep any of their own notes, certainly not in the form in which a great many people actually take notes, namely in hard copy. In other words, the same ends were achieved, but in a different way.

214. I specifically asked Mr Rankin about this as it seemed to me so surprising {Day9-NC/168-169}. He expressed similar if not greater surprise about the references to shredding, because he told me it would have been contrary to NDA policy to have suggested shredding or destruction of notes. He said, initially, that the NDA did not tell the SMEs not to keep notes. He then changed this, and stated they were allowed to keep notes but they had to keep them on AWARD. Given he was the Head of Competition, he was either not being frank with me, or he was wholly unaware of detailed preparatory steps that were taken to train SMEs, the contents of the training material, and the fact that one version instructed them that their notes would be shredded. Either of the alternatives – lack of frankness, or being wholly unaware - is wholly unsatisfactory, to say the least. In my judgment, the former is the more likely explanation, but regardless of that, it does not make much difference because the outcome is the same in any event. The sensitivity of the NDA to potential challenge meant that positive steps were taken to restrict, so much as possible, the amount of evaluation material available to a disappointed bidder for review.

215. Another NDA document, called the Evaluation Process Flowchart, and Revision 3 of which was amended also on 18 October 2013 {R/34/1}, expressly stated the following even after revision:

> At stage 1, if clarification is required "handwritten notes made of any clarification questions using the clarification sheets provided";
>
> At stage 1, "Using the proformas provided….."
>
> At stage 5, "Remaining evaluation documentation shredded".

Mr Rankin was asked about the use of the phrase "remaining evaluation documentation shredded" at the end of his cross-examination:

> "Q. Are you able to cast any light on that?
>
> A. I can't I'm afraid."

216. The contemporaneous materials used for training – for example the Evaluation Process Flowchart – clearly show shredding was, at one stage, specifically intended. It does not appear from that Flowchart that this intention was ever

consciously abandoned, at least not so far as the Clarification Notes were concerned. I cannot think of any reason why a body such as the NDA should have contemplated shredding any documents created in this procurement competition. There are a great many good reasons to the contrary, justifying why no such shredding should have been contemplated, but it is perhaps necessary only to identify the most important one, namely the obligation of transparency.

217. One of the explanations given by Mr Rankin {Day9-NC/162} for the NDA's approach to notes was that the disclosure process would be easier if all the notes were kept in one place, namely AWARD, and that was the reason that the NDA forbade the SMEs from keeping paper notes. I do not accept that this was the only, or even the prime, reason. If it had been, there would never have been any need for any training slides to state with such clarity the intention to shred notes, and the email from "Steve and Andrea" would have been worded very differently. I do not accept it is a good reason in any event. The whole approach of the NDA to restricting notes in this way seems to have been designed to minimise the degree of scrutiny to which the SMEs thought processes could be subject, in the event of a challenge. A simple method of ensuring that such notes were retained – for example, by issuing numbered notebooks, and collecting them – would have easily dealt with any difficulties, real or imagined, with potential disclosure.

218. Further, the Head of Competition should have realised that a clear and sensible explanation for any challenged scores in the future by a dissatisfied bidder would have been much more easily provided had proper notes been kept by the SMEs. It is no answer, in my view, for Mr Rankin simply to state that notes could be kept in AWARD. Firstly, unless a particular person wishes to work in that particular way, it is not necessarily easy to keep sensible or comprehensive notes on such a system. The SMEs were given hard copies of the tender responses; they should have been permitted to keep their own hard copy notes had they so wished. Secondly, Mr Rankin was not particularly enthusiastic about the SMEs keeping notes on AWARD either as the passage from his evidence on this point makes clear, quoted above in Section V of this judgment {Day9-NC/171}.

219. I do not find the supplementary reason proposed by Mr Rankin to justify this approach, namely it might have made future administration of the contract with the successful bidder more difficult, even remotely persuasive. Mr Rankin must also have known that important matters – such as the discussions concerning potential failure of threshold requirements by any of the bidders – should have been recorded in some way.

220. There is another reason why the approach to records by the NDA is not coherent. Following the closure of AWARD, there was no method whereby any SMEs who were involved in further consideration or discussion could make any record of this anywhere. I was told in evidence that decisions to change scores that had been "closed" in AWARD were made following oral discussions or telephone calls. Certainly no records of these have been disclosed, which means that the only way such discussions could have taken place would have been oral. This is wholly lacking in transparency.

221. I found Mr Rankin's evidence on this subject highly unsatisfactory. He told me the NDA policy was not to shred anything, yet there are numerous references in

contemporaneous documents (which I have outlined above) that expressly refer to shredding. In one of those, the NDA policy is stated as being wholly to the contrary of what Mr Rankin told me it was. I reject his evidence on this subject as being an attempt to deflect attention away from this. I find the NDA was concerned that too much note taking, or too great availability of notes, or too full a record of the evaluation, would render it more difficult for the NDA to deal with a legal challenge – as Mr Rankin put it "I was very aware that could attract the attention of disappointed bidders". Mr Rankin's approach to SMEs keeping fulsome notes on AWARD was part of this. There was a real reluctance on the part of the NDA to have too full a record by the SMEs of their thought processes of the important evaluation stage. This was highly likely, in my judgment, to have been influenced (if not entirely driven) by the NDA's sensitivity to a potential legal challenge. I do not understand such sensitivity. Indeed, the more comprehensive and robust the record of the SMEs evaluation, the stronger the NDA would have been in terms of any challenge, assuming the evaluation was done correctly. Thus, ironically, in my judgment the NDA's approach to note-taking ran counter to its objective.

222. I find the explanations proffered by Mr Rankin unconvincing, particularly as there is express reference in different places to shredding. I also find the NDA's approach to the keeping – or rather, not keeping – of notes by the SMEs verging on the extraordinary, given the scale of the exercise upon which the SMEs were embarked, and also given the whole procurement exercise is governed by an obligation upon the NDA of transparency; an obligation of which the NDA was obviously wholly aware, and in relation to which it was taking legal advice.

223. The NDA in its Closing Submissions drew attention to the large number of clarification documents that have been disclosed, to demonstrate that shredding did not in fact occur. In my judgment, that rather misses the point, because it is as though the NDA now seek to excuse the approach adopted during SME training by demonstrating that the intention either changed, or was not carried out. In my judgment, the need for transparency in the evaluation was never sufficiently grasped by the NDA. This has led to important matters, such as the lack of any records of most important conversations such as the one between Mr Godley and Mr Rankin concerning the CFP Tender Response to Node 303, being dealt with in a manner that is wholly contrary to the obligation of transparency.

The Burges Salmon Review

224. As well as an associate of Burges Salmon being present at some of the dialogue meetings, there was a step in the evaluation process called "the Burges Salmon Review". The purpose of this was explained as a "legal review". Initially on 4 December 2013 members of that firm undertook a legal review of the requests for clarification that had been raised by the SMEs, the redacted responses and the scores and consensus comments of selected Requirements where consensus had taken place. This review concentrated on the score and comments to "examine whether the comments appeared to be consistent with the score and appeared to have applied the appropriate evaluation methodology for the Requirement as set out in the SORR". They also checked to see if the SMEs had been consistent in their approach to different bidders. Further visits took place on 27-29 January, 5-6 February, 24-25 February, and 3-4 March 2015. On these occasions Burges Salmon undertook what was called "a legal review" of the reports for the

Evaluation Nodes which had recently been through consensus and any new clarification requests and responses. On their first three visits Burges Salmon only carried out legal reviews against those Evaluation Nodes where the consensus award record sheet had been signed off by the SMEs and the relevant Requirement closed. Subsequently Mr Rankin took the decision that Burges Salmon should carry out its legal review before the consensus award record sheets were signed off. He did this because it saved "on the administration involved in closing down and reopening the Requirement in AWARD." This therefore meant that Burges Salmon became intimately involved in the process whereby particular scores were arrived at. By the time the evaluation process was completed, the Burges Salmon team had carried out a legal review of the scores and consensus comments for all the Evaluation Nodes (with the exception of the Overall Costs Summary Evaluation Node which had not been evaluated by then) at least once, and in some cases more than once.

225. Energy Solutions made a disclosure application in these proceedings on 7 August 2015. This sought three categories of documents and answers to two requests for Further Information. The documents were:

i) Correspondence between the Defendant and its solicitors, Burges Salmon, in relation to the review carried out by Burges Salmon between 4 December 2013 and 5 March 2014 of the scores and consensus comments (the "Burges Salmon Legal Review");

ii) Any materials produced by Burges Salmon in the course of the Burges Salmon Legal Review;

iii) Any records or correspondence relating to the actions taken by the Defendant itself or any of its evaluators as a result of the Burges Salmon Legal Review.

That application was opposed by the NDA. A claim of legal professional privilege was made by the NDA in respect of categories (i) and (ii), and such documents within category (iii) that involved communications to and from Burges Salmon. A witness statement was provided by the NDA from Clare Poulter, the Head of Procurement at the NDA for the application. This stated that the role of Burges Salmon had been to identify whether the evaluation methodology had been properly and consistently applied, and this involved providing legal advice and the application of legal expertise. This involvement by Burges Salmon was initially intended to be by way of "sample checks" but was reconsidered after the evaluation process had been commenced. This was because a legal challenge from a bidder was considered to be "the top risk" to the competition and because "greater legal input" was required into the process.

226. The arguments on behalf of the NDA found favour with Akenhead J and he dismissed the disclosure application on 14 August 2015 {F/31/1}. He did however order a witness statement be provided from the partner at Burges Salmon with conduct of the case, confirming that all documents for which privilege had been claimed had been examined by that partner and were properly subject to such privilege. This was done by Michael Barlow (in his third witness statement) the partner at Burges Salmon with overall conduct of the litigation for the NDA.

Although that witness statement is in terse terms, Energy Solutions did not reapply to the court as permitted by paragraph 3 of the Order of Akenhead J and there the matter was allowed to rest.

227. The claim of privilege was maintained at the trial by Mr Giffin QC for the NDA. I am not asked to consider the matter further and in any case could not do so. Any appeal from the Order of Akenhead J would lie to the Court of Appeal, and Energy Solutions made no application for permission to bring such an appeal.

228. There are two different principles in this situation, which ought to be identified. On the one hand there is a legal obligation upon the NDA, throughout the competition generally and during the evaluation in particular, to act transparently. The document "Parent Body Organisation Competition Programme Governance Arrangements PBOC – 019" {W/91/1} made clear that the "Good Governance Standard for Public Services" applied to this competition. This standard is stated in that document as being based on Nolan principles. These principles are taken from the publication on 31 May 1995 by the Committee on Standards in Public Life of "The 7 Principles of Public Life" chaired by Lord Nolan. Those principles numbered 4 and 5 are stated to be as follows:

> **"4. Accountability**
>
> Holders of public office are accountable to the public for their decisions and actions and must submit themselves to the scrutiny necessary to ensure this.
>
> **5. Openness**
>
> Holders of public office should act and take decisions in an open and transparent manner. Information should not be withheld from the public unless there are clear and lawful reasons for so doing."

229. These principles were summarised in the Competition Programme Governance Arrangements document at paragraph 2 as "taking informed, transparent decisions and managing risk." The actual term "risk" does not appear in the Nolan principles, but "taking informed, transparent decisions" is a distillation of the principles of Accountability and Openness.

230. On the other hand, there is also the fundamental principle that is well-established and long-standing, namely the law of legal professional privilege. This is conveniently referred to as being potentially of two types, namely legal advice privilege, and litigation privilege. However, the ethos that underpins this is equally applicable to both limbs, namely that any person is entitled to consult their lawyer in confidence. Where such privilege exists (and is not waived or abrogated) it is paramount and absolute.

> "Legal professional privilege is thus much more than an ordinary rule of evidence, limited in its application to the facts of a particular case. It is a fundamental condition on which the administration of justice as a whole rests….."

per Lord Taylor CJ in ***R v Derby Magistrates Court ex p. B*** [1996] AC 487.

231. It is therefore not the case that the obligation of transparency, and the principle of legal professional privilege, conflict. Rather it is that the two principles have to be considered consistently with each other. In my judgment, compliance by the NDA with its obligations of transparency has to be considered consistently with the fundamental right the NDA has to keep the contents of the Burges Salmon Review privileged, such that neither Energy Solutions nor the court are entitled to consider its contents.

232. The NDA could, had it wished, have waived privilege in that review and the other documents, but chose not to do so, as Akenhead J found was its fundamental right. The fact that the NDA did not do so does not fall to be weighed by the court at all. Accordingly, no adverse inferences can be drawn from the absence of any detail of that review, and to be entirely fair to Energy Solutions, the court is not invited to do so.

233. However, this does mean that, in some instances, there is an omission in the chain of decision making that led to the RSS tender being given the particular score it was finally awarded. Mr Grey, and to a lesser extent Dr Clark, would sometimes retreat, by way of explanation for changed scores, behind the Burges Salmon Review. It was not possible for Energy Solutions to test whether that was correct or not, in the absence of material that may, or may not, have justified that approach. Transparent reasoning was therefore not always provided by the NDA for why a particular requirement merited a particular score.

234. Further, the court is entitled to draw adverse inferences from the absence of some individuals who could be expected to provide evidence on some of the scoring, and in relation to whom there was no explanation given as to why they were *not* being called. It is not relevant to speculate whether the NDA has made its task of defending these claims more or less difficult by its approach. For the avoidance of doubt, I am not asked by Energy Solutions to consider whether that assertion of privilege amounts to a breach of the NDA's obligation of transparency. The court can only consider the material before it when weighing the claims by Energy Solutions of manifest errors in valuation. However, the absence of reasoning for any particular score (particularly where that score was changed from a far higher one without explanation) cannot help the organisation that gave that particular score, namely the NDA. In this sense, the reliance on legal privilege by the NDA will not necessarily assist it in its defence to the claims brought by Energy Solutions.

IX The Regulations and the Legal Principles

235. Unsuccessful tenderers for public procurement exercises governed by the Regulations are not entitled to have the evaluation of their tenders wholly re-assessed by the courts simply because they are unhappy with the result. Quite apart from the logistical burden that this would impose upon the courts generally, such a process would inevitably mean that a large number of unsuccessful tenderers would simply use the court process as providing a second opportunity potentially to win the competition. The function of the courts is a supervisory one. As Silber J stated in ***Letting International Ltd v Newham London BC*** [2008] LCR 908 at [115] {AB/41/36}:

> "…it is not my task merely to embark upon a remarking exercise and to substitute my own view but to ascertain if there is a manifest error, which is not established merely because on mature reflection a different mark might have been awarded….."

236. This is recognised and accepted by Energy Solutions. The consideration and application of "manifest error" is dealt with further below, but the exercise undertaken in this judgment is not a remarking exercise. Agreed Issue 1 effectively recites that the test is one of manifest error. Absent a finding of manifest error or other unlawfulness as set out in Agreed Issue 1(a) on any of the Requirements, consideration of Agreed Issue 1(b) simply does not arise. There are separate considerations in respect of what were called "Threshold Issues". This term refers to elements of the Tender Submissions that had to reach a certain standard – either Threshold, or a Pass – and a failure to meet this standard would potentially have the result that the tenderer in question faced disqualification. Section IX – C "CFP Threshold Issues" deals with these, and Section C1 considers the legal principles relevant to disqualification. This section of the judgment deals with the evaluation generally.

237. This procurement was governed by the Public Contracts Regulations 2006 (as amended) ("the Regulations"). These Regulations were repealed by the Public Contracts Regulations 2015, but this repeal does not, as a result of Regulation 118 of the 2015 Regulations, have an effect upon contract award procedures that were begun before 26 February 2015. The Regulations give effect to two EU Directives: Directive 2004/18/EC of the European Parliament and the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts ("the Public Sector Directive") {AB/2/1}; and Council Directive 89/665/EEC on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts (as amended) ("the Remedies Directive") {AB/1/1}. There was some limited debate before me about the ultimate purpose of the Regulations, and whether, as the NDA submitted, their raison d'être was solely (or predominantly) to protect or enable cross-border competition. Professor Arrowsmith, who is a respected academic author in ***The Law of Public and Utilities Procurement: Regulation in the EU and UK*** *(Sweet & Maxwell 3rd edition 2014)* at paragraphs 3.16 to 3.20 expresses the view that the purpose of the Regulations is not to achieve acceptance of the best tender, in order to achieve value for money: the main purpose is promoting the internal or single

market. There was in some of the earlier cases prior to these Regulations, such as ***Harmon CFEM Facades (UK) Ltd v Corporate Officer of the House of Commons*** (1999) 67 Con LR 1 {AB/32/1}, consideration of matters such as a "Buy British" policy and its unlawfulness under both European and domestic law. In more recent cases of high authority, this purpose has been emphasised; thus in ***Risk Management Partners v Brent LBC*** [2011] 2 AC 34 [2011] UKSC 63 {AB/48/1} Lord Rodgers considered the purpose of Directive 2004/18/EC. He stated in paragraph [67] that "the starting point" was the free movement of services and the opening-up to undistorted competition in all the member states. In paragraph [92] he stated that the Regulations were "the way in which English law secures the free movement of services and the opening-up to undistorted competition in relation to contracts which are to be placed by English local authorities". His speech, and that of Lord Hope in that case, have been explained in ***United States of America v Nolan*** [2015] UKSC 63 {AB/73/1}, itself not a procurement case but that is not relevant.

238. However, regardless of the findings in those cases, and I am bound by the Supreme Court ones (but not by ***Harmon***, although it is persuasive), in my judgment the ultimate purpose of the Regulations in question does not for present purposes matter. Fairness of competition and transparency are important elements of domestic law, and the fact that their genesis may have been originally to enable a level playing field between economic operators from different jurisdictions within Europe does not matter. It is agreed by the parties that it is the 2006 Regulations that apply to this procurement.

239. The NDA is a statutory corporation established by section 1 of the Energy Act 2004. It was established to meet decommissioning needs in the nuclear industry in the general interest, and it is financed by the Secretary of State. At the risk of stating the obvious, the nuclear industry is a heavily regulated one and the NDA's sites are closely regulated by the Office for Nuclear Regulation ("ONR"), the Environment Agency, the Department of Transport and, depending upon their location, the Scottish Environmental Protection Agency and Natural Resources Wales. The NDA does not perform the actual decommissioning and clean-up activities of nuclear facilities itself. This is done by the SLCs on its behalf. Private sector contractors act as PBOs for the SLCs and these private sector contractors are selected following procurement exercises. Each nuclear site has what is called a life time plan or LTP which sets out the NDA's strategy for that site, and this will include milestones along the time line of decommissioning from their current state to their end state. This is the end result of the decommissioning, and an important milestone along the path to the end state is when the site has reached something which is called the Interim State. There are site-specific variations to that because at Winfrith there is something called an Interim End State (or "IES"). This is where further risk reduction is achieved by means of monitored radioactive decay rather than physical restoration work.

240. The NDA is, under Regulation 3(1)(w), a "contracting authority" for the purposes of the Regulations. It adopted the "competitive dialogue" procedure for this procurement for the award of what is called a Part A Services Contract (OJEU notice at {L/2/1}). The competitive dialogue procedure was introduced by the Public Sector Directive because contracting authorities, on particularly complex

projects, may have found it objectively impossible to define the means of satisfying their needs (or assessing what the market could offer to that authority by way of technical solutions). Such definition would be required or necessary if an authority were to use the open or restricted procedure. The competitive dialogue procedure is more flexible, and allows the authority to discuss the aspects of the contract with the tenderers, whilst still preserving competition between economic operators. This is made clear in the recitals to the Public Sector Directive ("the Directive"), namely Recital 31 {AB/2/5}. That recital expressly states:

> "However, this procedure must not be used in such a way as to restrict or distort competition..."

241. The use of the competitive dialogue procedure does not therefore remove the application of the Regulations. It does however add an extra stage of factual background into the procurement, because the tenderers engaged in a period of dialogue with the NDA prior to finalising their bids. Drafts of the bids were submitted by the tenderers to the NDA for comment during this period; these were called "interim drops". The NDA had run other procurement processes before the one the subject of these proceedings, most recently before this, one for the facilities at Dounreay. Dounreay is the UK's former centre of fast reactor research, and many of the personnel involved in this competition (both at the NDA, and Energy Solutions) had been involved in that competition previously. Energy Solutions had been unsuccessful in its attempt to obtain the contract to become the PBO for Dounreay. It had sought to do so in conjunction with AMEC Nuclear Holdings Ltd ("AMEC"), those two companies forming a consortium called Caithness Solutions. Some members of the Energy Solutions team involved in this procurement, who had been similarly involved in the Dounreay competition, explained in their evidence that the lessons that had been learned on the Dounreay competition were taken into account in the approach that Energy Solutions adopted for this procurement. Similarly, NDA personnel involved in both competitions undoubtedly drew on their previous procurement experience in the Dounreay competition.

242. Regulation 4(3) applied to this procurement exercise and is a succinct statement of the overriding obligations upon the NDA. It states as follows:

> "A contracting authority shall (in accordance with Article 2 of the Public Sector Directive)—
>
> *treat economic operators equally and in a non-discriminatory way; and*
>
> *act in a transparent way.*"

243. These are fundamental principles which underpin the whole of the law governing procurement. Material failures by an authority in a procurement competition to comply with these obligations will lead to the competition in question being unlawful.

244. Regulation 18 includes more detailed provisions, and states inter alia that:

"(16) The contracting authority shall send invitations in writing simultaneously to each economic operator selected to participate in the dialogue and the invitation shall ….be accompanied by the contract documents[3] [or specify how they may be obtained].

(18) The contracting authority shall include the following information in the invitation—

(a) the date specified for the commencement of the competitive dialogue, the address to which replies must be sent and the one or more languages in which they must be drawn up;

(b) a reference to the contract notice published in accordance with paragraph (4);

(c) …;and

(d) the relative weighting of criteria for the award of the contract or, where appropriate, the descending order of importance for such criteria, if this information was not specified in the contract notice published in accordance with paragraph (4).

(19) The contracting authority...shall supply such further information to the economic operator relating to the contract documents or the descriptive document as may reasonably be requested by that economic operator provided that the request for such information is received in sufficient time to enable the contracting authority to supply it not less than 6 days before the date specified in the invitation to tender as the final date of the receipt by it of tenders.

(20) The contracting authority shall open with the participants.... a dialogue the aim of which shall be to identify and define the means best suited to satisfying its needs.

(21) During the competitive dialogue procedure, a contracting authority—

(a) may discuss all aspects of the contract with the participants selected;

(b) shall ensure equality of treatment among all participants and in particular, shall not provide information in a discriminatory manner which may give some participants an advantage over others; and

[3] Defined by Regulation 2(1).

> *(c)* shall not reveal to the other participants solutions proposed or any confidential information communicated by a participant without that participant's agreement.
>
> (24) The contracting authority may continue the competitive dialogue procedure until it can identify one or more solutions, if necessary after comparing them, capable of meeting its needs.
>
> (25) Where the contracting authority declares that the dialogue is concluded, it shall—
>
> *(a)* inform each participant that the dialogue is concluded;
>
> *(b)* request each participant to submit a final tender containing all the elements required and necessary for the performance of the project on the basis of any solution presented and specified during the dialogue; and
>
> *(c)* specify in the invitation to submit a tender the final date for the receipt by it of tenders, the address to which they must be sent and the language or languages in which they must be drawn up.
>
> (26) The contracting authority may request a participant to clarify, specify or fine-tune a tender referred to in paragraph (25)(b), but such clarification, specification, fine-tuning or additional information shall not involve changes to the basic features of the tender or the call for tender when those variations are likely to distort competition or have a discriminatory effect."

245. Regulation 18(26) and its application to the facts of this case will be considered in greater detail below in relation to Bidder Clarification Requests or BCRs, as one of the allegations of breach made by Energy Solutions relates to what is said to be the different way in which clarification was sought by the NDA of the RSS tender on the one hand, and that of CFP on the other. There is also a separate issue or issues relating to whether information provided by CFP, when asked for clarification by NDA, in fact went further than clarification, specification or fine-tuning (which is permitted under the Regulations) and constituted the provision of extra information (which is not). Clarification that was provided by the different tenderers, was provided to the SMEs evaluating the tenders and was taken into account by them when considering the correct score for the relevant requirement in question.

246. Regulation 30 governed the award of the PBA. It provides *inter alia* that:

> "(1)....a contracting authority shall award a public contract on the basis of the offer which—
>
> (a) is the most economically advantageous from the point of view of the contracting authority;...

> (2) A contracting authority shall use criteria linked to the subject matter of the contract to determine that an offer is the most economically advantageous including quality, price, technical merit, aesthetic and functional characteristics, environmental characteristics, running costs, cost effectiveness, after sales service, technical assistance, delivery date and delivery period and period of completion.
>
> (3) Where a contracting authority intends to award a public contract on the basis of the offer which is the most economically advantageous it shall state the weighting which it gives to each of the criteria chosen in the contract notice or in the contract documents or, in the case of a competitive dialogue procedure, in the descriptive document.
>
> (4) When stating the weightings referred to in paragraph (3), a contracting authority may give the weightings a range and specify a minimum and maximum weighting where it considers it appropriate in view of the subject matter of the contract.
>
> (5) Where, in the opinion of the contracting authority, it is not possible to provide weightings for the criteria referred to in paragraph (3) on objective grounds, the contracting authority shall indicate the criteria in descending order of importance in the contract notice or contract documents or, in the case of a competitive dialogue procedure, in the descriptive document."

247. Given the subject matter of this procurement, the competitive dialogue procedure was doubtless the most suitable – if not the only suitable – way to proceed and meant that in a highly technical area the NDA was able to develop and identify the solution in dialogue with the different bidders. However, the NDA's needs and requirements still had to be defined in a contract notice and/or a descriptive document and the NDA was still required to "continue such dialogue until it can identify the solution or solutions...which are capable of meeting its needs". This is made clear in articles 29.2 and 29.5 of the Directive {AB/2/22}. Once the dialogue was concluded, the different bidders submitted their final tenders. The most economically advantageous tender (or MEAT) was to be chosen. Deciding which bid was the most economically advantageous was done in this procurement by marking each bid against the scoring criteria. The financial elements of the different bids were assessed by the commercial teams and the technical elements were assessed by the technical teams. Care was taken by the NDA to ensure that the commercial aspects of the bids were not communicated to the technical SMEs so that the different solutions that were being considered and marked on their technical merit would not be affected by the financial consequences of those solutions.

248. The NDA had to advertise its intention to seek offers to participate in the OJEU specifying its needs and requirements in the contract notice and defining them in that notice or/or other descriptive document. It was then required to select the economic operators to be invited to participate in the dialogue in accordance with various requirements. These are set out in Regulation 18.

249. Bidders were required to develop proposals for delivery of the NDA's requirements by taking the 12 sites the subject of the competition to defined states. The OJEU Notice {L/2/2} stated that bidders' proposals "must ensure continued safe, secure and environmentally responsible operations, and must also strike an optimum balance between total cost, hazard reduction, impact on the dates to meet the defined states, maintenance of mission-critical skills and socio-economic compliance".

250. Bechtel and ES formed a "consortium" (within the meaning of regulation 28(1)) for the purpose of the procurement, known as Reactor Site Solutions or RSS, and RSS was invited by the NDA to participate in the dialogue. There is an issue between the parties about the degree to which the NDA was required, when evaluating the RSS tender, to be consistent (or at least not inconsistent) with the dialogue provided to Energy Solutions during this stage. I have dealt with that above.

251. The dialogue phase opened on 11 January 2013 and lasted until October 2013. The final dialogue meeting was held on 19 September 2013, with a subsequent telephone dialogue meeting on 26 September 2013. At the end of this dialogue stage, on 2 October 2013 the NDA issued an Invitation to Submit Final Tenders ("ITSFT") {P/2/1} to four different consortia. They were CFP (the ultimately successful bidder); RSS (which included Energy Solutions); CAS Restoration Partnership; and UK Nuclear Restoration Ltd. The final tender submitted by RSS ("the RSS Tender Response") was submitted on 1 November 2013. The relatively short timescale from the ITSFT to the RSS Tender Response is explained by the nine months of dialogue that preceded it.

252. The ITSFT contained at section 5 the Evaluation Rationale. These were set out and described at different levels. Section 5.1(a) of the ITSFT stated that there was to be an initial assessment after which "non-compliant bids will be rejected", and after that a detailed evaluation exercise would be conducted with the Tender Responses evaluated against the criteria and weightings set out in Appendix 7 (the Evaluation Framework), and in further detail in Appendix 11 (Statement of Response Requirement) and Appendix 14 (Commercial (Contract Terms) Evaluation). Section 5(3)(a) of the ITSFT indicated that the Tender Responses would be assessed "on the basis of the Most Economically Advantageous Tender (Level 1)". Section 5(3)(b) stated that weighting had been applied to what were termed Level 2 criteria, and Appendix 7 illustrated the criteria and sub-criteria to Level 3. The weighting to the Level 2 criteria was in section 5(3)(c) and was in the following percentages:

Cost – 64% (split into Target Cost, and Cost and Programme Underpinning);

Commercial – 10%;

Key Enablers – 10% (this was made up of 7 "threshold only Evaluation Nodes" and 4 "threshold/ranking Evaluation Nodes"); and

Technical Scope and Methodology Underpinning – 16%.

253. In the same section, namely Section 5(3)(c)(iii), under Key Enablers, the following was stated, in relation to the "4 threshold/ranking Evaluation Nodes":

> "The threshold/ranking Evaluation Nodes have been selected due to their importance to the Authority, based on experience across the Authority estate. These Nodes are:"
>
> Nominated Staff (4%);
>
> PBO Governance (2%);
>
> Supply Chain Management (2%);
>
> Portfolio, Programme and Project Management (2%)."

This therefore showed how the 10% under Key Enablers would be split across these four Evaluation Nodes. Of the seven "threshold only" nodes, the bidders would have to pass the threshold but would not receive any score. These were also described in Appendix 11 as "Pure Threshold". The threshold/ranking nodes would have to be passed, but also each bidder would receive a score as well.

254. Of the appendices to the ITSFT, Appendix 11, which contained the Statement of Response Requirements (or "SORR") is the one which was concentrated upon in the trial {J/10/1}. Within each Evaluation Node for Key Enablers and Technical Scope, the bidders were required to respond to a number of detailed requirements. These were set out in Section 5 of the SORR for each Evaluation Node and were separately numbered. As an example of nomenclature, Requirement 5.1(a) of Evaluation Node 405 is referred to as Evaluation Node 405.5.1(a). Depending upon how many of the detailed Requirements were addressed in the response to that section or Requirement, the bidders would receive a score. The score varied but would typically be either 1, 3 or 5. 3 was defined as "Fair", and 5 as "Excellent". 1 was defined as "Unacceptable". Appendix 2 contained Tables which contained what was called the Scoring Matrix. This set out the criteria for different scores. The criteria were clearly supposed to be applied fairly and objectively to the different bidders' Tender Submissions to arrive at the correct scores for the different Requirements. These scores, with the necessary adjustment for weighting, would then provide a percentage total so that the most economically advantageous tender could be identified.

255. The principles of equal treatment, non-discrimination and transparency require a contracting authority that has adopted a decision-making procedure for assessing bids to comply with it once it has begun to do so. A different way of expressing the same principle is to state that a contracting authority that has set rules for that procedure must follow them, applying those rules in the same way to the different bidders. Changing the decision-making procedure during the process of assessment risks arbitrariness and favouritism, a risk that it is the purpose of such requirements to avoid. In ***C-226/09 Commission v Ireland [2010] ECR I-11807*** the weighting was altered after tenders had been submitted and after an initial review of those tenders had been performed. This was held to be conduct that was not consistent with the principle of equal treatment and the obligation of transparency.

256. A principle of proportionality also applies, a failure to comply with which will constitute a manifest error. Thus there is a power under regulation 18(26), and in some circumstances there may be an obligation given the principle of proportionality, upon a contracting authority to seek clarification of a bid. But unless an authority in this position treats tenderers equally and fairly, it will not satisfy the requirements for equal treatment and non-discrimination. Because the authority must treat tenderers equally and fairly, any request for clarification should not appear to have unduly favoured or disadvantaged the tenderer to whom it is addressed: ***C-336/12 Ministeriet for Forskning v Manova A/S*** [2014] PTSR 254 (2013) Oct 10th at [25]-[40] {AB/27/5-6}; ***William Clinton trading as Oriel Training Services v Department for Employment and Learning*** [2012] NICA 48 at [23]-[27] {AB/55/7-10}. In the present case, such unfairness is directly alleged by Energy Solutions in respect of the clarification process adopted using BCRs.

257. Regulation 32 provides that:

> "(1) Subject to paragraph (13), a contracting authority shall, as soon as possible after the decision has been made, inform the tenderers and candidates of its decision to—
>
> (a) award the contract;
>
> and shall do so by notice in writing by the most rapid means of communication practicable.
>
> (2) Where it is to be sent to a tenderer, the notice referred to in paragraph (1) shall include—
>
> (a) the criteria for the award of the contract;
>
> (b) the reasons for the decision, including the characteristics and relative advantages of the successful tender, the score (if any) obtained by—
>
> (i) the economic operator which is to receive the notice; and
>
> (ii) the economic operator—
>
> (aa) to be awarded the contract; or
>
> (bb) to become a party to the framework agreement,
>
> and anything required by paragraph (10);
>
> (c) the name of the economic operator—
>
> (i) to be awarded the contract;....
>
> (9) Except to the extent that the contracting authority has already informed the economic operator (whether by notice

> under paragraph (1) or otherwise), and subject to paragraph (13), a contracting authority shall within 15 days of the date on which it receives a request in writing from any economic operator which was unsuccessful (whether in accordance with regulation...18(10), 18(11), 18(22), [or] 18(23)...) —
>
> (a) inform that economic operator of the reasons why it was unsuccessful; and
>
> (b) if the economic operator submitted an admissible tender, the contracting authority shall inform that economic operator of the characteristics and relative advantages of the successful tender and—
>
> (i) the name of the economic operator to be awarded the contract...
>
> (13) A contracting authority may withhold any information to be provided in accordance with paragraph (1), [...] 12 (9) or (11) where the disclosure of such information—
>
> (a) would impede law enforcement;
>
> (b) would otherwise be contrary to the public interest;
>
> (c) would prejudice the legitimate commercial interests of any economic operator; or
>
> (d) might prejudice fair competition between economic operators."

258. The NDA informed RSS in a letter dated 31 March 2014 {U/1/1} that it had been unsuccessful. It included some information concerning the RSS Tender Response and that of the successful tenderer, CFP, together with the respective scores (85.42% for RSS compared with 86.48% to CFP). There was to be a standstill period, and after the elapse of this period the NDA intended to enter into the Transition Agreement with CFP on 15 April 2014, which was just over two weeks later. RSS sent a letter dated 6 April 2014 {U/9/1} from Mr Mark England and Mr Gary Taylor, both "Capture Managers", and addressed to Mr Rankin, the Head of Competition at the NDA, seeking the answers to certain questions arising from the notification to RSS of its lack of overall success in the competition. This letter asserted that the RSS Tender Response had been underscored by at least 6.02%, and highlighting some key points. Questions and requests for information were raised in 11 Appendices. RSS also sent a letter dated 10 April 2014 {U/20/1}. The NDA was asked by RSS to extend the standstill period.

259. The subject of the NDA's reasons provided to Energy Solutions is a contentious area. The NDA provided some reasons by its letter dated 31 March 2014 and certain spreadsheets that were said to be "a statement of the reasoning for [RSS's and CFP's] scores" (although some cells in the spreadsheets had been redacted). The NDA also provided a letter dated 11 April 2014 {U/23/1-2} which Energy

Solutions refers to as the "Supplementary Reasons Letter". This letter also has numerous appendices; very few of the NDA witnesses were prepared to admit to having had very much to do with the drafting of these appendices. In the letter of 11 April 2014 the NDA refuted the suggestion that the RSS Tender Response had been incorrectly scored. The NDA stated that RSS had identified what were, in reality, differences of opinion between its own experts in the bid teams and the NDA's SMEs. One particular point that is worthy of individual comment at this stage is that RSS asked questions of the NDA that effectively stated that the way CFP's Tender Response had been scored in certain respects had led to CFP avoiding a situation where it failed threshold requirements. Had it done so, the NDA would have had to exclude CFP from the competition. The NDA interpreted the questions from RSS in that way and replied as follows {U/23/1}. Evaluation Node 410 concerned Sample Project 1 at Chapelcross:

> "2.2 You have also asked a series of three questions which to us drive towards the suggestion that the scores for Evaluation Node 410 were deliberately 'moderated' to ensure that the tender response from CFP was not excluded from the competition. There is no foundation for such a suggestion".

260. Within what is called the standstill period (whether the initial period, or as extended) the NDA could not contract with the winning bidder CFP. The NDA refused to extend the standstill period to 23 April 2014 as requested by RSS. The NDA stated "we do not believe that any extension can be justified" and also stated that any delay would cause "very significant cost" to be suffered by the NDA.

261. There is no agreed nomenclature between the parties for the NDA letter of 11 April 2014 {U/23/1}; the NDA refer to it as "the Response to the Pre-Action Letter". The reason for this dispute about the title that should be applied to the letter (which might be thought otherwise to be an irrelevant squabble) is an important difference between the parties about which of the reasons given by the NDA the court is entitled to consider, when deciding the question of unlawfulness, and at what stage the court does so. In some instances Energy Solutions maintains that the NDA has changed its reasons for having given the RSS Tender Response particular scores. The NDA does not seem, on the face of it, to accept this, but if it has changed the reasons upon which it relies it might be thought not to be a promising start to defend its own scoring of the RSS Tender Response which is under attack in the Energy Solutions claim. Energy Solutions submits that it is only the reasons in the two letters that I may consider, as a matter of law, when deciding the question of unlawfulness. If I decide that the decisions made by NDA were unlawful, then I would come to consider other reasons given (either in the pleadings including the Further Information, or the evidence) as part of causation. In opening, the NDA submitted that I should take all the reasons into account when considering unlawfulness; by closing submissions, that position had modified a little but the NDA did not formally agree that the analysis submitted by Energy Solutions was correct. Agreed Issue 2 sets out the different approach of the parties. I deal with this subject under the heading "Reasons given by the NDA" below.

262. Part 9 of the Regulations governs applications to the court. Regulation 47A provides *inter alia* that:

> "(1) This regulation applies to the obligation on—
>
> (a) a contracting authority to comply with—
>
> (i) the provisions of these Regulations...; and
>
> (ii) any enforceable EU obligation in respect of a contract..
>
> (2) That obligation is a duty owed to an economic operator."

263. Regulation 47C states *inter alia* that:

> "(1) A breach of the duty owed in accordance with regulation 47A...is actionable by any economic operator which, in consequence, suffers, or risks suffering, loss or damage.
>
> (2) Proceedings for that purpose must be started in the High Court, and regulations 47D to 47P apply to such proceedings."

264. Regulation 47J states that:

> "(1) Paragraph (2) applies if—
>
> (a) the Court is satisfied that a decision or action taken by a contracting authority was in breach of the duty owed in accordance with regulation 47A..; and
>
> (b) the contract has already been entered into.
>
> (2) In those circumstances, the Court—
>
> ...
>
> (c) may award damages to an economic operator which has suffered loss or damage as a consequence of the breach...;
>
> (d) must not order any other remedies."

265. Where the economic operator is a consortium, references to an economic operator in the 2006 Regulations includes a reference to each person who is a member of that consortium. The CJEU has held that, while it would be compatible with the Remedies Directive to exclude an individual member of a consortium from bringing a claim alone to set aside or annul a contracting authority's decision, it would be incompatible with that Directive to exclude such an individual member (such as Energy Solutions in this case) from bringing a claim for damages alone: see ***C-145/08 Club Hotel Loutraki AE v Ethniko Simvoulio Radiotileorassis*** [2010] 3 CMLR 33 {AB/19/1} per AG Sharpston at [AG95, 111-118, 121, 124], and the Court at [72], [79]-[80]. In this case, the NDA refused to extend the standstill period within which, if proceedings are issued, the authority would be prevented by the automatic suspension from entering into the contract with the

successful tenderer CFP. Indeed, the fact that Energy Solutions issued proceedings outside that period was one of the areas of consideration under the first of the preliminary issues that was decided on appeal to the Court of Appeal from Edwards-Stuart J. The NDA had argued that this was a break in the chain of causation. This point will now be considered by the Supreme Court. This is a claim for damages by Energy Solutions alone, without the involvement of Bechtel, and this is permitted as to prevent a member of a consortium from being able to do so individually would be incompatible with the Directive.

266. The Court of Appeal found in relation to earlier regulations which transposed article 2.1 of the original Remedies Directive (which was in identical terms to article 2.1 of the Remedies Directive as amended) in virtually identical terms, "the action for damages provided by the Regulations was in its domestic characterisation, one for breach of statutory duty", "a claim in private law": ***Matra Communications SAS v Home Office*** [1999] 1 WLR 1646 {AB/34/1} per Buxton LJ at p1659f, 1660d. Buxton LJ (with whom the other members of the court agreed) further stated (at p1655c-d and f-g) that:

> "Once the obligation of the member state to provide that remedy in damages has been discharged by the United Kingdom by the terms of regulation 32(5)(b)(ii) those damages provided by domestic law remain damages on the basis envisaged by Directive (89/665/E.E.C.); but regulation 32(5)(b)(ii) none the less thereby creates a private law, non-discretionary, remedy, because within the national legal order any remedy in damages necessarily has those qualities."

267. In the judgment by the Court of Appeal on the preliminary issues appeal, Vos LJ stated at paragraph [45] {F/39/13}:

> "Conversely, however, part at least of Buxton LJ's dictum as to the status of the claim under the Regulations does seem to me to form part of the essential reasoning leading to the decision. The Regulations provide for a cause of action for breaches of the provisions of parts 1-8 of the Regulations, which must be regarded in these courts as an action for breach of statutory duty. It was because the claim was an action for breach of statutory duty that it had to be compared, in order to give effect to the EU law principle of equivalence, to other such duties. In any event, I have no doubt that Buxton LJ was right to hold that the claim under the Regulations was indeed a private law claim for breach of statutory duty."

268. The nature of the claim brought by Energy Solutions is therefore one for breach of statutory duty seeking damages.

The approach of the NDA

269. The NDA knew that there was a risk that such a large and valuable procurement would be challenged by an unsuccessful bidder. The NDA, upon advice, took certain anticipatory steps for the procurement in terms of training the SMEs and

preparation for the evaluation. The detail of this has been set out above, but in my judgment the procedure that the NDA adopted involved certain conscious decisions (which I find curious) in terms of record keeping that must have made evaluation far more difficult for the SMEs than would otherwise be the case. The motivation, it appears to me, seems to have been as much to make the NDA immune from challenge, as it was to ensure that there would be no grounds for challenge in the first place. Serious consideration seems to have been given to restricting the keeping of contemporaneous records of evaluation, because it was known these would be disclosable in any litigation. Of course, had the evaluation process been performed in accordance with the NDA's obligations under the Regulations, disclosure of the records of that process would present no danger to the NDA (assuming the evaluation was done without manifest error) because they would constitute what was described as an "audit trail" of the NDA's collective decision-making.

270. I have also dealt above deal with the proposed destruction of notes. Regardless of the findings that I make in this case regarding the specific challenges to the evaluation, I find it extremely worrying that any public authority or its advisers on any procurement, could contemplate any policy that would involve the routine destruction of such important documents. Public authorities have express obligations of transparency under the Regulations. It is difficult to see how the proposed or intended destruction of contemporaneous documents could ever be consistent with those obligations.

271. The NDA in its closing submissions urged me to take account of the fact that the evaluators:

> "…carried a heavy burden here, and some may have found this sort of role a challenging one. That is a good reason to take a realistic view of what standards of, for example, expression of reasons are to be looked for."

The NDA also submitted that the evaluators were doing their:

> "…level best, and it is also apparent that [the] NDA did seek to give them as much support as it could".

I do not consider that the correct test is to be diluted because some of the evaluators found their task difficult, or because some evaluators (predominantly, in terms of those who came to give evidence, Mr Grey) were given an excessive and extraordinarily heavy workload by the NDA. The NDA chose to use its own employees, as it was entitled to do, and it is entirely a matter for the NDA how it manages and deploys its own employees. The scope of the obligations upon the NDA is no wider, or narrower, as a result of that.

272. This approach by the NDA to what could be described as the subjective intention of the evaluators can also be seen in its plea that so much of what it did cannot be subject to the supervisory oversight of the court. The passages in the Defence in many places state that:

> "An evaluative judgment of this sort is not capable of constituting a manifest error."

This demonstrates that the crux of the NDA's case in a great many cases is simply that the type of evaluation that was undertaken, which involved an evaluative judgement, could not be capable of, nor contain a, manifest error.

273. The NDA, as with any contracting authority, is required to comply with its duties of transparency and equal treatment, and to perform its evaluation of the different tenders without manifest error. Coulson J set out a succinct statement of the principles in ***Woods Building Services v Milton Keynes Council*** [2015] EWHC 2011 (TCC) {AB/65/1} in the following terms:

> *"**2.1 Transparency***
>
> 5. In this case, the duty of transparency focused on the award criteria. It is trite law that "the award criteria must be formulated, in the contract documents or the contract notice, in such a way as to allow all reasonably well-informed and diligent tenderers to interpret them in the same way": see **SIAC Construction Ltd v County Council of the County of Mayo** [2001] ECR1-7725, at paragraph 41.
>
> 6. The award criteria must be drawn up "in a clear, precise and unequivocal manner in the notice or contract documents so that first, all reasonably informed tenderers exercising care can understand their exact significance and interpret them in the same way and, secondly, the contracting authority is able to ascertain whether the tenders submitted satisfy that criteria applying to the relevant contract": see **Commission v The Netherlands** [2013] All ER (EC) 804 at paragraph 109.
>
> 7. The true meaning and effect of the published award criteria is a matter of law for the court: see **Clinton (t/a Oriel Training Services) v Department of Employment and Learning and Another** [2012] NICA 48 at paragraph 33. A failure to comply with the criteria is a breach of the duty of transparency: see **Easycoach Ltd v Department for Regional Development** [2012] NIQB10.
>
> 8. Unlike other allegations commonly made during procurement disputes, such as whether or not a manifest error has been made in the evaluation, a breach of the transparency obligation does not allow for any "margin of appreciation": see paragraph 36 of the judgment of Morgan J in **Lion Apparel Systems v Firebuy Ltd** [2007] EWHC 2179 (Ch).
>
> **2.2 Equal Treatment**
>
> 9. The duty of equal treatment requires that the contracting authority must treat both parties in the same way. Thus

"comparable situations must not be treated differently" and "different situations must not be treated in the same way unless such treatment is objectively justified": see **Fabricom v Belgium** [2005] ECR1-01559 at paragraph 27. Thus the contracting authority must adopt the same approach to similar bids unless there is an objective justification for a difference in approach.

10. Morgan J's observation in **Lion Apparel**, noted above, is equally applicable to the duty of equality: again, when considering whether there has been compliance, there is no scope for any 'margin of appreciation' on the part of the contracting authority.

2.3 Manifest Error

11. The relevant regulation of the Public Contracts Regulations 2006 allows redress where the contracting authority has made a manifest error in its evaluation. As Morgan J makes plain in paragraph 37 of his Judgment in **Lion Apparel**, this is a matter of judgment or assessment, so in this respect the contracting authority does have a margin of appreciation. The court can only disturb the authority's decision in circumstances where it has committed a manifest error. Morgan J went on at paragraph 38 to say:

> "When referring to a 'manifest' error, the word 'manifest' does not require any exaggerated description of obviousness. A case of 'manifest error' is a case where an error has clearly been made."

12. The first (and still best-known) case in which a judge worked through a tender evaluation process to see whether or not manifest errors had been made was **Letting International Ltd v London Borough of Newham** [2008] EWHC 158 (QB). There, Silber J followed the approach of Morgan J in **Lion Apparel** as to the law, and went on to say:

> 115. Third, I agree with Mr Anderson that it is not my task merely to embark on a remarking exercise and to substitute my own view but to ascertain if there is a manifest error, which is not established merely because on mature reflection a different mark might have been awarded. Fourth, the issue for me is to determine if the combination of manifest errors made by Newham in marking the tenders would have led to a different result."

On the facts in that case, Silber J altered just two of the individual scores, in circumstances where the errors were either admitted or incapable of rational explanation.

274. The court can only disturb the authority's decision in circumstances where it has committed a manifest error. It is in matters of judgement or assessment that the NDA has what has been called a "margin of appreciation". Accordingly, where an evaluative judgement has been involved in arriving at the score awarded (as here), this "margin of appreciation" is brought to bear in considering whether there has been a manifest error. The court will not substitute its own view for what the score should have been just because that score might be different to the one arrived at by the SMEs. In my judgment, the NDA's pleaded sentence that "An evaluative judgement of this sort is not capable of constituting a manifest error" is wrong, in so far as it suggests a prohibition upon finding manifest error where an evaluative judgement has been applied. There is no prohibition, but there is a margin of appreciation. Differences of opinion are not sufficient to have the score changed. Absent a manifest error, the court will not interfere.

275. This is made clear from ***Lion Apparel Systems v Firebuy Ltd*** [2007] EWHC 2179 (Ch) {AB/40/1} and the cases that have followed it. That case concerned a procurement process for fire-fighters' uniforms and personal protective equipment, governed by Council Directive 92/50/EEC and the Public Services Contracts Regulations 1993. Morgan J stated:

> "27. The principally relevant enforceable Community obligations are obligations on the part of the Authority to treat bidders equally and in a non-discriminatory way and to act in a transparent way.
>
> 28. The purpose of the Directive and the Regulations is to ensure that the Authority is guided only by economic considerations.
>
> 29. The criteria used by the Authority must be transparent, objective and related to the proposed contract.
>
> 30. When the Authority publishes its criteria, which conform to the above requirements, it must then apply those criteria. The published criteria may contain express provision for their amendment. If those provisions are complied with, then the criteria may be amended and the Authority may, and must, then comply with the amended criteria.
>
> 31. In relation to equality of treatment, speaking generally, this involves treating equal cases equally and different cases differently…..
>
> ….
>
> 34. When the court is asked to review a decision taken, or a step taken, in a procurement process, it will apply the above principles.
>
> 35. The court must carry out its review with the appropriate degree of scrutiny to ensure that the above principles for public

> procurement have been complied with, that the facts relied upon by the Authority are correct and that there is no manifest error of assessment or misuse of power.
>
> 36. If the Authority has not complied with its obligations as to equality, transparency or objectivity, then there is no scope for the Authority to have a "margin of appreciation" as to the extent to which it will, or will not, comply with its obligations.
>
> 37. In relation to matters of judgment, or assessment, the Authority does have a margin of appreciation so that the court should only disturb the Authority's decision where it has committed a "manifest error"."

276. There is no similar margin of appreciation in terms of compliance with the obligations of equality or transparency. It is in matters of judgement by the SMEs or assessment that the NDA has this margin. It is for this reason that the court is not involved in a re-marking exercise when a challenge is brought by a dissatisfied bidder. The court does not reconsider and impose its own separate judgment for each of the marks given in a scoring evaluation. The court does not decide for each requirement what the mark, in any particular instance, should have been. That step *may* occur subsequently, but only if that point is arrived at because there has been a manifest error in the evaluation. This was made perfectly clear by Coulson J in ***BY Development Ltd and Others v Covent Garden Market Authority*** [2012] EWHC 2546 (TCC) when he said {AB/53/5}:

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

277. There is a further difference between the parties in this case, about the material to which the court should have regard when considering manifest error. I therefore turn to the different submissions in that respect.

Reasons given by the NDA

278. Mr Howell QC for Energy Solutions submitted that the obligation to give reasons imposed by Regulation 32 is an "essential procedural requirement" since its purpose is not merely to enable those concerned to ascertain the reasons for the

decision and thereby enable them to assert their rights but also "to enable the court to exercise its power of review". Failure to comply with the obligation to give reasons warrants the annulment of a decision. If further information is requested by the tenderer, such information may be taken into account (provided it does not conflict with what has previously been stated). But the requirement to state reasons and the validity of the decision must be assessed in the light of the information provided to an economic operator at the date at which the claim is instituted. The validity of the contract award decision falls to be reviewed on the basis of such reasons.

279. Energy Solutions submitted that the validity of such a decision could not be justified *ex post facto* by reasons provided to the court (save in exceptional circumstances) and this was made clear in the cases such as ***T-89/07 VIP Car Solutions SARL v European Parliament*** [2009] ECR II-01403 [2009] EUECJ T-89/07 {AB/17/1} May 20 at [2], [56]-[61], [65], [73]-[78]; ***T-667/11 Veloss International SA v European Parliament*** [2015] EUECJ T-667/11 January 14 {AB/28/1} at [41], [56]-[66]; and ***T-465/04 Evropaiki Dinamiki v Commission*** [2008] ECR II-00154 {AB/14/1} at [75].

280. Mr Giffin QC for the NDA sought to distinguish these authorities by submitting that there is a distinction to be drawn between an application to the court to annul a decision because of a failure to give proper or any reasons for that decision, and a challenge to the substance of a decision as to the identity of the successful bidder, as a claim of this nature, seeking damages.

281. The case of ***T-89/07 VIP Car Solutions SARL v European Parliament*** [2009] ECR II-01403 [2009] EUECJ T-89/07 {AB/17/1} concerned a procurement exercise for chauffeur-driven cars and mini-buses for members of the European Parliament in Strasbourg. The regulation that applied was the Financial Regulation applicable to the general budget of the European Communities, and the obligation for reasons was one upon a Community Institution in an award procedure for a public services contract. The European Parliament was stated to have a broad discretion with regard to the factors to be taken into account for the purpose of deciding to award a contract, and the court's review of the exercise of that discretion was limited to checking that the rules governing the procedure and statement of reasons were complied with. This applied the decision in ***T-465/04 Evropaiki Dinamiki v Commission*** [2008] ECR II-00154 at [75] {AB/14/1}. The Parliament was therefore under an obligation to apply Article 100(2) of the Financial Regulation and Article 149(3) of the Implementing Rules, which meant that it had to provide to unsuccessful tenderers:

> "…who expressly request it with the characteristics and relative advantages of the successful tender and the name of the tenderer to which the contract was awarded within fifteen calendar days of receipt of a written request" (Paragraph [59] {AB/17/11}).

The purpose of this duty was:

> "…to make the persons concerned aware of the reasons for the measure and thereby enable them to defend their rights and, on

> the other, to enable the Court to exercise its supervisory jurisdiction".

This was effectively a counter-balance to the Community institution having "broad powers of appraisal"; this made respect for the rights guaranteed by the Community legal order in administrative procedures "of even more fundamental importance".

282. The judgment continued (Paragraph [65] {AB/17/12}):

> "In any event, according to settled case-law, the statement of the reasons on which a decision adversely affecting a person is based must allow the Court to exercise its power of review as to its legality and must provide the person concerned with the information necessary to enable him to decide whether or not the decision is well founded. Accordingly, the fact that a statement of reasons is lacking or inadequate, hindering that review of legality, constitutes a matter of public interest which may, and even must, be raised by the Community judicature of its own motion."

283. The original statement of reasons is not the only communication about reasons that may be taken into account, however. The judgment made clear that a subsequent:

> "…letter in response to a request from the applicant seeking additional explanations about a decision before instituting proceedings but after the date laid in Article 149(3) of the Implementing Rules, that letter may also be taken into account when examining whether the statement of reasons in the case in question is adequate. The requirement to state reasons must be assessed in the light of the information which the applicant possessed at the time of instituting proceedings….the institution is not permitted to replace the original statement of reasons by an entirely new statement." [Paragraph [73], also citing and drawing an analogy with ***Evropaiki Dynamiki*** {AB/17/13}]

284. Although Parliament in that case provided the reasons for the decision in the course of the proceedings, the court stated that:

> "It is settled case law that the reasons for a decision cannot be explained for the first time ex post facto before the Court, save in exceptional circumstances which, in the absence of urgency, are not present in this case." (Paragraph [76])

In that case therefore, the absence of an adequate statement of reasons vitiated the award of the contract.

285. It is correct to state, as Mr Giffin QC does, that this case concerned an application to annul the award of the contract. Indeed, he relies upon that as putting the case in a separate category to those dealing with damages {Day2-XCON/52}. However,

upon analysis it can be seen that the claim in that case also included an express claim for damages (paragraphs [99] to [108]). That part of the claim was dismissed, not least because "the claim for damages…lacks even the most basic details" and the obvious defects and omissions – being silent as any causal link between the conduct complained of and the damage – were not sought to be corrected by the applicant even in reply (Paragraphs [105] and [106]). However, the Court did not suggest that there would be any alternative or different principles that would apply, so far as admissibility of reasons was concerned, on the damages claim rather than the application to annul the contract award.

286. It is expressly stated that:

> "…the obligation to state reasons is an essential procedural requirement, as distinct from the question whether the reasons given are correct, which goes to the substantive legality of the contested measure." (Paragraph [63])

Similar or identical statements are made in ***T-667/11 Veloss International SA v European Parliament*** [2015] EUECJ T-667/11 14 January at [41], [56]-[66], {AB/28/1} a case concerning the supply of Greek translation services for the Parliament. Although in that case the application was for annulment of the decision to select the successful tenderer, it also contained an express application for damages for the loss suffered. This can be seen from the second bullet point in paragraph [21], reciting that the applicant asked the Court to:

> "…order the Parliament to pay compensation in the amount of EUR 10000 for damages suffered on account of the loss of opportunity and damage to their reputation."

Paragraphs [38] to [41] of the judgment are in practically identical terms to the relevant passages in ***VIP Cars***. Paragraph [43] again states that:

> "…the obligation to state reasons is an essential procedural requirement, as distinct from the question whether the reasons given are correct, the latter going to the substantive legality of the contested measure."

VIP Cars is expressly followed and recited in paragraphs [56] and [63]. The amount of damages sought was described by the applicant as being "a symbolic sum" with the true amount far higher (Paragraph [68]). However, regardless of the quantification of damages, and whether symbolic of the loss or calculated in a precise measure, the case included such a claim.

287. Again, it was not suggested in the Court's findings that different principles applied depending upon the relief that was sought. It was however stated that:

> "…even if the Parliament did not give adequate reasons for the contested decision, that does not mean that the award of the contract to the successful tenderer constitutes wrongful conduct or that there is a causal link between that fact and the loss alleged by the applicants….There are no grounds for

> concluding that the Parliament would have awarded the contract in question to the applicants if the statement of reasons for the contested decision had been adequate." (Paragraph [72])

It was stated that:

> "…the claim for damages in respect of the alleged harm suffered as a result of the contested decision must, in so as it is based on the failure to state reasons for that decision, be rejected as unfounded." (Paragraph [73])

The claim for damages was therefore rejected.

288. The NDA also relies upon ***T-57/09 Alfastar Benelux SA v Council of the European Union*** [2011] EUECJ T-57/09 20 October {AB/77/1}. In that case, which concerned a tender for the supply of technical maintenance and help-desk services for the PCs and printers of the General Secretariat of the Council, the Council were not entitled to rely upon the evaluation report of the relevant committee that was only provided after the application was lodged (Paragraph [32]). The information that had been provided – which was essentially just the scores awarded to the different tenders – did not put either the applicant or the Court in a position where the lawfulness of the contested decision could be properly reviewed (Paragraphs [40] and [41]). The Court held that:

> "…in the context of the claim for annulment of the contested decision, that decision is flawed by inadequate reasoning and must therefore be annulled."

However, the Court also went on to state the following:

> "49 It is clear, however, that, even if the Council did not give adequate reasons for the contested decision, that does not mean that the award of the contract to the successful tenderer constitutes wrongful conduct or that there is a causal link between that fact and the loss alleged by the applicant (see, to that effect, **Case T-4/01 Renco v Council** [2003] ECR II-171, paragraph 89). Indeed, there is no ground for concluding that the Council would have awarded the contract in question to the applicant if that decision had been adequately reasoned.
>
> 50 It follows that the claim for damages in respect of the alleged damage suffered as a result of the contested decision must, in so far as it is based on the inadequate reasoning of that decision, be rejected as unfounded."
>
> [emphasis added]

289. The emphasised passage makes it clear, in my judgment, that the requirement for the causal link remains and there is no restriction upon this court, when analysing that element of the claim, to consider only those reasons available to RSS (and hence to Energy Solutions) at the time that the claim was issued.

290. Although the requirements to be satisfied by the statement of reasons depends upon the circumstances of each case (Paragraph [62] of ***VIP Cars*** {AB/17/11} and paragraph [25] of ***Alfastar Benelux*** {AB/77/4}), I do not consider that amounts to a statement that different principles are to apply depending upon whether damages are sought or not, which is one potential consequence of the "two category of cases" approach advocated by Mr Giffin QC in his oral opening for the NDA. Indeed, given that damages were sought in all these cases – albeit unsuccessfully – these Judgments of the General Court strongly suggests that the same principles apply regardless of the relief sought.

291. Energy Solutions also draw an analogy with the court's approach to reasons in domestic legislation and the susceptibility of decisions to judicial review when the reasons given were accepted to have been incorrect. In ***R v Westminster City Council ex p Ermakov*** [1996] 2 All ER 302 {AB/30/1} the Court of Appeal considered an appeal under section 64(4) of the Housing Act 1985. A council had notified the appellant that a finding of intentional homelessness against him was based on its lack of satisfaction that he had experienced harassment in Greece (as he claimed), their enquiries in that respect having not been answered. By the hearing of the application, the council had accepted that the reasons notified to the applicant were not their true reasons, but submitted affidavit evidence stating what their true reasons were. On appeal against the decision of a Deputy Judge (who had admitted the evidence), the Court of Appeal held that if no reasons, or wholly deficient reasons, had been given at the same time as the decision itself had been communicated, an applicant was prima facie entitled to have the decision quashed as unlawful. The court would admit evidence to elucidate or, exceptionally, correct or add to the reasons given by a housing authority, but it would be very cautious about doing so, and the function of such evidence would generally be elucidation, not fundamental alteration.

292. Regulation 32(2)(b) imposes an express obligation upon an authority to provide reasons. The purpose of requiring such reasons is two-fold. One is to enable the persons concerned to be aware of, and consider, the reasons so that they can, if necessary, defend their rights. The second is to enable the court to exercise its supervisory jurisdiction. That latter purpose would be wholly undermined, or rendered of no effect, if those reasons could arbitrarily be substituted or replaced throughout the proceedings. Of course, the cases make it clear that in exceptional circumstances that can be done, but Mr Giffin QC does not contend that this is an exceptional case and in my judgment he is right to adopt that approach. In a claim for damages, other reasons (whether different to the original ones or not) can and should be considered when the court comes to consider causation. But the primary issue the court is required to consider, before it comes to consider causation and damages, is whether there has been the necessary breach of statutory duty or not, so that a conclusion can be reached whether the procurement process has been unlawful, or not.

293. I find support for this approach in paragraph [47] {AB/28/7} of ***Veloss International*** where it is stated:

> "On the basis of the consideration that compliance with the procurement rules must be ensured in particular at a stage at which infringements can still be corrected, it must be concluded

> that an expression of the will of the contracting authority in connection with a contract, which comes in any way whatever to the knowledge of the persons interested, is amenable to review, provided that that expression has passed the stage of acts which constitute a mere preliminary study of the market or are purely preparatory and form part of the internal reflections of the contracting authority with a view to a public award procedure and is capable of producing legal effects."

It is evident that the "expression of the will of the contracting authority" must include the reasons communicated to the aggrieved applicant prior to instituting the review. I consider that ***Veloss International*** makes it clear that any inadequacy of reasons "for the contested decision" does not count against the authority when the court comes to consider both damages in general, and the existence or otherwise of the required causal link which is necessary for the applicant to succeed in damages. But it cannot sensibly be the case that the nature of the material to which the court will have regard, when it considers whether a contract award has been lawful or not, will change dependent upon the relief sought.

294. Drawing an analogy with ***R v Westminster City Council***, it is unrealistic to seek to draw a distinction between the decision, and the communication of the reasons that go with it. In a procurement case, that statement has even greater force because it is the reasons for (in most cases) the marking of the respective tenders that will have directly led to the contracting authority's decision that tenderer X has won the contract award, and tenderer Y has not. However, I do not consider that in any of the cases relevant to the failure to give adequate reasons which are analysed above, is the validity of an applicant's claim for damages frozen in time at the date of the application to the court, and the validity of that claim analysed solely by reference to the reasons provided to the applicant at the time the legal proceedings were issued. Further reasons put forward by an authority that post-date the application can and should be considered, because of the necessity for a causal link between the making of an unlawful decision, and loss suffered by the applicant. Indeed, both paragraph [72] of ***Veloss International*** and paragraph [49] of ***Alfastar Benelux*** make it clear, in my judgment, that this is not only permitted, but required. To do otherwise would be entirely to ignore causation when considering the claim for damages.

295. In ***Harmon CFEM Facades (UK) Ltd v Corporate Officer of the House of Commons*** (1999) 67 Con LR 1 {AB/32/1} HHJ Humphrey LLoyd QC found in paragraph [239] that the House of Commons, the contracting authority, could not rely upon reasons that were not disclosed to the unsuccessful tenderer at the time. That case was under the 1991 Regulations. The NDA submit, partly in reliance upon Professor Arrowsmith's views at paragraph 13-23, whose view is that this "extreme consequence" is doubtful, that ***Harmon*** is "indeed wrong" or at most, should be confined to cases where the authority seeks to substitute an entirely new set of reasons of an entirely different character. In my judgment ***Harmon*** can be explained in the following way. The passage in ***Harmon*** at paragraph [239] makes it clear that the reasons being considered were those for rejection of Harmon's tender. The reasons for the award that were prepared at the time were not recorded at all; there was no evaluation of the different tenders in the sense that term is now

normally understood. The House of Commons also negotiated with the successful tenderer prior to awarding the contract to it, did not negotiate with Harmon in the same way or at all, and also committed the tort of misfeasance in public office in doing so (point (14) in the headnote and paragraphs [241] to [256]). The reasons to which the Judge referred, upon which the House of Commons wished to rely, were stated by him in paragraph [239] as "certainly cannot be ones which either were not held at the time when the decision was taken or which were or might have been held but were not recorded as such". The reasons were also wholly different to the ones stated at the time. He also held that such reasons "have also to be tied back to the grounds upon which the contract could properly be awarded". In my judgment that case should be seen as confined to its own particular and highly unusual facts. If it does have any wider application on this particular point, it should indeed be confined to cases where the authority seeks to substitute an entirely new set of reasons of an entirely different character. I certainly do not read it as making a positive finding that is contrary to my findings in paragraph 250 of this judgment concerning reasons which must be considered as a matter of causation.

296. From this analysis I therefore draw the following principles in terms of the approach the court should adopt in a situation such as this one, namely where a contracting authority seeks to rely upon different explanations or reasons for its decision at the trial of the action to those communicated to the Claimant prior to the issue of proceedings:

1. The lawfulness of the decision by the contracting authority to award the contract to a competing tenderer rather than to the Claimant, will be considered by reference to the reasons made available from the contracting authority to the Claimant prior to the issuing of the proceedings.

2. In a claim for damages, the court will take proper regard of other reasons relied upon by the contracting authority when considering causation. A finding as to unlawfulness at the first stage will not automatically and of itself entitle the Claimant to damages.

297. In my judgment, it follows therefore that so far as the answer to Agreed Issue 2 is concerned, the position advocated for by Energy Solutions is the correct one, namely that in Agreed Issue 2(i). However, given the requirement for causation to be demonstrated in any event in a claim for damages, which is what these proceedings consist of, the essence of the test advocated for by the NDA in Agreed Issue 2(ii) does fall to be considered when analysing what the correct score would or should have been. That stage is only reached if a Claimant succeeds in demonstrating manifest error on the reasons available at the time that proceedings are issued. However, it does not mean that the NDA is shut out from relying upon other reasons that post-date the issue of proceedings when challenging causation.

298. Mr Howell QC used the phrase "Admissible Reasons" for those identified at stage 1 above. He is technically correct to do so because other reasons not communicated would be inadmissible when considering unlawfulness, but admissible when considering causation. I hesitate to adopt his term, because it could be apt to cause confusion if, in the future, parties are insufficiently precise about the two stages, and because of the well-understood meaning of inadmissibility. For the purposes of this judgment, I will refer to them as the reasons in the Consensus Rationale

(which was sent to RSS) and in the 11 April 2014 Letter, collectively "Stage 1 Reasons". I have also used the phrase "proper regard" to make it clear that rules both of pleading and of evidence still apply. The court would not be likely, in a hypothetical case, to give the same weight to a new reason advanced for the first time in oral evidence under cross-examination, for example, as it would to a fully pleaded reason supported by written witness evidence provided well in advance of the trial. "Proper regard" will be a matter of fact and degree on a case-by-case basis.

299. It should not be seen as imposing an excessively onerous burden upon an authority to have to communicate Stage 1 Reasons to a bidder. In each case, the nature and extent of the reasons will be fact-specific. In terms of the further reasons that were requested in this case, RSS (and Energy Solutions) was anxious to discern more of the reasoning that had led to the outcome of the procurement competition, no doubt in order that it could consider its legal position. There is nothing wrong with that – this is one of the functions of the Regulations that require such reasons. It is an express requirement of Regulation 32(2)(b) that such reasons are communicated, and the authority would have known throughout any procurement that this is required. It can hardly therefore have come as a surprise to the NDA. The reasons provided should amount to sufficient information to satisfy the Regulations. One of the purposes of the reasons is to enable unsuccessful tenderers to decide whether to defend their rights by issuing proceedings. Such reasons ought to be readily available to the contracting authority because they are (or should be) the reasons why an authority has already acted as it has, by the time the tender award notification has been issued. They also ought to be broadly accurate. Of course they are not going to be of the same nature and detail as a fully (or even partly) pleaded case, and in my judgment Energy Solutions is not claiming that they should be. But where (as here) the RSS Tender Response was scored on a particular requirement under an Evaluation Node as meriting a mark of 1 (or sometimes a 3), the reason for that ought to be readily capable of being provided. My findings on admissibility of reasons going to the consideration of unlawfulness at Stage 1 should not be seen as requiring anything out of the ordinary for a sensibly organised procurement exercise that is conducted transparently. There is certainly no intention within this judgment to impose any extra burden upon authorities in providing such reasons, or to insist upon a counsel of perfection.

300. There was some low-level discontent expressed by Mr Rankin, the Head of Competition at the NDA, about the shortness of time in the period when RSS were seeking further clarification which led to the letter of 11 April 2014 that included further reasons. He said in cross-examination, when being asked about the 11 Appendix response by the NDA that accompanied its letter of 11 April 2014:

> "….it was a highly charged period of time, the standstill period. We had got, I think, something in the region of a 70-page letter from RSS on a Sunday morning, Sunday, 6th April, if I recollect rightly. They demanded a response I think within a couple of days, or something like that, and we were trying to respond to it as quickly as we could."

That rather overlooks two rather time-critical factors. Firstly, the standstill period expired on 14 April 2014 at noon. This was made clear in the letter of 31 March

2014 notifying RSS of the award {U/1/1}. It was therefore essential for RSS, or any unsuccessful tenderer, to have sufficient information as quickly as possible, particularly if RSS were to issue proceedings within the relevant period to trigger the automatic suspension of the contract award to CFP. Secondly, the NDA was later asked by RSS to extend the standstill period and refused to do so. Given the time that the procurement exercise had been underway – the notice was in the OJEU in July 2012, and dialogue had gone on from January to October 2013 – and the scale and complexity of the subject matter – a maximum duration of the contract term of 14 years, with funding in the region of £4.211 billion – it might be thought that any pressure of time in this period at the very end of the process was brought about by the NDA itself. To be fair to Mr Rankin, he did not make this his major point, and in my view he was right not to do so. Section V of this judgment which deals with the witnesses also addresses some characteristics of the letter of 11 April 2014 and the NDA witnesses' reluctance to admit to any authorship of it.

The test of "manifest error" considered further

301. The reasons provided in accordance with the requirements of the Directive and Regulations (and any admissible supplementary explanation of them) – the Stage 1 Reasons – may disclose a manifest error of assessment. If there is no manifest error when the matter is considered by the court, then the claim brought by an aggrieved tenderer will fail.

302. Mr Howell QC's submission is that the court will move to the second stage (namely causation) if in relation to any particular requirement, absent the manifest error, the score given *might* have been different. The NDA in its written opening submissions put the matter slightly differently. The NDA stated {AA/2/19}:

> "45. It is also very important to note that it is the score ultimately awarded which must be manifestly erroneous before intervention is justified. Even if some manifest error is found in the reasoning which led to the score awarded, it will not follow that the score itself is manifestly erroneous; see **J Varney & Sons Waste Management Ltd v Hertfordshire CC [2010] LGR 801** at [193] {AB/46/1}, where Flaux J adopted the approach to manifest error of Silber J in **Letting International**, and continued:
>
> > 'I also agree with Mr Howell [counsel for the Defendant] that what Varney [the Claimant] has to demonstrate to satisfy the test is that the mark given was manifestly wrong. Much of the case advanced on behalf of Varney was on the basis that there were inconsistencies or unfairness in elements of Mr Shaw's [ie the evaluator's] reasoning in his notes. However, that in itself is beside the point: what has to be demonstrated is that the mark given was in manifest error.'
>
> 46. This need for manifest error in the score itself, not just in the reasoning behind it, was also recognised in **Willmott Dixon** at [179] and [214]."

Although ***Varney Ltd v Hertfordshire CC*** went to appeal, the appeal was not successful and did not involve this point[4].

303. However, the statement relied upon by the NDA in paragraph [193] of the judgment of Flaux J cannot be read in isolation; in particular his findings in paragraph [191] throw light upon the meaning of the text relied upon. Paragraph [191] makes it clear that although Varney complained about a number of alleged errors made by Mr Shaw in the way he had marked the various tenders, and in particular the way he had marked Varney's tender, these were accepted by Varney's counsel in his skeleton argument as not having "a substantial impact overall", and the Judge's view was that the "complaint is essentially academic". An unchallenged part of the evidence relied upon by the Council in that case was that:

> "…even if the criticisms were well-founded, it would have made no difference in practice to the outcome so far as Varney is concerned."

In other words, it is not enough for errors in marking to be present; they must have made a difference. An example which springs to mind would be where there were two arithmetic errors in totalling marks on two different pages of a tender evaluation. One mistake might give the unsuccessful tenderer a total for that page that is 10 marks *fewer* than the correct arithmetic total for the individual scores on that page; an error on another page might give the unsuccessful tenderer a total 10 marks *higher*. Each would be an obvious error when looked at in isolation, but they would have made no difference in practice to the outcome of the scoring. Another example, put forward by Mr Howell QC in his oral closing submissions, was where there could be four reasons identified by the NDA for giving a score of 3 (rather than 5) for a particular Requirement. Three reasons might be perfectly valid and correct, the fourth obviously wrong. In those circumstances the court would not interfere with the scoring of that Requirement; there would have been a manifest error, but it would not have been material. To adapt the phrase of Flaux J, even if some of the criticisms were well-founded, it would have made no difference in practice to the outcome.

304. There is another way of considering the concept of a manifest error that is academic only, making no difference to the outcome, and that is simply not to categorise it as a "manifest error" at all. There is some limited support for that in the judgment of Green J in ***Gibraltar Gaming and Betting Association Ltd v The Secretary of State for Culture, Media and Sport & Others*** [2014] EWHC 3236 (Admin) {AB/64/1}. In that case Green J was dealing with a challenge to the legality of an Act of Parliament. The relevant test was whether or not it was 'manifestly inappropriate'. In paragraph 100 of his Judgment he stated the following:

> "In neither EU nor domestic law is there an articulation of what is understood by "manifest". The phrase is defined in dictionaries as something which is: readily perceived, clear, evident, clearly apparent, obvious or plain. The etymology is

[4] [2011] EGLR 770

> from the Latin "manifestus" - palpable or manifest. These definitions are helpful only to a degree. What has to be "manifest" is the inappropriateness of a measure. There are two broad types of case where inappropriateness is put in issue. First, where it is said that a measure is vitiated by a clearly identifiable and material error. These are the relatively easy cases because the error can be identified and determined and its materiality assessed. The error may be a legal one, e.g. the measure is on its face discriminatory on grounds of nationality (as in ***R v Secretary of State for Transport ex Parte Factortame*** [1991] ECR I-3905). It may be a glaring error in logic or reasoning or in process. But even here there are complications since whilst it is true that an error which is plain or palpable or obvious on the face of the record may easily be termed "manifest" that cannot be the end of the story. An error which is clear and obvious may nonetheless not go to the root of the measure; it might be peripheral or ancillary and as such would not make the disputed measure manifestly inappropriate. Equally an error which is far from being obvious or palpable may nonetheless prove to be fundamental. For instance a decision or measure based upon a conclusion expressed mathematically might have been arrived at through a serious error of calculation. The fact that the calculation is complex and that only an accountant, econometrician or actuary might have exclaimed that it was an "obvious" error or a "howler", and even then only once they had performed complex calculations, does not mean that the error is not manifest. An error in the placing of a decimal point may exert profound consequences upon the logic of a measure. This suggests that manifest in/appropriateness is essentially about the nature, and, or centrality/materiality of an error. <u>An error will be manifest when (assuming it is proven) it goes to the heart of the impugned measure and would make a real difference to the outcome</u>."
>
> [emphasis added]

However, I do not consider that, in the field of procurement, a manifest error must have made “a real difference to the outcome” in order properly to be described as a manifest error. It would be rather surprising if, in the example given above concerning two basic arithmetical errors, each incorrect by 10 marks but cancelling each other out, it could properly be said that adding 2 and 3 together to give an answer of 15 is not a “manifest error”. I do not read the judgment of Green J as stating that proposition. A better way of expressing the concept is that a manifest error must be material before the court will interfere.

305. The difficulty in looking at the matter in the way submitted by the NDA, namely that “it is the score ultimately awarded which must be manifestly wrong” is that the score in this case, as in so many cases, is effectively just a number. In order properly to consider whether that number is the correct one, in the sense that it has

been reached without manifest error, regard must be had to the reasons given for applying the scoring criteria contained in the SORR to reach that score. If the reasons given disclose no manifest error, and when that is then considered against the scoring criteria to justify a score of (say) 3, then the reasons, *and* the application of the criteria, *and* the score would all be correct (as having been reached without manifest error). Manifest error could, however, be present in any one (or more than one) of those three steps, although importantly bearing in mind the margin of appreciation available to the NDA. In my judgment, the exercise upon which the court is engaged is to consider all of those stages. It is not restricted solely to the last one, namely the score, in isolation. Considering the different steps is exactly what Flaux J was doing in ***Varney***, although, it having been accepted by the Claimant in that case that the score given would have been the same absent the alleged errors, any manifest errors would not have been material.

306. The NDA also submits that the courts have been:

> "…more ready to find that a manifest error has been committed if the evaluation exercise as a whole has been casual and ill-organised." {AA/2/19}

The reason for this submission may be because the NDA effectively seek to rely upon the converse, to the effect that the court should be less ready to find a manifest error if the exercise has been well-organised. There is no doubt that in some cases, some of the evaluation exercises have left something, if not a great deal, to be desired. A good example is the exercise in ***Woods Building Services v Milton Keynes Council*** [2015] EWHC 2011 {AB/65/1} when the Judge described, with commendable understatement, certain factors as "unsatisfactory". He set these out in paragraphs [39] to [44] of his judgment, and one would not expect to find at least three of those factors in a well-organised competition. Those three factors were the involvement in the evaluation exercise of a previous employee of Woods; that employee failing to disclose this when asked by Woods, and positively misleading Woods about his involvement; and the keeping of only brief and unhelpful notes, not constituting proper reasons, at times being "all but meaningless".

307. Whilst the court may find more manifest errors, or might find manifest errors more readily, in a poorly organised competition, I do not accept that the court would or should adopt what might be called a default position or presumption in favour of a well-organised competition, even if that description could be applied to this one. The NDA went to some lengths in organising the competition in an attempt to render a challenge less likely, including taking advice from Burges Salmon (this subject is dealt with in Section VII) and giving the SMEs some training. I do not accept that this can be used to the NDA's advantage in these proceedings as a separate hurdle for Energy Solutions to overcome when seeking to argue there have been manifest errors. I do not accept that there is any different legal test to be applied. In order to consider the claims brought by Energy Solutions, it is necessary to consider whether the NDA's reasoning discloses a manifest error, or manifest errors, that were material. Unless it does, then the claim would fail and the court need go no further than the first stage of the test outlined above.

308. When referring to "manifest" error, the word "manifest" does not require any exaggerated description of obviousness. A case of 'manifest error' is a case where an error has clearly been made. But in all cases whether an error has manifestly (that is to say, clearly) been made will depend on what may be involved in the particular assessment alleged to be in error and the nature of the error alleged.

"Wednesbury" unreasonableness

309. ***BY Development Ltd and Others v Covent Garden Market Authority*** [2012] EWHC 2546 (TCC) concerned an application to adduce expert evidence on planning and finance issues on a procurement for the redevelopment of the New Covent Garden Market site at Vauxhall in London. Coulson J stated (Paragraph [11]) that:

> "…the test of 'manifest error' applied in the European cases, which is that required by the 2006 Regulations, is very similar to, if not the same as, the ***Wednesbury*** test of irrationality in domestic judicial review proceedings….."
>
> {AB/53/6}

There is a difference on this point between Energy Solutions and the NDA. The NDA submits that there is "support for the idea that the manifest error standard in the procurement context equates to a *Wednesbury* approach" {AA/2/18}, and that for something to be a manifest error "the fact remains that it must be a conclusion which no reasonable evaluator could have reached" {AA/2/19}. The NDA frankly accepts that the manifest error test is ultimately an EU law test, whereas the Wednesbury doctrine is one of domestic law, but submits that the latter test:

> "…is a yardstick that is helpful in indicating to judges in a common law jurisdiction where the bar is to be set in manifest error cases." {AA/2/18}

Energy Solutions disagrees with this approach which is said to be irrelevant.

310. This point was most recently addressed by Coulson J in ***Woods Building Services v Milton Keynes Council*** {AB/65/1}. He stated:

> "The only real issue of principle was the extent to which 'manifest error' broadly equated with the concept in UK law of **Wednesbury** unreasonableness. Ms Osepciu said that it did; Mr Barrett submitted that the bar for 'manifest error' was not as high as that.
>
> In my view there is a broad equivalence between the two concepts. I set out my reasons for that conclusion, together with the relevant authorities, in **BY Development Ltd and Others v Covent Garden Market Authority** [2012] EWHC 2546 (TCC). I note that subsequently, in the Court of Appeal decision in **Smyth v Secretary of State for Communities and Local Gvernement and Others** [2015] EWCA (Civ) 174,

Sales LJ said, when dealing with the review of a planning dispute on environmental grounds, that "the relevant standard of review is the **Wednesbury** standard which is substantially the same as the relevant standard of review of 'manifest error of assessment' applied by the CJEU in equivalent contexts…".

By contrast, no authority was cited to me which suggests that this broad equivalence is incorrect. I note that my judgment in **BY Developments** was cited and followed in **Wilmott Dixon Partnership Ltd v London Borough of Hammersmith and Fulham** [2014] EWHC 3191 (TCC). Moreover, in my view there is nothing in the **SIAC** or the **Easycoach** cases to suggest any different approach, despite Mr Barrett's submissions to that effect. The highest he could put it was by reference to paragraph 53 of the opinion of Advocate General Jacobs in **SIAC**, but it is clear to me that this was simply a comment on the possibly exaggerated way in which the **Wednesbury** test had been expressed at first instance in that case, rather than an exposition of a point of principle, let alone one of such importance. Had it been otherwise, some citation by the Advocate General of at least some authority for this approach might be thought to have been the minimum required. There is none.

Finally I should mention the recent case of **Gibraltar Gaming and Betting Association Ltd v The Secretary of State for Culture, Media and Sport & Others** [2014] EWHC 3236 (Admin). In that case Green J was dealing with a challenge to the legality of an Act of Parliament. The relevant test was whether or not it was 'manifestly inappropriate'. He dealt with that issue at paragraph 100 of his Judgment in these terms:

"In neither EU nor domestic law is there an articulation of what is understood by "manifest". The phrase is defined in dictionaries as something which is: readily perceived, clear, evident, clearly apparent, obvious or plain. The etymology is from the Latin "manifestus" - palpable or manifest. These definitions are helpful only to a degree. What has to be "manifest" is the inappropriateness of a measure. There are two broad types of case where inappropriateness is put in issue. First, where it is said that a measure is vitiated by a clearly identifiable and material error. These are the relatively easy cases because the error can be identified and determined and its materiality assessed. The error may be a legal one, e.g. the measure is on its face discriminatory on grounds of nationality (as in R v Secretary of State for Transport ex Parte Factortame [1991] ECR I-3905). It may be a glaring error in logic or reasoning or in process. But even here there are complications since whilst it is true that an error which is plain or palpable or obvious on the face of the record may easily be termed

> "manifest" that cannot be the end of the story. An error which is clear and obvious may nonetheless not go to the root of the measure; it might be peripheral or ancillary and as such would not make the disputed measure manifestly inappropriate. Equally an error which is far from being obvious or palpable may nonetheless prove to be fundamental. For instance a decision or measure based upon a conclusion expressed mathematically might have been arrived at through a serious error of calculation. The fact that the calculation is complex and that only an accountant, econometrician or actuary might have exclaimed that it was an "obvious" error or a "howler", and even then only once they had performed complex calculations, does not mean that the error is not manifest. An error in the placing of a decimal point may exert profound consequences upon the logic of a measure. This suggests that manifest in/appropriateness is essentially about the nature, and, or centrality/materiality of an error. An error will be manifest when (assuming it is proven) it goes to the heart of the impugned measure and would make a real difference to the outcome."
>
> Mr Barrett suggested that this analysis was inconsistent with the test of **Wednesbury** unreasonableness. Again I disagree. Green J was simply making plain that manifest inappropriateness, or in this case manifest error, is essentially about the nature and centrality (or materiality) of the error in question. In particular he was making the point that the mere fact that the error might not be immediately apparent to the layman is not necessarily a reason to conclude that it is not manifest. The observations of Green J seem to me perfectly consistent with the approach taken to the test of 'manifest error' in the cases to which I have already referred."

311. Energy Solutions submits that this is an "irrelevant dispute in the case law" and that "it would be surprising in any event if English administrative law provides the test for what is flawed in EU law" {AA/1/29}. The submissions continue:

> "The dispute is irrelevant, however, for what it ultimately seeks to do is to substitute for the relevant test, namely whether there is a manifest error of assessment, a different test, namely whether the assessment is Wednesbury unreasonable."

I am not sure that the court needs a common law yardstick to be able to comprehend or apply EU legal principle. However, I do not consider that is what the court was doing in the cases above. Mr Howell QC points out that in ***Woods*** Coulson J considered the dicta in the ***Gibraltar Betting*** case, which was concerned with whether a measure was manifestly inappropriate, which is not the same as a manifest error of assessment. In other cases "manifestly wrong" has been considered akin to what may be the *Wednesbury* approach. For example in ***R (Rotherham MBC) v Secretary of State for Business Innovation and Skills*** [2015] PTSR 322 Lord Neuberger said [63] {AB/71/30}:

> "I am not so sure that I get much assistance from the test of 'manifestly wrong' (although I acknowledge that it is used by the Court of Justice), unless the expression means that no reasonable government could have taken the decision".

312. Criticism is made by Mr Howell QC of the expression "broad equivalence" between the two tests that was used by Coulson J in ***Woods***. However, the two approaches or tests are, in my judgment, broadly equivalent, which is what I take Coulson J to have been saying. The debate may in any event prove to be simply one of semantics; the judge was not saying that the two tests were exactly the same, nor was he in the case of ***Woods*** applying the *Wednesbury* test.

313. It may be in any event that, in the vast majority of cases, the result would be the same, regardless of which test is applied. A conclusion reached by an evaluator that was so unreasonable that no reasonable evaluator could have reached it, is highly likely to be obviously wrong or manifestly erroneous. However, that is an academic debate which it is not necessary to consider in any detail. I have no doubt that Coulson J was applying the test of manifest error in ***Woods***, and was dealing in the passages identified with submissions made to him by the parties about the height at which that "bar" was set (the term used in the submissions to him as shown in paragraph [13] of the judgment) relative to *Wednesbury* unreasonableness.

314. It is plain that the appropriate test in a procurement challenge such as this one is that of manifest error, and that is the test that I apply in this case.

315. A *manifest* error of assessment should also not be confused, however, with a *material* error. A manifest error will not be material if it makes no difference to the decision: see ***T-514/09 bpost NV van publiek recht v European Commission*** [2011] ECR II- 00420 at [163]-[164] {AB/22/25}.

316. I also accept the submission made by Energy Solutions that if the reasons provided for a decision contain a manifest error of assessment, there is then no justification for according the contracting authority's reasons any *further* deference or 'margin of appreciation' (save for any matter that is not affected by such faults). The "margin of appreciation" is taken into account by the court in arriving at the conclusion of whether there has been a manifest error of assessment in the first place. There is a margin of appreciation when matters of judgement are involved. I have not, in my consideration of the detailed Requirements and the different challenges on each of them, sought to substitute my judgment of what the correct score should have been in each case, to see if it matches that of the SMEs at the time. Rather, I have considered what the SMEs have done to come to a decision on each allegation of manifest error, and also considered the reasons. It is only where I find that there has been such a manifest error or errors, that I have then gone on to consider what the correct score should have been.

Adverse inferences

317. I have dealt in Section V above with those witnesses whom the NDA chose to call. There is of course a proportionality issue in any proceedings when a party comes to consider, from a potentially large cast, who the witnesses at any trial are to be. Not

every single person who was involved can or should be called as a witness, and this case is no exception. However, Mr Godley, Mr Harrop and Dr Rhodes had all been intimately involved in some of the Nodes that were under scrutiny, and had far greater knowledge in certain areas than the witnesses who were called. There seemed to be a general approach by the NDA that if, say, Mr Grey had been involved at all, he should be the one giving the evidence. No explanation was given to me for the absence of any of the three individuals I have identified, other than Mr Harrop had retired in February 2015. Also, as I have explained, Mr Godley was involved in at least one very important conversation about CFP's potential failure to achieve a threshold score.

318. Energy Solutions invites me to draw adverse inferences from the absence of these witnesses. It is submitted that the NDA has adopted a selective approach to tendering witnesses, and that in particular SMEs were not called who were very closely involved in the evaluation of certain of the nodes.

319. The court is entitled in some circumstances to draw adverse inferences when witnesses might have given evidence: ***Wisniewski v Central Manchester Health Authority*** [1998] PIQR 324 {AB/33/1}. That case concerned the failure of a health authority, in a clinical negligence case brought on behalf of a plaintiff who had suffered irreversible brain damage at birth, to call the relevant doctor as a witness. Having extensively considered all the relevant authorities from 1875 onwards[5], Brooke LJ stated the following {AB/33/17}:

> "From this line of authority I derive the following principles in the context of the present case:
>
> (1) In certain circumstances a court may be entitled to draw adverse inferences from the absence or silence of a witness who might be expected to have material evidence to give on an issue in the action.
>
> (2) If a court is willing to draw such inferences, they may go to strengthen the evidence adduced on that issue by the other party or to weaken the evidence, if any, adduced by the party who might reasonably be expected to call the witness.
>
> (3) There must, however, have been some evidence, however weak, adduced by the former on the matter in question before the court is entitled to draw the desired inference: in other words, there must be a case to answer on that issue.
>
> (4) If the reason for the witness's absence or silence satisfies the court, then no such adverse inference may be drawn. If, on the other hand, there is some credible explanation given, even if it is not wholly satisfactory, the potentially detrimental effect of his/her absence or silence may be reduced or nullified."

[5] P337

320. That case was considered and applied by the Court of Appeal in ***Society of Lloyd's v Jaffray*** [2002] All ER (D) 399 [2002] EWCA Civ 1101, which concerned the well-known Lloyd's litigation, when Lloyd's Names (who were underwriting members of the Society) inherited massive losses from earlier accounting periods. The Names brought proceedings alleging deceit, and in summary their case was that Lloyd's had known about the unquantifiable but massive looming losses, whilst giving the Names the impression that all was under control and that proper reserves had been made. At the trial of what was called the threshold fraud issue, and although witness statements had been served from individuals at Lloyd's whom the Society might have called as witnesses, a number of them were not in fact called. The Court of Appeal held, applying the principles of Brooke LJ in ***Wisniewski***, the following:

> "It seems to us that on aspects where the evidence points in a direction against Lloyd's in an area which could have been dealt with by Mr Randall the judge should have drawn an adverse inference from Lloyd's failure to call Mr Randall to deal with it. This does not mean that any allegation that the Names make against Mr Randall must be accepted because he did not give evidence. It simply means that where the evidence points in a certain direction an adverse inference can be drawn from a failure to call the witness to deal with it."
>
> (Paragraphs [406] and [407])

321. That case was also considered and applied by the Court of Appeal in ***Benham Limited v Kythira Investments Ltd*** [2003] EWCA Civ 1794 [26] {AB/38/11}, which concerned a successful appeal against a first-instance judge's acceptance of a "no case to answer" submission in a civil trial.

322. The absence of certain individuals as witnesses who had acted as SMEs during the evaluation inevitably meant that those who were called to give evidence had to cover ground that was more logically the province of others. This would not, in usual circumstances, necessarily present a problem depending upon how many individuals fell into the category of those not called. However, in this case, so many important potential witnesses did not appear that there were substantial evidential gaps in the justification or explanation by the NDA for the scoring in certain important respects. I will deal with any adverse inferences separately in respect of each of the Evaluation Nodes where lack of evidence from the most suitable person arises. It would be wrong to approach the matter with a blanket approach when the evidence in respect of each is different.

323. It should however be said, without in any way departing from the statements of principle that apply in this situation generally or applying a different standard, that procurement proceedings have a particular aspect to them that should be borne in mind. This is that there is an express obligation of transparency upon the contracting authority. On occasion, and without in any way shifting the burden of proof, contracting authorities and their evaluators may be required to justify or explain what has been done when evaluating tenders, particularly if a score given on a particular requirement has been changed by the SMEs themselves during the evaluation process. Reasons have to be recorded and the record is important; it

helps compliance with the obligation of transparency. Such explanation is made far more difficult for a contracting authority if the directly relevant personnel who were centrally involved in that process are not called as witnesses. This justification or explanation is something that will or may arise if, the material available shows a prima facie manifest error. That is probably simply a different way of stating the third of Brooke LJ's principles in ***Wisniewski***.

324. The evaluation exercise is an important step in any procurement competition. In the Northern Ireland case of ***Resource (NI) v Northern Ireland Courts and Tribunals Service [2011] NIQB 121*** {AB/75/1} McCloskey J stated the following:

> "…..meetings of contract procurement evaluation panels are something considerably greater than merely formal events. They are solemn exercises of critical importance to economic operators and the public and must be designed, constructed and transacted in such a manner to ensure that full effect is given to the overarching procurement rules and principles." {AB/75/25}

That statement was endorsed by Coulson J in ***Bristol Missing Link Ltd v Bristol City Council [2015] EWHC 876 (TCC)*** {AB/76/1} at paragraph [42] {AB/76/11}. In that case a provider of domestic violence and abuse support services in Bristol challenged the award of a contract for those services going forward to another provider. In giving his detailed reasons for continuing the imposition of the automatic stay upon the award of the new contract, and in the context of a "serious issue to be tried", Coulson J addressed the issue of a moderation exercise, which had produced apparent anomalies for which there was no explanation. As a result of a particular moderation meeting, the higher scores that Bristol Missing Link Ltd had been initially awarded were reduced, with no explanation in the proceedings other than:

> "…an admission by the Council that the original evaluators may have failed to apply the correct criteria first time round."

Coulson J found that there was a serious issue to be tried concerning that moderation exercise, dismissing the submissions by the Council that:

> "…all that mattered was the final scores awarded as a result of that process." (paragraph [40] {AB/76/11})

325. A lack of explanation by a contracting authority – that may or may not arise from not calling a particular witness – may not assist that authority when defending a claim that something has gone wrong in the evaluation exercise, which is a "solemn exercise of critical importance", to adopt the phrase of McCloskey J in ***Resource (NI) v Northern Ireland Courts and Tribunals Service [2011] NIQB 121*** {AB/75/1}. This may be particularly so if a score has changed from one that had appeared to be the final view of the SMEs.

326. Assuming that on any particular Evaluation Node the court finds that there has been a manifest error, Energy Solutions submits that when considering a claim for damages, it is for the court then to determine for itself on the balance of probabilities whether or not, if such an error had not been made, the assessment,

mark or outcome (as the case may be) would have been different and what it would have been.

327. Energy Solutions submits that in that regard, evidence on the part of the contracting authority as to what it would have done is admissible, but the court is not bound to accept it (even if it comes from all those involved) particularly if it smacks of hindsight and justification: see for example ***Alliance & Leicester Building Society v Robinson*** (2000) WL 774991 May 4th CA per Chadwick LJ at [32]-[33] {AB/36/11}. There are inevitably risks that, however well intentioned, individuals may tend to seek to justify their own conduct and to minimise the consequences of any error on their part.

328. Energy Solutions also submits that the Court should also have regard to the well-known principle, derived from ***Armory v Delamirie*** (1722) 1 Strange 505; 93 E.R. 664 {AB/29/1}, namely that uncertainties should be resolved by making assumptions favourable to the Claimant where the Defendant's wrongdoing has created those uncertainties. In ***Keefe v The Isle of Man Steam Packet Company Ltd*** [2010] EWCA Civ 683 {AB/45/7} Longmore LJ expressed the principle in the following terms:

> "[19] … a Defendant who has, in breach of duty, made it difficult or impossible for a Claimant to adduce relevant evidence [as to the consequences of a breach of duty] must run the risk of adverse factual findings".

In the case of ***Armory v Delamirie***, a chimney sweep found a jewel and took it to a jeweller, who offered him only a nominal price for it. The sweep therefore asked for it back and the jeweller refused. In an action by the sweep for trover, Lord Pratt CJ directed the jury that:

> "…unless the Defendant did produce the jewel, and shew it not to be of the finest water, they should presume the strongest case against him, and make the value of the best jewels the measure of their damages".

I do not find that authority to be particularly helpful in the current situation between these parties. There is no need for the court to make assumptions favourable to Energy Solutions in the same way that the eighteenth century jury were invited to do by Lord Pratt in respect of the jeweller who refused to produce the jewel. If there has been a manifest error, on the material before the court it is possible to compare the RSS Tender Submission against the scoring criteria in the SORR and assess what the correct score *would* have been, absent the error. It is correct that the court is not a SME; however, evidence from SMEs is available, the tender submission and the scoring criteria are available, and the court is not engaged in an exercise of mere speculation.

329. If there has been a manifest error in evaluating a particular Requirement, Energy Solutions had identified "the acts of wrongdoing" as the NDA's failures to conduct lawful evaluations. However it is characterised, on each occasion the question arises as to what score would have been awarded on a lawful evaluation. It could be said that in the absence of all three of the SMEs who evaluated that

Requirement, there would always be an element of uncertainty. However, even though that "uncertainty" would arise because of the NDA's own conduct (either the unlawful evaluation in the first place, or the absence of relevant witnesses, or even both), I do not consider it necessary to rely upon the principles in ***Armory v Delamirie*** or ***Keefe v The Isle of Man Steam Packet Company Ltd*** in order to arrive at what the score would have been absent the manifest error. The content of the Tender Submission on the Requirement in question needs to be considered against the scoring criteria in the SORR, together with the evidence of the RSS personnel involved in preparing the bid, and the SMEs who were available and did give evidence on the scoring of that particular Requirement. If manifest error is found, that material taken together gives the court sufficient evidence to be able to consider what the correct score should or would have been absent the manifest error.

330. However, the first step in the process is to consider the complaints by Energy Solutions of manifest error. It is only if, on any particular Requirement, there is such a manifest error that the issue of considering correction to the score that was in fact given by the SMEs will arise at all. Manifest error is still a consideration on the so-called Threshold Issues, but in a different context as on those Requirements the allegation amounts to one that, absent the manifest error, CFP would (or should) have been given a score that would have led to disqualification. The specific issues relating to evaluation of the tenders are addressed in the next section, Section IX.

X Evaluation of the Tender Submissions

331. The different Evaluation Nodes that are the subject of these proceedings can be usefully considered as being in one of the following groups. Firstly, the RSS tender in respect of which Energy Solutions alleges breach of statutory duty by the NDA, such that the scores awarded to the RSS Tender Submission are said to be manifestly erroneous ("RSS Evaluation Issues" dealt with in Part B of this Section). Secondly, the CFP tender in relation to Evaluation Nodes where Energy Solutions maintain CFP should have failed on a "threshold" issue, or issues, such that the correct and lawful outcome should have been elimination of CFP from the competition ("CFP Threshold Issues" dealt with in Part C of this Section). This group also contains arguments raised by the NDA in the alternative against the RSS tender, were the CFP Threshold Issues to be decided against the NDA. These points arise because the NDA maintains that *if* the approach urged on the court by Energy Solutions in relation to CFP Threshold Issues was the correct one (contrary to the NDA's defence to those issues), then application of the same approach at the time by the NDA in relation to the RSS tender would have led to elimination of RSS from the competition as well. Thirdly, there are what are called "non-threshold" issues relating to the CFP tender, in which Energy Solutions maintain the score given to CFP was in breach of statutory duty and manifestly erroneous ("CFP Non-Threshold Evaluation Issues" dealt with in Part D of this Section).

A. Introduction

332. Some of the matters complained of by Energy Solutions have common themes, in that they affect more than one Evaluation Node. As an example, the approach by the NDA in evaluation to critical assets has a potential impact upon the scoring of six different Nodes in the RSS Evaluation Issues category. Supply Chain Management, for example, concerns both RSS Evaluation Issues and CFP Threshold Issues. It is therefore convenient to group some of the Nodes, and some of the complaints, by theme rather than in numerical order, to avoid repetition.

333. Some of these themes concern how the SMEs interpreted the SORR and the tender submissions. The analysis of a common theme will also therefore have an effect upon specific Requirements. For example, the approach to identification of key critical assets (which is controversial) also has specific consequences (RSS being marked down because the SMEs thought critical assets, or key critical assets, had been omitted). Some of the themes encompass the requirement of lack of equal treatment, for example in the way BCRs were used (or not used) by the NDA, which were said to have had the effect of disadvantaging RSS. In some of them, the reasons relied upon by the NDA to justify how the RSS tender was scored have changed over time; in others the NDA's position has remained broadly consistent.

334. The bidders were instructed in the Introduction to the SORR {J/10/1} to submit their tender responses in three individual volumes, and were also entitled to submit two further volumes of additional supporting information. Volume 1 was to be entitled "Key Enablers" and had a strict page limit for each Evaluation Node, including charts, tables and illustrations – this limit differed but was typically 25 pages. Volume 2 was "Technical Scope and Methodology Underpinning" and was to be no more than 415 pages in length. Volume 3 was "Cost & Programme Underpinning" and Volume 4 was "Generic Supplementary Information in Support

of Volume 3……" – those two volumes were to be not more than 2000 pages in length in aggregate. Volume 5 had no page limit, and was entitled "Supporting Information", but if a bidder wished to rely upon information in this volume to support a response, then that had to be clearly referenced and identifiable in the Volume 3 tender response. The font size was specified and a definition was given for how A3 pages would be counted towards the page count. These rules were clear and all the bidders knew that they had to be concise, given the amount of ground that the tender responses had to cover. They also knew that there were certain matters that had to be included. All the bidders also had the benefit of having been through the dialogue process with the NDA.

335. In paragraph 1.9 of the Introduction {J/10/13}, guidance was given as to the meaning of a "material omission" or a "material inconsistency", which were relevant terms for the application of the scoring criteria in the Appendix 2 Tables and Appendix 5, Table A. For the Key Enabler and Technical Underpinning Evaluation Nodes this guidance was as follows:

> "(b) For the purposes of evaluation, a response will be deemed to contain a "material omission" or a "material inconsistency", if the Bidder's response contains an omission or inconsistency which, in the opinion of the evaluators, is likely to result in any of the following effects:
>
> (i) In relation to the Key Enabler and Technical Scope and Methodology Underpinning Evaluation Nodes:
>
> (A) A significant impact on the programme or a high risk of a delay or failure to complete an Authority Milestone;
>
> (B) The Bidder's rationale for adopting the proposed strategy or approach being fundamentally undermined;
>
> (C) A failure of safety critical aspects of work or an increase in safety related incidents;
>
> (D) Regulatory enforcement action;
>
> (E) Creation of a conflict between the Bidder's proposed strategies or approaches which undermines confidence in delivery of the Requirements as set out in the SORR or the required outcomes in the Client Specification or the terms of the SLCA or PBA; or
>
> (F) The Authority's confidence being otherwise fundamentally undermined in relation to the Bidder's strategy or approach or its ability to deliver the Requirements as set out in the SORR or the required outcomes in the Client Specification or the terms of the SLCA or PBA".

Guidance was also given on the concept of "Rationale".

336. The opinion of the evaluators, also referred to as SMEs, was therefore an integral part of the evaluation process. It is necessary, when considering the substance of the different complaints in these proceedings, to guard against simply substituting the court's view for what the score should have been on the facts, in other words simply reconsidering the exercise upon which the SMEs were engaged at the time. As Coulson J stated in ***BY Development Ltd v Covent Garden Market Authority*** (2012) 145 Con LR 102 {AB/53/1} at paragraph [8]:

> "Accordingly, in deciding such claims, the court's function is a limited one. It is reviewing the decision solely to see whether or not there was a manifest error and/or whether the process was in some way unfair."

337. Where the SMEs were called upon, as they were, to make complex assessments and apply their opinion, the NDA enjoys a wide measure of discretion. The court cannot substitute its own assessment of the facts for that made by the authority concerned. What the court will consider is whether the NDA's evaluation was vitiated by a "manifest error" or a misuse of powers, and that it did not "clearly exceed" the bounds of its discretion {AB/53/5}. The expression used by Morgan J In ***Lion Apparel Systems Ltd v Firebuy Ltd*** [2007] EWHC 2179 (Ch), [2008] EuLR 191 {AB/40.1/1}, namely a "margin of appreciation", applies to matters of judgement of assessment when considering manifest error, but not in relation to compliance with its legal obligations of transparency and equality. It is therefore necessary to consider whether there is or are such errors when considering the complaints raised by Energy Solutions.

338. Both parties served large numbers of highly detailed witness statements from different witnesses dealing with the content of the RSS tender submissions, how they were evaluated, the justification for the scores given by the SMEs, the reasons why those scores were said to be wrong or reached by or in manifest error, and the justification claimed for what the scores should have been and also why the scores actually given were correct, or at the least not manifestly erroneous. A similar but more limited exercise was undertaken in relation to the CFP bid. The witnesses were cross-examined and inevitably such cross-examination dealt with numerous matters of fine detail as well as the more global criticisms of what had been done, and why, and/or what should have been done. I have carefully considered all of the evidence, both written and oral, and was greatly assisted by two documents prepared by the parties called "RSS Node Summary Sheet" and "CFP Node Summary Sheet" that provided specific references in both parties' evidence, written and oral, concerning each Requirement within each Node. However, in this judgment I only deal with such evidence as is required in order to come to the necessary findings on the complaints of manifest error, and lack of equal treatment and transparency on the different Requirements under the different Nodes, and any re-scoring necessary. Reciting all of the evidence in this judgment, both written and oral, both for and against each party's case on each of the Requirements, would add immeasurably to the length of this judgment. It should not be thought that evidence has been ignored simply because it is not individually recited. It should also be remembered that the exercise in which the court is involved is the limited review of what the NDA SMEs did in evaluating the RSS Tender

Submission. The evidence relied upon by Energy Solutions in this trial was not available to those SMEs for that evaluation.

B. RSS Evaluation Issues

B1. Critical Assets and Key Critical Assets – Nodes 411, 412, 414, 408, 405, 410

339. The SORR required consideration of the bidders' approach to identification and management of "*critical assets*", both as part of their general approach to asset management (which was Node 406) and when dealing with each relevant Project and Sample Project. This also required consideration of "*key*" critical assets, both in identification and (in fewer instances) management.

340. The Nodes affected by the NDA's treatment of critical assets are in numerical order as follows (they appear in a different order in the Agreed List of Issues):

1. Node 405 Spent Fuel and Nuclear Materials Management;

2. Node 408 Delivery of Winfrith Interim End State;

3. Node 410 Sample Project 1: Preparing Chapelcross CXPP and B141 for Interim State;

4. Node 411 Sample Project 2: Preparing Dungeness Reactor Complex for Interim State;

5. Node 412 Sample Project 3: Preparing the Fuel Storage Ponds at Sizewell A;

6. Node 414 Sample Project 5: The Management of Active Effluent at the Sizewell A Site.

341. The general issues that arise in respect of critical assets are those numbered 5, 6 and 7 in the Agreed List of Issues {AA/10/1}:

Agreed Issue 5

Whether:

(a) the SORR required RSS's response to be evaluated on the basis that the determination of whether an asset was critical should take no account of (i) the probability of asset failure and (ii) measures to mitigate the consequences of any such failure; and

(b) the Defendant was entitled to evaluate RSS's response on that basis.

Agreed Issue 6

On what basis:

(a) Did the SORR require or permit a bidder to identify a critical asset as a "key" critical asset; and

(b) Was the Defendant entitled to evaluate a response as failing to identify a "key" critical asset?

Agreed Issue 7

What was the nature of the explanation of the management of key critical assets (a) that the SORR required bidders to provide and (b) that the Defendant was entitled to look for in the evaluation of RSS's responses?

342. The Requirements affected in this category are 5.3(j) for Node 405, Spent Fuel and Nuclear Materials Management, and 5.3(c) for all of the others. The wording of the Requirements were (because they were slightly different in some cases):

> 1. Nodes 410.5.3(c), 411.5.3(c); 412.5.3(c) and 414.5.3(c): "Identification of the critical assets (including, but not limited to, waste handling infrastructure) needed to deliver the Sample Project work scope and a description of how those assets will be managed to ensure delivery of the work scope" {J/10/195};"
>
> 2. Node 408.5.3(c) "Identification of the critical assets required to deliver the strategy (including, but not limited to, waste handling infrastructure) and a description of arrangements to deliver required performance" {J/10/170};
>
> 3. Node 405.5.3(j) "Identification of the critical assets required to deliver MOP9 and nuclear materials and Exotic fuels outcomes (described in the Client Specification) (including fuel handling and waste infrastructure) and a description of the arrangements to deliver the required performance" {J/10/136}.

MOP9 was the latest version of the Magnox Operational Plan ("MOP") which defined the whole fuel cycle management for Magnox fuel, including generation, de-fuelling, storage of fuel and transport by rail to Sellafield for reprocessing. It was published by the NDA in July 2012 {V/34/1}.

343. It can be seen therefore that these Nodes all required identification of critical assets and the scoring table was to be found at {J/10/330} for all of them, despite the small differences in wording. The wording of the Requirements varied only very slightly between the Project and Sample Project Nodes.

344. The Sample Project wording is the most suitable to consider in detail because it covers more of the Nodes than any of the other wording {J/10/195}. It stated as follows:

> "5.3 Bidders must provide a description of their approach to implementing the strategy including, as a minimum, the following sections …
>
> (c) Identification of the critical assets (including, but not limited to, waste handling infrastructure) needed to deliver the Sample Project work scope and a description of how

> those assets will be managed to ensure delivery of the work scope".

I find there to be no differences in meaning, so far as identification of critical assets are concerned, despite the slight changes in the words for Nodes 405 and 408.

345. The scoring criteria for the Requirement were set out in Table K, "*Critical Assets*", in Appendix 2 of the SORR {J/10/330}. This provided the following so far as it concerns identification of critical assets:

> (1) A score of 5 (Excellent) was for where the response "Identifies the key critical assets necessary to deliver the Bidder's strategy and provides the rationale as to why they are critical".
>
> (2) A score of 3 (Fair) was for where the response "Identifies the key critical assets necessary to deliver the Bidder's strategy but may not provide the rationale as to why they are critical".
>
> (3) A score of 1 (Unacceptable) was for where the response "Does not identify the critical assets necessary to deliver the Bidder's strategy".

346. For each of Nodes 405.5.3(j), 408.5.3(c), 411.5.3(c), 412.5.3(c) and 414.5.3(c) RSS scored a 1. For Node 410.5.3(c) RSS scored a 3. In each of these six cases, Energy Solutions maintains a score of 5 should have been awarded. Dr Clark was the Lead SME for Node 408 and Mr Grey was the Lead SME for the other five Nodes in question. There is therefore a considerable gulf between the parties on the quality and correct score for this particular topic across a large number of Requirements, and whether there were any manifest errors.

347. It can be seen that the rationale for a score of 1 does not use the term "key critical assets", although the scores for 3 and 5 do. The introduction of the word "key" was something that occurred fairly late in the dialogue process. Energy Solutions submits that on the proper interpretation of the scoring criteria:

> "(1) To warrant a score of 1, any failure to identify a critical asset must relate to a failure to identify a "*key*" critical asset. Any other construction would make the scoring criteria inconsistent. That is because a response warranted a score 5 or 3 if such "*key*" critical assets were identified, even if other critical assets (that were not "key") were not so identified. It follows that it was insufficient to justify a score of 1 for the SMEs merely to conclude (justifiably) that an asset which a bidder had not identified was "*critical*". A score of 1 was only justified if SMEs concluded (justifiably) that the omitted critical asset was a "*key*" critical asset.
>
> (2) Any key critical asset must be one "*necessary to deliver the Bidder's strategy*". What may be a critical asset (and which of those were "*key*" critical assets) had to be determined,

> therefore, in the light of that bidder's strategy (as the NDA accepted in its Opening Submissions at Appendix 1 paragraph 125 {AA/3/25}).
>
> (3) There was no requirement for bidders to provide any reasons or rationale (a) why any asset was not critical or (b) why any asset, which was critical, was not identified as a "*key*" critical asset. That also was accepted by the NDA in its Opening Submissions at Appendix 1 paragraph 133 {AA/3/27} and by the NDA's witnesses. The only basis for a tender to be marked down was if there was in fact a failure to identify what was in fact a key critical asset."

348. The NDA's case on these Nodes does not turn on any highly technical point of construction on the differences in the scoring criteria between that for 1 (and the reference to "critical assets") and those for 3 and 5 (which uses "key critical assets"). The real point is more substantive for each Node, and amounts to whether the RSS bid had omitted to identify the key critical assets necessary. Essentially – and the assets in question are different for each Node – the SMEs concluded that the RSS bid had failed to identify certain assets that were in reality key critical assets that were necessary to deliver RSS'S strategy, with the exception of Node 410.5.3(c). For that Node, which achieved a score of 3, the SMEs concluded that the rationale for the critical asset categorisation was not provided.

349. I find that the scoring criteria for a score of 1 should be read as "key critical asset" rather than just "critical asset". The only reason for having the criteria for scores of 3 and 5 use the word "key" in conjunction with "critical assets", was to reflect the fact that a sub-set of critical assets was to be considered, namely those that were "key". A RWIND tenderer would have read the scoring criteria for each of 1, 3 and 5 as all relating to the same subject matter, namely "key critical assets". However, for an asset to be a "key" critical asset, it must be a critical asset in the first place. It is obvious that key critical assets are a sub-set of critical assets.

350. Essentially, the complaints by Energy Solutions in relation to the way these Nodes were scored amount to this. The Lead SMEs – in five cases Mr Grey, in the other case Dr Clark – are said to have applied the wrong test or tests to what was a critical asset/key critical asset. Dr Clark accepted that his views on this subject "mostly came" from Mr Grey {Day10-NC/125} although he said there were other colleagues who also helped him develop and understand the NDA's expectation. I find as a fact that Dr Clark applied the same test as Mr Grey in this respect. Energy Solutions submits that the wrong test was applied by the NDA as to whether an asset was a critical asset or not. It is submitted that this was because both these SMEs considered that it was irrelevant what risk might be associated with an asset, when one was considering whether that asset was a critical asset or not (or a key critical asset). All that should have been considered was the impact of failure of the asset in question. Accordingly, applying this test – which was different to the one adopted in the RSS Tender, because risk *had* been taken into account by the tender team – these SME teams concluded that a score of 1 (Unacceptable) was the correct score for five of the Nodes as the response did "not identify the critical assets necessary to deliver the Bidder's strategy". Given different tests were being applied for the categorisation of a critical asset by, on the one hand, the RSS team,

and on the other, Mr Grey and Dr Clark, it is perhaps unsurprising that the latter came to different conclusions as to what were critical assets. The SMEs therefore concluded that the RSS bid did not correctly identify the assets necessary and came to the score of 1 for five of these Nodes. This application of the wrong test is said to be manifestly erroneous.

351. In summary, the NDA position in the proceedings is that risk should properly be taken into account with critical assets, but only in the management of those assets. It is not taken into account when identifying whether those assets are in fact critical or not. There were different specific reasons given by the NDA in respect of each of the six Nodes for their score of 1. For example for Node 411 and Requirement 411.5.3(c), the SMEs took the view that RSS had failed to identify the Active Effluent Treatment Plant ("AETP") and saline water groundwater pumping system ("SWTP") as key critical assets. Additionally so far as this Requirement was concerned, there is a challenge to the CFP bid for exactly the same reason – CFP had not identified the AETP or the saline water groundwater pumping system as key critical assets either, but were given a higher mark than RSS for this Requirement. This forms the subject of Agreed Issues 71 and 72 which are dealt with in Confidential Appendix 3.

352. The specific reasons provided by the NDA in relation to each Node are separately dealt with, but fundamental to them is the approach to critical assets explained in the evidence. As Mr Grey put it in his first witness statement "I believe [RSS to have used] the wrong approach to the identification of critical assets" {ZA-CON/2/28}. For three of the five Nodes in which Mr Grey was involved, that was the reason for the low score. For the other two, it was said there were deficiencies in the answer in relation to the management of assets and whether RSS were adopting good practice. Dr Clark, for Node 408, together with the other two SMEs for that Node (who were Dr Clark's wife, Dr Anna Clark, and Mr David Rushton), concluded that there was a failure by RSS to include two particular assets as key critical assets, namely the Active Liquid Effluent System ("ALES") and the Treated Radioactive Waste Store ("TRS"). There were other issues on other Nodes, for example, for Node 412 and Requirement 412.5.3(c), the SMEs decided at the evaluation stage that RSS had failed to identify the skip handling crane as a key critical asset, and the NDA stated that it should have been so identified. This was said to be because the crane was necessary to move fuel inventory in and out of the storage ponds. In fact, that contention was wrong and the skip crane does *not* move fuel inventory in and out of the storage ponds. This point was abandoned during the proceedings by the NDA, and another one put in its place as justification for the necessity of the skip handling crane being a critical asset.

353. It can therefore be seen that the approach to identification of critical assets is central to all six of these Nodes. Mr Giffin QC put the NDA view on identification of critical assets to the relevant Energy Solutions' witnesses, predominantly Mr Colwill, but also Mr Board. The general tenor of this oral evidence from experienced personnel at Energy Solutions was that the points being put to them by Mr Giffin QC were wrong, and risk had to be taken into account at the categorisation, not merely the management, stage for critical assets.

354. The Consensus Rationale for the RSS bid adopted different phraseology for each of these Nodes, and also for some of the Nodes that did not solely rely upon failures

to identify assets as key critical assets to justify the scoring. For example, the Consensus Rationale for Node 411.5.3(c) stated {U/4/57}:

> "Critical assets identified complete with rationale and ownership.
>
> Information on how they intend to manage the critical assets is provided as well as maintenance and monitoring.
>
> The bidder has not recognised the AETP and the saline ground water pumping system (these are examples of omissions) as critical assets despite descriptions of their role and risks in the project elsewhere in the submission that would suggest otherwise which is considered to be a material omission.
>
> Whilst the proposal states that critical assets will be managed taking account of past performance, future demand and capability and therefore responds to the requirement, the quality could have been improved by providing more details on specifically how this will be done. The absence of this detail is considered to be an omission but not material.
>
> Otherwise the submission has addressed the remaining scoring criteria."

Although the explanations and the Consensus Rationale are not identical, the common theme running through these Nodes is that RSS had failed to identify key critical assets or critical assets sufficiently or adequately in the Tender Response, and that as a result the submission did not qualify for a score of 5.

355. Further, the position taken by the NDA in its pleadings was that the SMEs were engaged in an evaluative judgment – which they undoubtedly were – but that this simply could not constitute a manifest error. So for example in relation to Node 405.5.3(j) paragraph 66(5) of the Defence in action HT-2014-000053 states {A/5/31}:

> "An evaluative judgment of this sort is not capable of constituting a manifest error".

I have dealt above with my finding that this is wrong insofar as it suggests a prohibition upon the possibility of any manifest error in reaching an evaluative judgment. The SMEs are however entitled to a margin of appreciation.

356. There was no definition of "critical asset" in the SORR. However, that term is of wide application in industry generally and there is a relevant standard in this respect, namely "Publically Available Specification 55" or "PAS-55" "Specification for the optimized management of physical assets" {V/12/1}. This is published by the British Standards Institute, is also approved by the Institute of Asset Management and is recognised as being Good Industry Practice, including by the NDA itself. Indeed, in the Client Specification for the whole competition

itself in relation to the "Critical Enabler: Asset Management" {K/6/73} the NDA expressly stated that this would be used as follows:

> "Contractual Obligation:
>
> To support the Authority's Strategy in relation to the requirement to adopt a recognised Good Industry Practice asset management standard such as the Publicly Available Specification PAS-55, the Contractor shall:
>
> > 6.4(a) implement asset management consistent with Good Industry Practice. When judging whether Good Industry Practice is being achieved the Authority will use:
> >
> > > [i] Publicly Available Specification PAS-55 (or equivalent) with the expectation that the Contractor demonstrates a maturity level of 3 (or equivalent) as measured by the standard; and
> > >
> > > [ii] any relevant and recognised guidance (e.g. HSE, IAEA, professional bodies, etc.) associated with the management of assets…."
>
> [emphasis added]

357. PAS-55 expressly contains a definition of "critical assets" in the Definitions Section, Section 3. At paragraph 3.16 it states {V/12/17}:

> "critical assets/asset systems
>
> **assets** and/or **asset systems** that are identified as having the greatest potential to impact on the achievement of the **organisational strategic plan**. **NOTE** The assets can be safety-critical, environment-critical and/or performance-critical, and can relate to legal, regulatory and/or statutory requirements"

358. Further, Part 2 of PAS 55 is entitled "Part 2: Guidelines for the application of PAS 55-1". This provides further specific guidance on critical assets {V/12/84}:

> "4.4.7.6 Asset criticality
>
> The concept of asset criticality is a particular manifestation of risk management - this is the recognition that assets and asset systems have differing importance (value), or represent different vulnerabilities, to the organization. Criticality will usually include, but is not limited to, the risks of asset failure or non-performance. Criticality may also consider asset capital value, performance or efficiency, flexibility and other characteristics that reflect organizational goals and values. The corresponding asset characteristics should be assessed and weighted or scaled in a consistent manner to determine asset

> criticality for the purposes of prioritized asset management attention. Some assets of low material value, or indirect business contribution, may still have the potential to cause high impact in the event of failure (for example, safety relief valves).
>
> Care should be taken in the definition and determination of asset criticality that includes risk elements. Some organizations refer to criticality only in terms of the potential failure consequences of the assets or asset systems; this may be suitable for prioritizing repairs or corrective actions for failures that have already occurred, but the true risks (probabilities multiplied by consequences) should normally be used within asset criticalities for the purposes of planning asset management (and risk management) actions. In some cases, where risks represent very low probability, very high consequence events (such as major safety risks), a degree of "disproportionality" should be considered to artificially increase the criticality, in recognition of the greater uncertainties associated with such risk estimations."
>
> [emphasis added]

In my judgment, the above passages make it clear that risk is an integral part of proper consideration of whether an asset is, or is not, properly characterised as a critical asset, as well as in management of that asset. Not only does PAS-55 make clear that this is Good Industry Practice – and the Client Specification itself expressly required bidders to use Good Industry Practice, with PAS-55 being specifically identified as a benchmark in that respect – but other documents make it clear that risk is an integral part of this identification and categorisation process. My finding in this respect means that Mr Grey and Dr Clark failed to apply the correct industry-wide test when they were considering the identification of critical assets. They applied the wrong test when they were evaluating the RSS Tender Submission in this respect. It is not only PAS-55 that uses the risk-based approach. ISO-55000, the International Standard on Asset Management {V/239.1/1} uses the same definition as PAS-55 and the British Standards Publication BS ISO 55002:2014 Guidelines on the application of ISO 55001 expressly state at paragraph 6.2.2.1 {V/260.2/19}:

> "A risk ranking process can determine which assets have a significant potential to impact on the achievement of the asset management objectives, ie which are the critical assets".

359. Further, the NDA's very own asset management strategy, contained in a document called "Asset Management Approve Strategy (Gate C) March 2011" {V/19/1} (referred to as "the Gate C document") stated the following: "The strategy selected for NDA asset management improvement is to utilise the internationally recognised asset management standard, Publically Available Specification – 55 (PAS-55)". It also expressly stated in the Gate C document that:

> "…the SLCs were incentivised to secure asset performance through benchmarking their asset management arrangements and to identify critical assets using a risk based approach."
>
> [emphasis added]

This is particularly notable given that the author of the Gate C document was none other than Mr Grey himself. The NDA's evaluation of all of these Requirements was therefore, in my judgment, manifestly erroneous. The test applied by Mr Grey was a different one to the "risk based approach" he himself had included in the Gate C document that he had drafted.

360. RSS had expressly considered risk in its approach to identification of critical assets. Node 406 was entitled "Asset Management" and designed to test the bidders' general approach and methodology to asset management. Requirement 406.5.3(a) within this Node stated that bidders had to describe:

> "How the Bidder will institute and maintain Good Industry Practice asset management within the Magnox SLC and the RSRL SLC consistent with the Client Specification." {J/10/145}

361. Requirement 5.3(b)(x) required bidders to describe:

> "How the Bidder will optimise the asset management programmes to: … (x) Identify and report on critical assets." {J/10/146}

RSS's asset management strategy for identifying "critical assets" expressly included an assessment of the risk which those assets posed to the strategy adopted by RSS. This general approach to identification of critical assets in its response to Requirement 406.5.3(b)(x) was at pages 28 and 29 of the tender response {Q/22/25}. This stated:

> "… The key element that our approach brings to this analysis is the additional consideration of the extent of risk the asset potentially represents to the SLC. It is this additional perspective that will enable us to flag whether the asset is critical at project, programme, SLC or estate level and apply asset management action accordingly. Our criteria for determining the criticality of the asset is the same as that used for prioritisation, which is covered in Section 406.5.3 p. 18 and illustrated in Figure 406-18, Identification of Critical Assets, p 25 …"
>
> [emphasis added]

362. The anticipated outcomes of this approach (set out in the box on the same page) included "risk evaluated as part of criticality". The references directing the SMEs to page 18 {Q/22/15} and Figure 406-18 on page 25 {Q/22/21} made it clear that RSS's approach to identification of critical assets was based on an overall

"criticality score". This took into account both probability and consequences of an asset failure (by means of what was called a "Threat-PID" assessment). That included reference to a Probability and Impact Diagram ("PID") which was in the NDA's own Programme Controls Procedure Manual (PCP-M) {V/110/114}. The use of this produces what is called a "*PID score*". Figure 406-18 also indicated that the "criticality score" would take account of "capability of managing controlling risk" (under "Performance Vulnerability Assessment") and "replacement lead time of spares" as well as hazard and work activity reduction impact (under "Business Vulnerability Assessment").

363. There is no doubt from this material that RSS had included an assessment of risk in determining the identification of critical assets. Mr Grey accepted this in his cross-examination {Day12Z-CON/80} to {Day12Z-CON/84}. Interestingly, Mr Grey led the SME team on this Node too, who gave RSS the top score of 5 (excellent) for Requirement 5.3(b) {U/4/49}. This can only mean that, in the view of those SMEs on this Requirement in this Node, what had been done by RSS was consistent with both the Client Specification and Good Industry Practice; {J/10/337} and {Day12Z-CON/87}. The Consensus Rationale for this Requirement stated that RSS's approach to asset management (which included identification of critical assets) was:

> "… comprehensive and easy to read, including … the approach to optimising asset programmes/performance … and ownership and monitoring proposals."

364. This is exceptionally difficult, if not frankly impossible, to reconcile with the argument relied upon by the NDA that risk should not be taken into account when identifying critical assets. Yet this is precisely the crux of these issues between the parties. Notwithstanding the obvious difficulties in reconciling these two approaches, Mr Grey sought to reconcile them. He explained the award of a score of 5, in which he had personally been involved, for this Requirement in Node 406, must have occurred either because the SMEs had not appreciated what RSS was proposing, or that they had not focussed as they should have done when assessing it {Day 12Z-CON/89}. In my view this is a clear example of a failure by Mr Grey to recognise and accept an obvious mistake. Mr Grey accepted that, before the Consensus Rationale was formulated and the Requirement was scored, each of the three SMEs would have read RSS's Tender Responses at least three times, and may have gone back to certain parts more often {Day12Z-CON/90}. The notion that all three of them would each have made the same error on at least three (if not more) separate occasions is not a sensible one. Mr Grey fastened on this because to do otherwise would have been to admit that the approach by the NDA on the other more numerous Nodes was wrong. I consider that he was trying to "protect" or defend the overall score given to the RSS Tender Submission, and would rather criticise the award of 5 on this Requirement – which in my view was plainly right, and certainly was not reached manifestly erroneously – than accept that all six of the other Nodes were scored manifestly erroneously.

365. The NDA's explanation for the scoring of the Nodes that are challenged was as follows. This explanation was provided both in submission and in the evidence of Mr Grey (and to a lesser extent Dr Clark), and was that risk had to be taken into account when dealing with the management of critical assets, but not in their

identification. The British Standard Institute Guidelines referred to above, whose terms were put to Mr Grey by Mr Hunter QC, initially without being identified as such, were roundly criticised by Mr Grey as constituting "bad industry practice" {Day12-NC/55}. I find the British Standard Institute Guidelines to constitute good industry practice. Mr Grey also explained the presence in the Gate C document, which he had personally drafted (and proof-read), of the text above as being a "mistake". He accepted many people must have read that text since its inception in 2011, and that none had brought the mistake to his attention {Day12-NC/64}:

> "….I don't know – no one has highlighted this before. Many people have read it [the Gate C document] and not highlighted the error and questioned it. I have read it many times and missed it myself. I can't account for that."

If the text of the Gate C document genuinely did contain such a mistake, it would, so far as categorisation of critical assets is concerned, be a rather glaring and obvious mistake and would surely have been noticed.

366. There is however another, more logical, and quite simple explanation for this, and that is that PAS-55, the International Standard, the British Standard Guidelines on the International Standard, and the NDA's own Gate C document (drafted by Mr Grey) were all correct, and consistent in identifying Good Industry Practice (namely requiring risk to be taken into account in the identification of critical assets, not just in their management); that this Good Industry Practice was correctly applied by RSS in its categorisation of critical assets and key critical assets; and that it was Mr Grey (and also Dr Clark) who made an obvious mistake in the approach they adopted when evaluating these particular Requirements, by applying the wrong test. That is the scenario that is far more likely, and is the one that I find occurred. I find that Good Industry Practice is represented by the express terms of these different published documents, and that this was applied by RSS. Risk would not only ordinarily be taken into account, but must be taken into account, by a bidder when identifying assets as critical assets (and by extension when considering key critical assets). The mistake made by Mr Grey was also made by Dr Clark, who was taking guidance from Mr Grey, as he was more familiar with this subject than Dr Clark. Dr Clark had no asset management experience of his own and had been given no training on asset management. His knowledge of this subject was plainly limited.

367. Dr Clark said "I'm not familiar enough with PAS 55 to know whether that is exactly what it says in PAS 55" about the definition of critical assets {Day10Z-CON/133}. He could not recall whether he had read PAS-55 before he was involved in evaluating various projects but, if he had done so, he accepted that he had not done so in detail, nor could he recall having read the associated guidance on asset criticality {Day10Z-CON/128}. That evidence in itself would, on its own, give grounds for concern, given Dr Clark was involved in the exercise of scoring tender submissions by reference to marking criteria that required express consideration of asset criticality. However, in conjunction with his taking guidance from Mr Grey, who was plainly applying the wrong test, this leads me to conclude that Dr Clark was applying the wrong test too. I do not consider that, simply because the SMEs were arriving at "an evaluative judgment" of this sort, means that is not capable of constituting a manifest error. Applying what is obviously the

wrong test in this way (and a test directly contrary to Good Industry Practice) is precisely the sort of manifest error, I find, that *is* susceptible to review by the court in the exercise of its supervisory jurisdiction in procurement competitions. I do not find that the margin of appreciation available to the NDA in matters of evaluative judgment permits it to escape a finding that the scoring of these Requirements was manifestly erroneous.

368. Energy Solutions also rely upon other matters that occurred during the dialogue process where both Mr Grey and Dr Clark were said to have expressly approved this approach that RSS had adopted to the identification of critical assets. It is unnecessary to consider these in detail as I have found that the wrong test was plainly applied by the SMEs during evaluation, but I accept that the approach adopted by RSS was expressly approved by the NDA during the dialogue phase. The reason it is unnecessary to dwell on this approval, or its effect, is that I have found manifest error in the NDA's approach to the evaluation regardless of this approval. In any event, all the published material from the various authoritative bodies, and the NDA's own Gate C document drafted by Mr Grey himself, expressly state the correct approach and the one that I have found to be Good Industry Practice.

369. It follows therefore that in my judgment the SMEs made manifest errors in evaluating RSS's tender submissions on all six of these Nodes concerning the identification of both critical, and key critical, assets. The manifest error was to apply the wrong test to the identification of both critical assets, and key critical assets, by considering that risk should *not* be taken into account in that identification process. I find also that it would be reasonable for bidders to treat as "key" critical assets those that were most important, or those that presented the greatest risk to their strategy. Both Mr Grey {Day12Z-CON/102} and Dr Clark {Day10Z-CON/137} accepted that it would be reasonable for bidders to treat as "*key*" critical assets those assets that presented the greatest risk to their strategy and so this much, at least, appears to be common ground with the NDA's own SMEs.

370. The consensus rationale for these Nodes do not differentiate between *key* critical assets, and critical assets, in any event. There are no contemporaneous records of the SMEs addressing the question of whether an asset was a "*key*" critical asset, rather than merely a critical asset. Their conclusions, when an asset was not listed and a score of 1 was awarded, were that there had been failures to identify a "*critical asset*", not a "*key*" critical asset. That is contrary to how I have found the SORR should have been construed in any event; at the very least, a RWIND tenderer was entitled to interpret the criteria for a score of 1 as meaning a *key* critical asset. None of the consensus rationales and none of the NDA's witness statements sought to identify that the risk from the asset which it was said RSS ought to have listed was in fact greater, or in some other way more significant, than those critical assets that RSS had in fact listed. It should be remembered that the NDA were anxious that fewer, rather than more, assets were listed as being critical, and there were in any event space restrictions upon the bidders regarding the length of their tender submissions.

371. In its Opening Submissions the NDA stated that:

> "The key critical assets which needed to be identified were those which were necessary to deliver the bidder's strategy." {AA/3/44}

372. However, Energy Solutions submits that even this illustrates the fact that the NDA did not differentiate, because it does not distinguish between the "critical assets" necessary to deliver the bidder's strategy (the identification of which involved a comparative exercise) and the "key critical assets" necessary to deliver it. In its closing submissions, the NDA accepted that the addition of the word "key was not intended to change the nature of what was a critical asset". Attention was also drawn by the NDA to the fact that the amendment to the SORR that added the word "key" was made on 20 September 2013 {J/9a/409}, dialogue closed on 30 September 2013, and within that period RSS could have sought clarification of the amendment had it wished to do so. However, that submission presupposes that clarification would have been seen at the time as necessary. Given it is accepted that the word "key" was not intended to change the approach to critical assets, and given that the NDA had told the bidders in dialogue that a couple of good examples were needed, I do not accept that Energy Solutions can be criticised (or that the Energy Solutions' complaints have less force) because RSS did not seek clarification in late September 2013.

373. The NDA's interpretation of risk and its role in the identification of critical assets was manifestly erroneous, and the evaluation was unlawful, and in breach of the NDA's obligations under the Regulations. Without changing the legal test that has to be applied in procurement cases such as this one in any way, I would categorise this error (or series of errors across a number of Nodes) as being glaringly obvious on the face of these published industry documents, and on the terms of the NDA's own Gate C document. Mr Grey misapplied the very test that was included in a document drafted by him, and which had stood as the NDA's own standard on this very subject since 2011, and which he had also effectively adopted and approved when marking Node 406. The attempts by the NDA to cling to their convoluted explanations concerning this glaringly obvious error demonstrated the degree to which those at the NDA found themselves unable to admit to any mistakes.

374. The NDA in its Closing Submissions stated that Mr Grey was "too willing to accept that he had made a mistake" in his oral evidence, and it is also said that it was five years since he had drafted the document in question {AA/19/53}. I reject both of those submissions. Mr Grey was attempting to reconcile what the document stated, which was one thing, and what he had done (apart from on Node 406) which was another. It was sensible of him to accept that reconciliation could not be achieved as the two approaches were entirely different, and his good sense in this respect was helpful to the court. It would have been verging on the ludicrous had he attempted to explain that he had applied the Gate C approach, because he plainly had not. I simply do not understand how the NDA can criticise its own witness for being "too willing to accept that he had made a mistake". Such a submission does however neatly encapsulate the NDA's overall approach in this trial, which was never to accept that any mistakes were made, regardless of the evidence to the contrary.

375. It is also in issue between Energy Solutions and the NDA how the bidders should have approached assets that were not "owned". Requirement 5.3(c) required bidders to provide:

> "…a description of how those assets will be managed to ensure delivery of the [Sample Project] work scope".

Table K of the SORR contained the scoring criteria, and for a mark of 5 {J/10/330} this stated that the following had to be included:

> "• Demonstrates ownership and monitoring of critical assets such that they are managed throughout the duration of the strategy to ensure the required level of performance is achieved;
>
> • Explains how it will manage the critical assets to deliver the Bidder's strategy in the context of past performance, future demand and capability"

376. If the response failed to demonstrate ownership of the key critical assets "such that they are managed throughout the duration of the strategy" a score of 1 would be justified. Similarly, a failure to provide an explanation of how the assets would be managed in the context of past performance, future demand and capability would also mean that correct application of the scoring criteria would justify a 1.

377. The question therefore arises concerning assets that were not owned, or within the particular project. Bidders had been instructed, as Mr Colwill explained, to treat the Sample Projects in question as wholly self-contained {B/7/71}. An asset that was not owned could not, on a proper construction of the SORR, be identified as a key critical asset within that project because the bidder could not "demonstrate ownership". Logically, if such an asset were identified as a key critical asset, this should have resulted in a score of 1, since the criteria that had to be satisfied to obtain a higher score ("explaining how [the bidder] will manage" it to deliver its strategy) could not be met. In some cases, however, the NDA argues that RSS failed to identify, as critical assets, assets which it would not own and manage as part of the project, such as the Active Effluent Treatment Plant ("AETP") in Node 411 Sample Project 2 (Dungeness). This was to be operated by the Site Operations team and was not part of the Sample Project. The asset was expressly out of scope, as was made clear in the Tender Submission {Q/27/13}. This meant that it could not be managed as part of the Sample Project. Mr Grey said in his evidence {Day13Z-CON/42:15} that this was:

> "…irrelevant. The assets are critical to the project and it doesn't matter who manages them."

That point is somewhat circular, and omits consideration of the terms of the SORR itself. The answer assumes that management is not relevant if an asset has been identified as critical. However, the SORR requires management to be identified as part of the bidder's strategy for a particular project. If the management is being performed within another project or out of scope, then that asset should not be identified as critical to the project in question.

378. The AETP was to be operated, monitored and managed by the Site Operations team, outside the scope of the Sample Project. In those circumstances, it could not be, in my judgment, a key critical asset within the Sample Project. Mr Grey stated {Day13Z-CON/45} that in this situation the response should identify or provide a description of "the way in which they would manage the interface with whoever was" responsible for their management. But there were other Requirements in the SORR, not assessed by reference to the same criteria, and these dealt with interfaces with other projects. Dealing with such interfaces is wholly different to identification of what were the key critical assets within, for example, Sample Project 2.

379. Further, an explanation was required for how RSS would manage the key critical assets in the context of past performance, future demand and capability. Until a bidder's asset management strategy was approved and put in place under the contract (which could be expected to take up to 24 months), it was an NDA requirement that the successful bidder was required to manage any asset in accordance with the existing arrangements for it in the LTP Performance Plan. The explanation bidders were required to provide of how an asset was to be managed "to deliver the Bidder's strategy in the context of past performance, future demand and capability" was plainly directed at how it would be managed under the bidder's own asset management strategy, once that was in operation. Accordingly, there would be no point in identifying, and it would be inconsistent with the SORR's manifest intention to identify, an asset as a "key" critical asset whose use would come to an end before the bidder applied its own asset management strategy, since there would be no relevant management proposals to explain. That conclusion is reinforced by the fact that the object of including the Requirement in the relevant specific Nodes (as the structure of the SORR itself indicated) was to test a bidder's asset management strategy by seeing how assets would be managed under it. It would make no sense (as a matter of the SORR Requirements) for bidders to be required to identify assets which they could not, and would not, manage as part of their strategy for the project or Sample Project. Mr Grey accepted that it would be impossible for the bidders to set out asset management plans, and also that the purpose was to test the bidder's new asset management strategy {Day12Z-CON/105}. This was also accepted by the NDA during the trial {Day5Z-CON/11} when Mr Davies in cross-examination said it had to be at a high level and Mr Giffin QC sensibly described this as "a perfectly fair point". RSS had also been told by the NDA in dialogue on 5 July 2013 {M/35/4} that it:

> "…should show a couple of good examples from the list [of critical assets] to demonstrate out (sic) thinking".

Dr Clark accepted {Day10Z-CON/135} that what was required was:

> "…an outline description of how those key critical assets would be managed".

Mr Grey likewise said that he wanted an "*outline*" to give confidence that the right thing was going to be done {Day13Z-CON/118}.

380. I accept Energy Solutions' submissions on this point. If a particular asset is not "owned" by the project in question (for example Sample Project 2), then the asset

cannot be a key critical asset within Sample Project 2. It may well be a key critical asset within the other project but it is wholly illogical to score Sample Project 2 down for omitting it as a key critical asset within Sample Project 2. It is also wholly illogical to mark down any of the Tender Submissions for failing to identify the management of an asset or assets which the bidder would never be managing.

381. The answers to Agreed Issues 5, 6 and 7 are therefore as follows:

Agreed Issue 5:

(a) The SORR did not require RSS's Tender Response to be evaluated on the basis that the determination of whether an asset was critical should take no account of (i) the probability of asset failure and (ii) measures to mitigate the consequences of any such failure; and

(b) The NDA was not entitled to evaluate RSS's Tender Response on the basis that no account should be taken of such matters.

Agreed Issue 6:

(a) The SORR permitted a bidder to identify a critical asset as a "*key*" critical asset on a reasonable basis consistent with Good Industry Practice which included doing so using a risk-based approach. This is what RSS did;

(b) The NDA was only entitled to conclude that a bidder had failed to identify a "*key*" critical asset if there were proper grounds to conclude that the bidder had failed to identify an asset which was in fact a "*key*" critical asset applying the bidder's approach to identifying such assets, which in the case of the RSS approach, was a risk-based approach consistent with the published industry standards and good practice.

Agreed Issue 7:

The SORR required bidders to provide an explanation of their approach to managing the particular key critical assets (which they had identified) but only in outline, and in the context of past performance, future demand and capability. The bidders were not required to provide a detailed asset management plan. The NDA should have evaluated the tender submissions on this basis.

The specific Nodes

382. It is necessary therefore to turn to the separate Nodes in issue in this category. The different Nodes and the Agreed Issues associated with them are as follows. They were not listed in numerical order in the Agreed List of Issues. For convenience, I deal with them in the order used in the Agreed List of Issues {AA/10/1}.

Node 411 Dungeness (Sample Project 2): Requirement 5.3(c)

Agreed Issue 8. The primary issue is whether a score of 1 was lawfully awarded because the active effluent treatment plant (AETP) and saline groundwater pumping system were not treated as key critical assets in the RSS's response.

Agreed Issue 9. Within that issue, a specific sub-issue is whether the Defendant was entitled to treat an asset as one needing to be identified as a key critical asset for a project, even though the management of that asset fell outside the scope of that project (and whether the groundwater pumping system in fact fell outside the scope of this project as described in the RSS tender). It is agreed by the parties that the AETP fell outside the scope of the project.

Agreed Issue 10. The secondary issue is whether the score which should have been awarded if the NDA had acted lawfully was 3 (rather than 5) given the explanation of the management of the weather envelope cladding identified as a critical asset by RSS.

Node 412 Sizewell A (Sample Project 3): Requirement 5.3(c)

Agreed Issue 11. The primary issue is whether a score of 1 was lawfully awarded because the skip crane was not treated as a key critical asset in the RSS response.

Agreed Issue 12. Specific sub-issues with respect to the skip crane are:

a. whether there was an error by the Defendant in relation to what function could and needed to be performed by the skip crane; and

b. the materiality of any such error.

Agreed Issue 13. The secondary issue is whether the score that should been awarded if the NDA had acted lawfully was 3 (rather than 5) given the explanation of the management of the AETP components and sludge drying kit identified as critical by RSS.

Node 414 Sizewell A (Sample Project 5): Requirement 5.3(c)

Agreed Issue 14. The primary issue is whether a score of 1 was lawfully awarded because the pond water treatment plant (PWTP) was not treated as a key critical asset in the RSS response.

Agreed Issue 15. Specific sub-issues with respect to the PWTP are:

a. Whether the PWTP would manage active effluent; and

b. Whether there was an error by the Defendant in relation to the functions of the PWTP or the consequences of it failing, and

c. the materiality of any such error.

Agreed Issue 16. The secondary issue is whether the score that should have been awarded if the NDA had acted lawfully was 3 (rather than 5) given the explanation of the management of the AETP components and mobile AETP identified as critical by RSS.

Node 408 (Winfrith Interim End State or IES): Requirement 5.3(c)

Agreed Issue 17. The issue is whether a score of 1 was lawfully awarded because the Active Liquid Effluent System ("ALES") and Treated Radioactive Waste Store ("TRS") were not treated as key critical assets in the RSS response.

Agreed Issue 18. Within that issue, specific sub-issues concern:

(i) The relevance of RSS's intention to cease using the ALES and TRS before its own asset management system was fully functioning;

(ii) the consequences of failure of the ALES or TRS.

Node 405 (Spent Fuel and Nuclear Materials Management): Requirement 5.3(j)

Agreed Issue 19. The issue is whether a score of 1 was lawfully awarded given the explanation by RSS of how it would manage the modular flasks, M2 flasks, Wylfa flask handling crane and Wylfa pile cap equipment which it had identified as critical assets. (These flasks are the containers that are used to contain the spent fuel).

Node 410 Chapelcross (Sample Project 1): Requirement 5.3(c)

Agreed Issue 20. The issue is whether a score of 3 was lawfully awarded given the explanation by RSS of how it would manage the CXPP cave crane and CXPP process area ventilation system which it had identified as critical assets.

383. Due to my findings on the correct test to be applied, and the failure by the NDA to apply Good Industry Practice and the requirements of the various publications to the identification of critical assets, each of the Agreed Issues numbered 8, 11, and 14, are answered that the scores in each case were not lawfully awarded. Issue 17 is different because the reasons for criticality (on the part of the NDA) and non-criticality (on the part of RSS) were different and did not include analysis of risk.

384. However, consideration is still required of whether the different assets in each case should have been identified as key critical assets in any event, applying the correct test, and what the correct score should have been. The answer will not necessarily be the same for each of the different Nodes and the different assets in question. Simply because Energy Solutions has succeeded in demonstrating manifest error in the test applied by the SMEs does not mean of itself that the RSS Tender Submission is automatically entitled to a score of 5 on each of the Requirements.

Sample Project 2 – Preparing Dungeness Reactor Complex for Interim State: Node 411 Requirement 5.3(c) identification of critical assets

385. The AETP and the saline groundwater pumping system were not considered to be key critical assets by RSS. It is noteworthy that CFP, the winning bidder, also did not consider the AETP or the saline groundwater pumping system to have been critical assets. However, that consistency in approach by the bidders to these assets was not matched by consistency in the mark awarded by the SMEs. Energy Solutions challenges the score given to the CFP bid on this Requirement, as even though it had not identified the AETP or the saline groundwater pumping system

as critical, CFP was given a score of 3. This forms the subject matter of Agreed Issues 71 and 72 which are dealt with in Confidential Appendix 3.

386. Evidence on this Requirement was given by Mr Colwill for Energy Solutions and Mr Grey for the NDA.

387. The AETP was not within the scope of Sample Project 2 and could not therefore be a key critical asset for the reasons already explained above.

388. The groundwater pumping system was similarly not within the scope of this project and this was stated in the RSS Tender Submission. This was explained at {Q/27/13} in the following terms:

> "The following scopes are excluded from Preparing Dungeness Reactor Complex for IS:
>
> ■ The Ponds are attached to the reactor complex but the scope is in the Ponds programme
>
> ■ The Miscellaneous Reactor Area Clearance scope is in the contaminated D&D works
>
> ■ Storage of ILW in the reactor complex voids
>
> ■ The site enabling activities and C&M periods are in the facilities scope
>
> ■ The onsite and offsite transport of wastes and the disposal/storage of wastes is in the Technical and Waste Function scope
>
> ■ Land Quality Management personnel will address remaining soil and groundwater scope"

389. If there were groundwater ingress at the site, it would be the Site Operations Team who would operate the groundwater pump to remove it and the penultimate bullet point in the list above makes it clear that this was out of scope. Mr Grey broadly accepted this {Day13Z-CON/43} – {Day13Z-CON/45} but said there was "confusion" due to the Reactor Project Wiring Diagram in Figure 411-16. I do not accept there was any confusion, if the text is also read in conjunction as it should have been. However, given the nature of the assets – pumps to remove water – I do not accept that even if they were in scope, they must be categorised as key critical assets in any event. The pumps are not complex and alternatives could be hired easily in the event of failure, as Mr Grey accepted when the point was put to him {Day13Z-CON/47}. The risk of failure would be low in any event, but the impact of any failure would be negligible.

390. RSS had listed two key critical assets, ISO containers for desiccant and catalyst storage and the weather envelope cladding {Q/27/16}. The consensus rationale stated that {U/4/57}:

> "Critical assets identified complete with rationale and ownership...The bidder has not recognised the AETP and the saline ground water pumping system (these are examples of omissions) as critical assets despite descriptions of their role and risks in the project elsewhere in the submission which is considered to be a material omission. Whilst the proposal states that critical assets will be managed taking account of past performance, future demand and capability and therefore responds to the requirement, the quality could have been improved by providing more details on specifically how this will be done. The absence of this detail is considered to be an omission but not material. Otherwise the submission has addressed the remaining scoring criteria."

391. Mr Grey accepted that both these assets had been treated as critical by the SMEs without considering the likelihood (another way of saying risk) of their failure {Day13Z-CON/41}. In attempting to explain why CFP was not also given a score of 1, given CFP's identical failure to identify the AETP or groundwater pumps as key critical assets, Mr Grey said there was:

> "…no foundation to suggest that [CFP] had either understood or identified groundwater as being an issue." {Day13Z-CON/53}

Even though, according to him, it was:

> "…one of the two things that everyone at Dungeness talked about a lot." {Day13Z-CON/53}

This is somewhat circular. Either groundwater was an issue at Dungeness, or it was not. A failure to identify that it was an issue could not, logically, excuse a bidder from identifying the measures necessary to deal with it as key critical assets. CFP used a slightly different title to the Node, namely:

> "Preparing the reactor building complex for both reactors at Dungeness Site for the Interim State".

The introductory wording to the RSS Tender Submission make it clear that it is dealing with the same subject matter as one would expect. That title was:

> "The scope of this Sample Project (Project) is to prepare the reactor building complex for both reactors at the Dungeness Site for Interim State (IS), by reducing radiological risks and industrial hazards, and constructing a weather envelope for the reactor buildings."

I find that there was no difference in Sample Project 2 to justify this different approach to scoring this Requirement by the two bidders.

392. The approach by the SMEs to the bidders' approach to groundwater should have been consistent, regardless of CFP's state of knowledge about this as an issue.

Bidders were in any event supposed to make enquiries {Day13Z-CON/55}. The NDA in its submissions identified that {AA/3/42}:

> "The object was to see whether bidders had properly considered the implications of their own strategies."

However, regardless of the "strategies" adopted by RSS and CFP, the groundwater, if an important matter, would have to be dealt with regardless. The SMEs had expressly considered the matter, since Mr Harrop had noted the issue in connection with CFP's Tender Response (this is shown in the entries {T/133/1400}), and the SMEs had initially scored CFP at 1 for failing to identify the groundwater pump as a critical asset ({T/131/663}, {Day13Z-CON/61}). This common approach to both RSS and CFP was therefore not maintained. There was no explanation from Mr Harrop about this because he did not give evidence.

393. The NDA submitted in its Closing Submissions that:

> "The criteria and concepts in play here are not hard-edged ones admitting of a single objectively right or wrong answer. Rather they were matters of degree calling for judgment on the part of the evaluators, challengeable only on the basis of manifest error."

It is correct that whether a particular piece of equipment or system was a key critical asset involves a matter of judgement. However, when that equipment comprises groundwater pumps to deal with a site specific issue such as groundwater ingress, that issue is either important at the site in question or it is not. The equipment is either a critical asset for the Project or it is not. I fail to see how it can be critical for RSS, but not for CFP. It would be wholly irrational for the SMEs to conclude that groundwater ingress was important at Dungeness such that RSS should be considered to have made a material omission in this respect, but not CFP. The exercise of judgment by the SMEs should lead to the same conclusion if both bids are being treated equally, which is what is required. Further, Mr Harrop was not able to give any explanation for the change of score granted to CFP to increase it above that originally given of 1. I am entitled to draw an adverse inference from that, and I do so. However, even were I not to do so, my conclusion on this issue would be the same. This is because I accept that Energy Solutions' case on this Requirement is made out, even without such an inference.

394. In my judgment, neither the AETP nor the saline groundwater pumping system were critical assets, let alone key critical assets. The AETP fell outside the scope of this project. The groundwater pumping system also fell outside the scope of the project. However, if I am wrong about that and the system did fall within the scope of this project as described in the RSS tender, when properly considered against the industry standard, the only conclusion that could be reached sensibly is that the system was not a critical asset. The risk of failure was low, and the impact of failure would similarly be low.

395. The secondary issue is whether the score which should have been awarded had the NDA acted lawfully was 3 (rather than 5, as contended for by Energy Solutions) given the explanation of the management of the weather envelope cladding

identified as a critical asset by RSS. The consensus rationale identified an omission – but not a material omission – in the following terms:

> "Whilst the proposal states that critical assets will be managed taking account of past performance, future demand and capability and therefore responds to the requirement, the quality could have been improved by providing more details on specifically how this will be done. The absence of this detail is considered to be an omission but not material."

396. The NDA contends that in relation to one of the two assets identified, namely the weather envelope cladding for the reactor building, the bid contained an omission and therefore should have been given a score of 3.

397. The approach to cladding by RSS was described in Figure 411-21 {Q/27/17} and also dealt with in assumptions in Figure 411-27 {Q/27/24}. It is said in the NDA Closing Submissions {AA/19/58} that:

> "…no explanation or justification [was] offered for that sort of relatively expensive inspection regime where, as recorded in the same Figure 411-21, the cladding had been warranted with a 25 year design life. Thus no attempt had been made to explain the proposed management of this asset….."

Part of Mr Grey's written evidence on this warrants quotation {ZA/CON/2/57}:

> "For example, for the weather envelope cladding in Figure 411-21 on page 17, what is the logic behind 'Annual inspections … with refurbishment of cladding as necessary' given the observation under the heading 'Future Demand & Capability' that the cladding had been warranted with a 25 year design life? It might be that the cladding does require inspection annually with refurbishment as necessary, but there is no link between this and the other observations. We were left to join the dots."

398. This demonstrates a wholly artificial approach by Mr Grey, in my judgment. If the cladding is warranted with a design life of 25 years, which it was, and which was clearly stated, this does not mean that cladding can be wholly ignored for that period and no maintenance at all would be required for that period of 25 years. That is not what the term "design life" means. "Design life" is not the same as "entirely maintenance free". The full quotation from Figure 411-21 is:

> "Annual inspections (100% at fixing points) with refurbishment of cladding as necessary".

This evidently means that management of the asset (the cladding) involved inspecting it annually, with all of the fixing points being inspected. If any refurbishment were found to be required, this would be done. That is entirely consistent with the design life being 25 years – there are no "dots" for the SMEs to "join". Further, Future Demand and Capability also includes the statement that:

> "Refurbishment of cladding and roof replacement is expected to be performed over two replacement cycles during the IS period".

399. However, the absence of the supposedly necessary link is precisely the type of "omission" relied upon by the NDA at trial to justify a mark of 3, rather than 5, for this Requirement. In my judgment, there is no basis for treating this as an omission. It is an artificial criticism. There had been other criticism of RSS's proposals with respect to the ISO containers but this was abandoned by the NDA in its Opening Submissions {AA/3/43}. Absent manifest error, and applying the correct test, the score that would have been awarded is one of 5.

400. The correct score for the RSS Tender Submission for this Requirement in my judgment is therefore 5. The answers to Agreed Issues 8, 9 and 10 are therefore as follows:

Agreed Issue 8: The score of 1 was not lawfully awarded.

Agreed Issue 9: No, the NDA was not so entitled.

Agreed Issue 10: The correct score for the RSS Tender Submission for this Requirement is 5, not 1 (as awarded) nor 3 (as contended for by the NDA in the alternative).

Sample Project 3 - Preparing the Fuel Storage Ponds at Sizewell A: Node 412 Requirement 5.3(c) identification of critical assets

401. The RSS Tender Submission for this Requirement was given a score of 1. Central to the challenge in relation to this Requirement is whether the skip crane should have been a critical asset, and whether the NDA made a manifest error (or errors) regarding the function of the skip crane. There is also an alternative case by the NDA, which is if the score of 1 was unlawful, whether RSS should only have been given a score of 3 (rather than 5 as claimed). Evidence on this Requirement was given by Mr Colwill and Mr Grey.

402. Fuel storage ponds are an integral, and important, part of the management of spent nuclear fuel. Such fuel is placed in containers called skips, and these remain submerged in the ponds. The water both cools (as the spent fuel gives off considerable heat) and acts to absorb some of the harmful radioactivity that is emitted, providing barrier protection. Everything in the ponds would, in use and over time, have become contaminated to some extent from this radioactivity. The subject matter of Sample Project 3 was to deal with the redundant former fuel storage ponds at Sizewell A. These ponds had to be de-planted of the equipment contained within them, the ponds had to be drained and sealed, and the pond building itself had to be prepared for Interim State. RSS's Tender Response {Q/28/16} identified two specific critical assets. These were firstly the AETP Sand Pressure Filters ("SPFs") and Hold Up Tanks, and secondly the In-Container Drying of Sludge kit. Two other assets were also referred to, namely the pond skip crane and the UHP jetting equipment (meaning Ultra-High Pressure, and used for cleaning). The RSS Tender Response stated that these had originally been identified as potentially critical but were no longer:

> "Following our process we are, however, content that the past performance of the crane and the downtime of any maintenance can be sufficiently mitigated and downgraded to an essential asset. UHP jetting equipment was determined to be essential but not critical because of the availability for maintenance and replacement."

The skip crane was therefore clearly identified as not being critical, consideration having been given to that specific point.

403. This explanation in the RSS Tender Response is criticised by the NDA in its Closing Submissions because it was based upon an assessment of the probability of failure {AA/19/59}. This point has already been addressed and the approach adopted by RSS for identification of critical assets was plainly in accordance with the published material and Good Industry Practice. Other matters are also relied upon by the NDA as justifying the need for identification of the skip handling crane as a key critical asset, such as the statement that the crane was operational, that reference was made to it in the table of assumptions as item TO-0344 and the identification of highest rated risks. The NDA also submits that because it was described as "essential" it must be a critical asset. These points are not correct, and ignore the published guidance and good industry practice as to categorisation of critical assets. An asset can be essential, but with a low probability of failure, and/or having a low impact in the event of failure (because replacement equipment could be readily obtained, for example). Both these latter points should be taken into account in assessing criticality. Mr Grey accepted that if a risk-based approach was permissible he could not disagree with RSS's assessment that the skip handling crane was not a key critical asset {Day12Z-CON/144}. This disposes of these submissions by the NDA.

404. Reliance is also placed by the NDA upon the fact that RSS, at the Second Interim Drop stage, identified the skip handling crane as a key critical asset. However, that is not determinative in my judgment, and in any case the Second Interim Drop was only an interim iteration of the tender. RSS plainly explained in its Tender Submission that it had originally identified the skip handling crane as a key critical asset but, for the reasons stated, and although it was essential, its categorisation had been changed.

405. The SMEs at the time considered the failure to designate the skip handling crane as a critical asset to be wrong. However, it is a curiosity of this part of the case that the NDA itself was confused (and turned out to be wrong) about what the skip crane actually does (or did). The consensus rationale stated the following "Of most concern is the rejection of the skip handling crane as being a critical asset…." Appendix 6 of the 11 April 2014 Letter that clarified certain matters {U/23/15} stated:

> "In the opinion of the SMEs, the skip handling crane is a critical asset and its omission from the response to this requirement resulted in a score of 1 in accordance with the SORR.
>
> …

> Question 4
>
> The skip handling crane is a critical asset <u>because it moves the fuel inventory in and out of the storage pond</u>".
>
> [emphasis added].

406. However, that statement about the use of the skip handling crane is factually incorrect. This is not the function of the skip handling crane. It could only move the fuel inventory (basically, the skips containing spent fuel) around the pond whilst they remained submerged. It cannot lift skips out of the water or out of the pond (which contains the water). Indeed, this is a specific design feature of the crane, as Mr Colwill explained {B/7/111}, and the purpose of it is to ensure that the shielding from radioactive emission provided by the water in the pond is available at all times. I accept his evidence fully on this point. Further, all the fuel would have been removed from the ponds in any event before the relevant project began, as Mr Grey accepted {Day12Z-CON/132}. It is obvious that whoever drafted that particular Appendix to the letter and provided the answer to Question 4 did not know this, and misstated the function and purpose of the skip handling crane. However, who that was remains a mystery. This important factual error is rather glossed over by the NDA in its Closing Submissions.

407. The NDA formally admitted that the 11 April 2014 letter (paragraph 90(1) of the Re-Re-Amended Defence {A/10/46} {Day12Z-CON/132}):

> "…was in error when it stated that the skip crane was used to move the fuel inventory in and out of the storage pond."

408. The accepted error of fact is, in my judgment, sufficient on its own to demonstrate that the evaluation was performed in manifest error (even had the SMEs been applying the correct test concerning critical assets, which I have found they were not). Ascertaining that the facts have been correctly stated is part of the function of the court, which includes:

> "checking that...the facts have been accurately stated and there has been no manifest error of assessment".
>
> [***<u>T-667/11 Veloss International SA v European Parliament</u>*** (2015) at [38] {AB/28/6}]

In the NDA Opening Submissions, the NDA stated that there was a dispute about the precise tasks to be carried out by the crane and their significance and submitted that:

> "…differing views of the factual position cannot realistically be impugned on the basis of manifest error."
>
> [paragraph 226 of Appendix 1 {AA/3/43}]

This characterisation by the NDA of the situation is flawed. If there *were* differing views of the factual position, such as one party stating the function included removing skips from the pond, and the other party stating to the contrary, that

dispute would have to be resolved (absent agreement by the witnesses) by the court. Here, the NDA has admitted that the function of the skip handling crane is as contended for by Energy Solutions, and not as Appendix 6 (its own document) had earlier stated it to be. Manifest factual error in evaluation is not immune from review by the court, even though the NDA surprisingly submits that it is.

409. Indeed, the error here is two-fold. Firstly, there would be no fuel inventory left in the pond to be removed. Secondly, even if there were such remaining fuel, the skip handling crane could not be used to remove it from the pond, but only move it about under the water. It is no function of the design of the skip handling crane to remove fuel, and by design it cannot remove the skips (containing the fuel) from the water which provides protection from the radioactivity.

410. However, the NDA then settled on another reason, not given in the letter, in the Re-Re-Amended Defence for treating the skip handling crane as a critical asset. This is in paragraph 90(1) {A/10/46} and was that:

> "…the skip crane is the only viable means of moving pond furniture and containers for sludge around the pond, including use in conjunction with a conveyor used to move items in and out of the pond. If the skip crane failed the project time line will be delayed."

411. Mr Grey said that he was involved in this {Day12Z-CON/134} and also that it was "a reasonable summary" of the SMEs' reasoning {Day12Z-CON/135}. However, this too is also factually wrong. The skip crane cannot move pond furniture and/or containers for sludge around the pond. It can only move skips, a point made by Mr Colwill {Day4Z-CON/16} and accepted in cross-examination by Mr Grey {Day12Z-CON/136}. The claim that:

> "The skip crane is the only viable means of moving pond furniture and containers for sludge around the pond…"

therefore is another manifest error, even if that was what the SMEs were thinking at the time. Mr Grey said that the SMEs had assumed that some of the pond furniture might be cut up and put in the skips for storage and subsequent removal {Day12Z-CON/135} and {Day12Z-CON/136}. Energy Solutions point out that this line of defence (namely moving the skips and whatever they might contain) is not what the Re-Re-Amended Defence contended that the skip crane would be used for. It would entail the SMEs making such an assumption, not recounting this to anyone or recording it in the consensus rationale, and relying upon such an assumption to conclude (wrongly) that the skip handling crane was a critical asset. The reason this would be factually wrong is there are no grounds whatsoever for making such an assumption in the first place. I do not accept that the SMEs made such an assumption at the time. However, even if that is what the SMEs thought during the evaluation, they would have been factually wrong to do so.

412. There was no basis for, nor anything contained in RSS's Tender Response to justify, an assumption by the SMEs that the pond furniture and sludge containers would be cut up and put in the skips for removal (even if that assumption were indeed made at the time by the SMEs). I find that the assumption was not made at

the time, and that this was later justification provided by Mr Grey in an attempt to retain or justify the score that was given at the time. RSS's Tender Response did not contain, and it was not required to contain, detailed work plans and this was accepted by Mr Grey {Day12Z-CON/140}. Mr Colwill explained that there were items that it would not be safe or practical to put into skips, and also that they would not fit in the skips {Day4Z-CON/10}. "Step 1- Deplanting the pond" in the RSS Tender Submission {Q/28/13} explained what sort of items had to be removed, and they were as follows:

> "The items and equipment to be removed include bolted or concreted furniture such as sorting tables and underwater handling equipment, and loose items such as skips, IONSIV cartridges, Submersible Caesium Removal Unit filters, and section gates."

Other equipment would always therefore have been needed to remove these from the pond. That equipment would be required both to move items other than skips around the pond, and to move those items and the skips out of the pond. RSS's Tender Response proposed the acquisition of new equipment to de-plant the pond once the items in it had been characterised and this was made clear in the pond-specific activities contained in the Tender Response {Q/28/24}:

> "Enabling Activities: Purchase of Main Equipment, Install and Function test of deplanting, decontamination and sludge retrieval equipment, ongoing maintenance, set up furniture/skip decontamination, size reduction, survey and packaging facility including provision of equipment, tools and ventilation."

413. That other equipment was required to remove items (including the skips themselves) from the pond makes it obvious, in my judgment, that the skip handling crane was not to be used (and indeed could not be used) for that purpose. It was not a key critical asset and it was manifestly erroneous to mark the RSS Tender Submission as though it was.

414. The next issue is also contentious and relates to whether the correct score should have been 5, or 3. The NDA have raised certain criticisms, both in the Opening Submissions and the oral evidence of Mr Grey, concerning other alleged deficiencies in the management of the assets that had been identified as key critical assets, namely the AETP Sand Pressure Filters and Hold-Up Tanks, and the In-Container Drying of Sludge kit. Energy Solutions objects to these points because they are not pleaded, were not put to Mr Colwill in cross-examination (who had not dealt with them in his evidence because they were not pleaded) and because no positive case was properly advanced by the NDA for a score of 3 (in contrast to other Nodes where such a case was properly advanced and put). There is force in these objections by Energy Solutions, but to deal with this matter comprehensively I will in any event provide my conclusions upon the NDA's arguments in this respect. NDA's arguments are flawed, whether pleaded or not.

415. The proposed management was contained in Figure 412-17 {Q/28/17}. For each of the identified key critical assets RSS had provided entries dealing with "Manage Critical Assets to ensure they remain available to deliver the strategy" and had

done so both in terms of Past Performance, Future Demand and Capability, and Monitoring Regime.

416. Mr Grey's evidence in his cross-examination was that what was lacking was something that "joined up" the proposals for management of the assets with what was said against those three headings, and in particular he said that there was nothing to link the entries in the Monitoring Regime with the other two headings. The NDA in its Closing Submissions maintained that to look for such a linkage was "clearly proper", whether it was sufficiently provided was a matter of factual judgment, and the conclusion was not manifestly erroneous.

417. I consider the approach of Mr Grey and the other SMEs on this to have been manifestly erroneous. It entirely confuses the three different tenses of Past Performance (what occurred in the past); Future Demand (what will or is likely to be the case in the future); and Monitoring (what will be done in the present during the Sample Project to monitor those assets). It should also be noted that the detail provided by the RSS Tender Submission is somewhat more comprehensive than that of CFP under Node 405 {XD-CON/16/38}, where critical assets were simply listed. Even though Mr Grey said that the required information in the CFP bid was "woven through" the CFP Tender Submission rather than separately identified, I do have considerable difficulty in accepting Mr Grey's complaint of a lack of "joined up" proposals about asset management in the RSS Tender Submission on this Node, particularly when compared to the approach adopted by CFP. The NDA in its Closing Submissions assert that what was wrong with the RSS Tender Submission was that rather than planning on the basis of past failures, the regime proposed was "essentially [a] reactive one of relying upon inspections". There is nothing inherently wrong in a regime relying upon inspections, which provides real data on performance and steps necessary to avoid failure, both of which are obviously parts of management.

418. Considering the RSS Tender Submission on this Requirement against the SORR in my judgment leads to a conclusion that, absent the manifest errors, the score awarded would have been 5.

419. The answers to the issues are therefore as follows:

Agreed Issue 11: The score of 1 was not lawfully awarded.

Agreed Issue 12: The answers to the specific sub-issues are:

a. There were errors by the NDA in relation to what function could and needed to be performed by the skip handling crane; and

b. These errors were manifest and had a material effect upon the evaluation of this Requirement by the SMEs. They led to the manifestly erroneous conclusion that the skip handling crane should have been identified by RSS as a key critical asset when it was not.

Agreed Issue 13: The secondary issue is not pleaded and does not arise. However, in any event, the score that would been awarded if the NDA had acted lawfully was 5 because the explanation of the management of the AETP components and

sludge drying kit identified as critical by RSS was sufficient to justify that score when considered against the scoring criteria in the SORR.

Sample Project 5 – The Management of Active Effluent at the Sizewell A Site: Node 414 Requirement 5.3(c) identification of critical assets

420. There was another Sample Project at Sizewell, and this was the management of active effluent. The introductory words of the Tender Submission explain it in the following terms {Q/30/1}:

> "The scope of this Sample Project (Project) is to manage liquid active effluent at the Sizewell A site. This includes operations, maintenance and replacement of water treatment systems, and the compliant discharge of treated effluents to the North Sea. The decommissioning of active effluent treatment facilities is not within the scope of this Project."

421. RSS intended to maintain the existing Active Effluent Treatment Plant (or "AETP") system, and after the ponds had been drained, use something called the Mobile Active Effluent Treatment Plant ("MAETP"). Evidence on this Requirement was given by Mr Colwill and Mr Grey.

422. The approach by RSS to identifying key critical assets listed three specific critical assets {Q/30/16}. These were the AETP SPFs; the AETP Monitoring Delay Tanks (or "MDTs"); and the MAETP. The SME team of Mr Grey, Mr Harrop and Mr Woolmer (the latter being replaced later by Mr Ridpath) originally gave RSS a score of 5. Mr Grey said {ZA-CON/2/46} that this was done "giving RSS the benefit of the doubt" that the Pond Water Treatment Plant, or PWTP, could be seen as part of the AETP. In view of the "if in doubt, score up" instruction to the SMEs, even if there were such doubt, RSS was entitled to the benefit of it. However, following an intervention by Burges Salmon, this was changed to a score of 1. The consensus rationale stated as follows {U/4/61}:

> "The bidder has not recognised the PWTP as a critical asset despite descriptions of its role in the project elsewhere in the submission that would suggest otherwise. This is considered to be a material omission.
>
> Whilst the proposal states that critical assets will be managed taking into account of past performance, future demand and capability and therefore addresses the requirement, the quality could have been improved by providing more details on specifically how this will be done. The absence of this detail is considered to be an omission but not material".
>
> [emphasis added]

423. This was explained further by the NDA because the consensus rationale was expanded in Appendix 7 of the 11 April 2014 Letter {U/23/16} which stated:

> "RSS failed to understand what was expected from them in this response. The bidders were asked to identify what the critical assets were and how they would manage the risks associated with them. Failure to identify a critical asset is deemed to be a

> material omission for the purposes of scoring a 1 (Appendix 2 Table K). As they did not identify a critical asset necessary to deliver their strategy, RSS was automatically scored a 1.
>
> RSS appears to have taken the approach that an asset is not critical if it is low risk i.e. they only categorised assets as "critical" if they were high risk.
>
> Question 1
>
> The identification of critical assets is linked to the bidder's strategy. PWTP is in the opinion of the expert evaluators, critical to the management of active effluent, based on RSS strategy. RSS appears to have misunderstood what PWTP does.
>
> RSS has adopted a different categorisation to critical assets depending upon their risk profile and has dismissed PWTP as a critical asset on the basis that it is considered to be low risk. This is not what the NDA required them to do. If RSS had responded that they were going to change the strategy from the status quo and justified why they do not need the PWTP any more, the evaluators would not have scored the RSS response 1 based upon the failure to identify a critical asset."

424. The expression "RSS was automatically scored a 1" in the consensus rationale cannot be justified in circumstances where initially the SMEs had given RSS a score of 5 for this Requirement. However, even putting that to one side, the explanation clearly demonstrates that it was the different approach to risk of failure in identification of critical assets, with which I have dealt above, that dictated the SMEs' thinking on this point (or at least did after the change of score from 5 to 1).

425. A central point between the parties on this is the scope of Sample Project 5 and whether the PWTP was in fact part of Sample Project 5. The PWTP deals with the water within the pond, recirculating it in broadly the same way that swimming pools have filtration and treatment systems. Energy Solutions submits that the water in that system, which is a closed system, is not effluent at all. Accordingly, that would mean this sat within Sample Project 3 and not Sample Project 5. The Re-Re-Amended Defence in paragraph 92(1) and (4) {A/10/48} and the NDA's response to a request for further information {A/25/16} both refer to the consequences of degradation of the pond water and the risk that if it were to degrade sufficiently, that would interrupt or disrupt operations in relation to the ponds (by leading to a lack of sufficient clarity for visual operations or an unacceptable imbalance in chemical impurities); and that the PWTP was the only viable means of preventing degradation of the water quality. It was also asserted that, if the water became "contaminated through lack of treatment", additional delay and cost might be entailed to bring it into a condition for safe discharge {A/25/16}.

426. Mr Grey agreed that the pond water became effluent at the point it was discharged, and also agreed that management of the pond water was (or should have been) within Sample Project 3. However, he also maintained it was "a very important

part of conditioning of the water" {Day13Z-CON/2}, {Day13Z-CON/3} and {Day14Z-CON/77}. The fact that the water becomes effluent once discharged from the system is also recognised in the Client Specification {K/6/49} at 4.3.6(c) which required the Contractor to:

> "…drain pond water as necessary and treat the effluent such that it becomes suitable for discharge".

427. I doubt anyone involved in the nuclear industry could disagree with Mr Grey that the water contained in a pond such as this one is important, and that the plant that treats it is very important. It plainly is. However, the point is where in the scope of the different projects the PWTP sits, because that is the way the NDA chose to demarcate the scope of the different Sample Projects. Mr Grey accepted that the management of the water was within Sample Project 3, and re-stated this even during re-examination {Day14Z-CON/77}.

428. During cross-examination Mr Grey explained the significance of the PWTP in operational terms, namely to keep the water in a clear state and to prevent sludge from being discharged, overburdening the filtration systems in the AETP {Day13Z-CON/15} – {Day13Z-CON/21}. However, this alone does not lead to a conclusion that the PWTP was automatically within Sample Project 5.

429. The NDA in its Closing Submissions made the point that the use of the PWTP to treat the pond water on recirculation prior to discharge was necessary to the delivery of the strategy for Sample Project 5. However, even after treatment by the PWTP, the pond water would remain in use for recirculation purposes for the operational reasons explained. It would not be effluent. Once discharged, it would become effluent. The NDA assumes (or seems to assume) that treating the water for operational reasons before it becomes effluent is necessary to the delivery of the strategy for dealing with effluent. The former, in my view, relates to pond operations, and not treatment of waste.

430. However, the introductory wording of RSS Tender Submission states that Sample Project 5:

> "…includes operations, maintenance and replacement of water treatment systems."

I do not consider that the answer to this point can be arrived at solely by considering whether the pond water is "effluent" or not. The issue is, was the PWTP (including the water within it) part of Sample Project 5 or not, and this depends upon the scope of the project, and not the definition of "effluent". In my view it was within Sample Project 5. Sample Project 5 as defined plainly included *operation* of water systems. The water within those systems was, when being used, not effluent, but was still part of the operation of such a system. However, this simply decides that the operation of the systems was included within Sample Project 5, and is not determinative of whether the PWTP was a critical asset.

431. Although initially the SMEs applied the "if in doubt, score up" approach, and gave a score of 5, this was for a patently wrong reason. Figure 414-19 {Q/30/17} identified the AETP and described the system, and it was this that led the SMEs to

conclude that arguably the PWTP was within the AETP. However, the heading to that figure makes it clear that it is the filters (the SPFs) that are being identified as critical, not the whole AETP. Attention is drawn by the NDA to the "mismatch" between the references in the Tender Submission to the PWPT and its non-appearance as a critical asset. However, nowhere was it stated that the bidders should only address or refer to assets that were critical (or key critical).

432. In my judgment, the PWTP was not a critical asset. At the point of draining, the water within the pond would become effluent, because it was no longer being used in operation of the pond; this point was accepted by Mr Colwill {Day4Z-CON/20}. Mr Colwill did not know whether the water would go through the PWTP before it reached the AETP, which was to be the last point of treatment (the word used in cross examination was "barrier") before the sea. However, even if it did, the treatment of it was to occur in the AETP before it was discharged. Its treatment in the PWTP as part of recirculation for re-use in the pond for operational purposes would have ended. In those circumstances, I consider it was manifestly erroneous to have concluded that it should have been identified as a critical asset and that the failure to do so was a material omission. I accept the submission of the NDA in its Closing Submissions that the precise amount of the PWTP that would be used in so draining the pond is not determinative of whether the PWTP should have been identified as a critical asset. However, equally, simply because part of it was to be used to drain the pond does not make it a critical asset either. Drainage of water (even potentially radioactive water) is not the most complex of activities, and low risk of failure is something that I have expressly found can and should have been taken into account (in accordance with the published guidance) when deciding upon asset criticality.

433. The secondary issue that therefore arises is what Energy Solutions refer to as "nit-picking" by Mr Grey about further criticisms concerning lack of detail and deficiencies in management of the critical assets that were identified. Mr Grey's written evidence states {ZA-CON/2/47}:

> "However, when we came to scrutinise the response again in late February, and with the benefit of having observed these same issues when evaluating RSS's other Technical Scope and Methodology Underpinning Evaluation Nodes, we felt that RSS could and should have done more to explain how observations and analysis of past performance and future demand were influencing the asset management going forward. For example, for the sand pressure filters, what exactly had been learnt from experiences at Bradwell and Hinkley Point? RSS identifies uncertainties but does not explain what happened at Bradwell and Hinkley Point and what that might mean for Sizewell. Overall, it lacks a level of detail to give us confidence that RSS's proposed management has incorporated these lessons. We determined that the absence of detail was an omission, but not a material one."

434. There are a number of difficulties with this evidence. Firstly, my view of Mr Grey is that he was, or had become, so convinced that the scoring at the time reflected the correct outcome that he gave the impression he would fight tooth and nail to

avoid RSS'S Tender Submission being given any higher marks in these proceedings. In those circumstances, I would seek confirmation from other sources to corroborate this very detailed recollection. Secondly, this view is not supported by any statement in equivalent detail in AWARD, so there is only limited contemporaneous material to support it. All that is said is that the submission "could have been improved by providing more details". Thirdly, the other SMEs were not called to support it. Fourthly, his recollection of this is rather at odds with his statement concerning the score awarded of 5 initially, when he said:

> "…I cannot recall our deliberations in precise detail". {ZA-CON/2/46}

In my judgment, Mr Grey's evidence in this regard is highly selective. Finally, there *is* reference to RSS'S earlier experience at Bradwell and Hinkley Point within the Tender Submission {Q/30/18}.

435. In those circumstances, even though the NDA relies upon the use of what is called a "stock phrase" and absence of link between the management regime and the three entries of past performance, future demand and capability, and monitoring regime, I do not consider these points by Mr Grey to be valid ones. These points are relied upon by the NDA in justifying an alternative score of 3, rather than the 5 sought by Energy Solutions in the event that the Requirement comes to be re-marked. The two critical assets were to be the subject of inspection and monitoring and in my judgment satisfied the requirements of the scoring criteria to justify a score of 5. There were no omissions.

436. The correct application of the terms of the SORR to the RSS Tender Submission would therefore result in a score of 5. The answers to the Agreed Issues are therefore as follows:

Agreed Issue 14: The score of 1 was not lawfully awarded.

Agreed Issue 15: The answers to the specific sub-issues with respect to the PWTP are as follows:

a. The PWTP would not manage active effluent during its operation, and the water within it would not become effluent until drained. However, that is not determinative to the issue of whether the PWPT was a critical asset;

b. there was a manifest error by the NDA in relation to the criticality of the PWTP and also to how the consequences of it failing should impact upon the determination of asset criticality;

c. this led to the Requirement being given a score of 1.

Agreed Issue 16: The score that would have been awarded if the NDA had acted lawfully was 5. Correct application of the SORR to the information provided for management of assets identified as critical did not reveal omissions.

Delivery of Winfrith Interim End State Node 408 Requirement 5.3(c) identification of critical assets

437. Two assets are in issue in this Requirement. These were not identified as key critical assets and are the Active Liquid Effluent System ("ALES") and the Treated Radioactive Waste (or Radwaste) Store ("TRS"). The former treats effluent prior to its discharge into the sea. Winfrith is close to the Dorset coast and there is a pipeline that takes such treated effluent to the sea for discharge. The latter is a store used for storage of drums containing low level radioactive sludge. Five critical assets were listed by RSS but these did not include the ALES, nor the TRS {Q/24/29}.

438. The SME team for this Node was led by Dr Clark, and evidence on this Requirement was given by Mr Colwill, Mr Matthews and Mr Board for Energy Solutions, and Dr Clark (and Mr Grey so far as general evidence about critical assets was concerned).

439. As I have found above, Dr Clark was not particularly experienced in asset criticality, had not studied PAS-55 and took his lead regarding this subject from Mr Grey.

440. There is a point of principle relied upon by Energy Solutions for this Requirement, namely that because the use of both of these assets was to have come to an end prior to the successful bidder putting its own asset management strategy in place (but after the PBO would have taken over responsibility for Winfrith) they should not, or could not, in principle properly be identified as critical assets. RSS had stated expressly their approach in the Tender Submission {Q/24/29} in the following terms:

> "At Winfrith there are no operations longer than two years, or assets with a life longer than seven years, except possibly the surface water drainage. We will focus on removing assets as facilities are shut down and minimising maintenance compatible with these limited lives. We have not covered component level assets within facilities such as ALES or SGHWR, nor have we listed standard radiation monitoring equipment. Some assets (e.g., ALES and TRS and their equipment) are not listed because we plan to complete using them before our system is fully functioning."
>
> [emphasis added]

When Dr Clark initially reviewed this, he found nothing wrong with it {T/132/1310} {Day11Z-CON/13}. He stated:

> "…the Asset Management programme is described. The process for identifying the assets is also described (it is noted that assets that will be decommissioned before the Asset Management programme is up and running are not included)."

There was no requirement to give reasons for excluding a particular asset from the critical class of assets, nor any justification for marking down if the reason were "wrong" – the test in my judgment is, taking into account the margin of appreciation, whether the SMEs were manifestly in error in concluding that an asset was critical (and hence there had been a material omission) when it was not.

441. Dr Clark stated in his written evidence that:

> "This Requirement tested the ability of the bidders to identify critical assets and to set out the arrangements to deliver the required performance. Clearly they should include all assets that were critical from day one of the preferred bidder taking charge….. RSS's own strategy proposed the continued use of ALES for a period of some months and the continued use of TRS for a period of some years (and therefore our concern over the rejection of these items on the grounds that RSS's system would not be fully functioning within this period)." {XC-CON/2/33}

He also made it clear that the failure (as he saw it) in relation to application of Good Industry Practice (which I have found the NDA to have been wrong about) was only part of the reason for the score.

442. The fact that Dr Clark's initial view was not reflected in the conclusion in the consensus is not relevant. As he said "my individual review is a very different thing to consensus review". However, this does mean that the witness the NDA called to defend the evaluation was one of the SMEs who, individually and upon consideration, saw nothing wrong with the submission prior to consensus. The fact that RSS gave a reason for not listing the ALES and TRS as critical assets, and the validity of that reason, is not determinative of the issue but does provide considerable assistance. It does give the impression that the RSS team considered these assets potentially to be critical assets, but they had not been listed as such for the reason stated. Certainly, there would be no reason for the Tender Submission to have provided an incorrect reason. However, only one of those two assets has to be truly critical (or to put the same point another way, the SMEs would have to be manifestly erroneous in their conclusions as to *both* assets) for Energy Solutions to be entitled to have the court review the score.

443. In my judgment the ALES should be considered first. I reject the point of principle relied upon by Energy Solutions, which was based on use of this asset having ceased before the asset management plan by RSS was to be fully adopted. The incoming PBO was going to be responsible for the asset during the period prior to cessation of its use. The RSS plan for ALES (shown in Figure 408-11 at {Q/24/10}) was that it would be completely closed by February 2015 when liquid LLW operations and disposal ceased. Under the SLCA, the successful bidder had to carry out the scope of works in accordance with existing plans until its new strategy was implemented. ALES was not an asset that RSS would manage as part of its asset management strategy, but it would be monitored and maintained under the existing plan including inspection and maintenance arrangements until it was switched off in February 2015. There was therefore a period of months (depending upon when it was actually switched off) when the successful PBO would be

responsible for Winfrith whilst ALES was operational. Dr Clark explained that the transition period ended on 1 September 2014, so the period was approximately six months. Thereafter it was to be decommissioned.

444. Mr Colwill pointed out that ALES is a simple system, had recently been refurbished in 2009, was in good working order and its maintenance would be in accordance with the schedule in MCP-19. It also has multiple barriers to failure and any failure is only likely at the component level. Given the majority of its components are readily available commercially, such a failure would not have appreciable consequences. It also has significant spare capacity to store any liquids requiring treatment (this is called "buffering"). Although the NDA did not have Mr Colwill's evidence during the evaluation – the SMEs only had the Tender Submission – these factors should have been known to them, in particular the simplicity of the system, its recent refurbishment and the buffering capacity. The period of time it was to be in use is a highly relevant factor too.

445. Energy Solutions relies upon the fact that the volume of effluent being treated by ALES was negligible and the tanks were designed for far greater volumes. This would allow sufficient time to deal with any failure, were one to occur, without impacting on the strategy and without risking any regulatory action. Any failure would therefore present no real risk to RSS's strategy or ability to deliver the NDA's milestones for Winfrith. Dr Clark was unable to say how much storage capacity ALES had for buffering, or how long it would take to become full {Day11Z-CON/24}. He explained that one of the other SMEs, Mr Rushton, was far more familiar with Winfrith than he was. Mr Rushton is still employed by the NDA but was not called as a witness. Dr Clark could not recall if risk of failure was considered by the SMEs in arriving at their conclusion. Mr Matthews, who gave evidence for Energy Solutions, also had been employed at the site previously and had greater specific knowledge than Dr Clark.

446. However the role of the court is not to substitute its own judgment for that of the SMEs. It is to consider whether the evaluation judgement, taking account of the margin of appreciation, involved a manifest error.

447. Here, there are two points to be considered. Firstly, the application of the wrong "good industry practice" test by the SMEs, which was manifestly wrong. There is no evidence that the SMEs considered the risk of failure, only the consequences of that failure. However, that was not the only reason for the score of 1. The second point is, had the matter been considered using the correct test (namely risk of failure as well as risk of consequences), should the ALES have been considered a critical asset? Proper consideration of the factors identified by Mr Colwill demonstrate, in my judgment, that the risks of failure of ALES and the consequences of any such failures were so negligible that a conclusion that the ALES should have been identified as a critical asset was manifestly erroneous. Prior to consensus, this was Dr Clark's individual view in any event.

448. In my judgment, in these proceedings the NDA have exaggerated the potential of failure leading to untreated radioactive discharge into the sea (or the rivers Win and/or Frome) and the consequent risk of regulatory action, in an attempt to bolster their case on this being such an important asset. Even a total failure of ALES would have simply led to storage being required in tanks, rather than discharge, as

Dr Clark accepted {Day11Z-CON/24}. The conclusion of the SMEs was, in my judgment, manifestly erroneous in identifying the non-identification of ALES as a critical asset as constituting a material omission.

449. Turning therefore to the TRS, this is a simple store and Energy Solutions submits it has a low risk of "failure". The drums contain the waste and the drums are themselves contained in sand filled concrete silos within the store building. Given it is a building constructed in the 1990s, I accept that the risk of failure of the building fabric or envelope is negligible. Indeed, failure of a structure – particularly a recently constructed structure – is of a completely different, and far lower, order of risk than failure of mechanical equipment. The TRS was to be used until 2017, and Energy Solutions cannot rely simply upon the "use having ended" point of principle for this asset to justify its omission, any more than for the ALES. However, given that the risk of failure is so low, in my judgment it was manifestly erroneous to conclude that the failure to identify this as a critical asset was a material omission. This too was Dr Clark's individual view prior to consensus.

450. The answers to the Agreed Issues are therefore as follows:

Agreed Issue 17: The score of 1 was not lawfully awarded.

Agreed Issue 18: Within that issue, specific sub-issues concern:

(i) It was not relevant that RSS's intention was to cease using the ALES and TRS before its own asset management system was fully functioning. These assets could potentially be critical assets notwithstanding this;

(ii) However, the consequences of failure of the ALES or TRS were extremely low. In the case of the former, the very limited amount of time that the ALES was to be used was a highly relevant factor in considering risk of failure, and total failure would lead to storage within the ALES in any event. In the case of the latter, the nature of the asset itself meant that the risk of failure was negligible.

451. The parties have not agreed an issue which specifically seeks identification of what the correct score should be. This plainly is required, given my finding that the score of 1 was not lawfully awarded. I do not consider that there was a material omission in failing to list either the ALES or the TRS as critical assets. Given there were no material omissions – or other omissions – and considering the content of the Tender Submission against the SORR, the correct score would have been one of 5.

Spent Fuel and Nuclear Materials Management: Node 405 Requirement 5.3(j) management of critical assets

452. This Node concerned spent fuel. Spent nuclear fuel was located at three Magnox sites, namely Sizewell, Oldbury, and Wylfa. The first two were in the process of what is called de-fuelling, and Wylfa was generating until 2015 and thereafter was to enter the de-fuelling phase. There were also what are called "exotic" fuels in the form of Dragon fuel, GLEEP (which stands for Graphite Low Energy Experimental Pile) and Zenith fuel, and other nuclear materials stored at Harwell as Intermediate Level Waste (ILW). There was also other material in this scope, namely uranic material which was also stored at Harwell.

453. The witnesses who gave evidence on this Requirement were Mr Colwill, Mr Board and Mr Davies for Energy Solutions, and Mr Grey for the NDA. The Requirement stated the following:

> "Identification of the critical assets required to deliver MOP9 and nuclear materials and Exotic fuels outcomes (described in the Client Specification) (including fuel handling and waste infrastructure) and a description of the arrangements to deliver the required performance." {J/10/136}

454. The MOP9 was the latest version of the Magnox Operational Plan which contained the whole fuel cycle management for Magnox fuel, including generation, de-fuelling, storage of fuel and transport by rail to Sellafield for reprocessing. It was published by the NDA in July 2012 {V/34/1}.

455. The Node was therefore concerned with the bidders' strategies for managing (and disposing of) spent fuel and nuclear materials. In these locations, the spent fuel or nuclear material had not yet been shipped to Sellafield for reprocessing or storage. The scoring was however still under Appendix 2, Table K {J/10/330} which was the same as the other critical asset Requirements for the Sample Projects. RSS identified four critical assets {Q/21/30}. These were (1) Modular flasks; (2) M2 flasks; (3) the Wylfa Flask Handling Crane; and (4) Wylfa Pile Cap Equipment. RSS was given a score of 1 by the SME team of Mr Grey, Mr Vaughan and Dr Rhodes.

456. The consensus rationale {U/4/48} stated:

> "The bidder has addressed the requirements
>
> In addressing the scoring criteria the bidder has not explained how it will manage and continually review critical assets in the context of past performance, future demand and capability. The headings are provided in the submission along with assertions about what maintenance and inspections will be performed based on the current understanding. Otherwise the submission has addressed the remaining scoring criteria."

457. Appendix 5 to the 11 April 2014 Letter {U/23/13}, which Mr Grey accepted must have been drafted with his input although he could not fully remember {Day13Z-CON/72}, stated as follows:

> "The critical assets response given by RSS failed to recognise that past performance, future demand and capability are linked and affect how their proposed management will account for these in an integrated manner. The response failed to demonstrate how it would continually review critical assets, for example, to explain how the bidder proposes to model the aging mechanisms and use this in the consideration of the remaining lifetime and duty required from the assets to inform how the assets will be managed in terms of operations, maintenance, asset care etc going forward.
>
> The proposed approach described is not consistent with Good Industry Practice…"

458. There were therefore two further points relied upon, one concerning modelling ageing mechanisms as part of continual review, and the other concerning failure to observe Good Industry Practice. This latter point was rather grudgingly abandoned in the NDA's Further Information which stated in Answers 15 and 16 on this point:

> "…the issue with the RSS response is not that it contained anything which was directly inconsistent with good asset management and good industry practice." {A/25/9}

459. The RSS Tender Submission itself set out (in a uniform way, as with the other Nodes) {Q/21/30} for each of these four assets, how it had assessed the "*past performance*" and "*future demand and capability*" of the asset, and how it proposed to manage and monitor the asset. There was both a general approach and specific sections dealing with each of the four critical assets.

460. The Further Information to which I have referred added another reason, namely a failure to provide supporting evidence as follows. It stated that RSS: "failed to provide sufficient supporting evidence to give the evaluators confidence that what was proposed would be consistent" {A/25/9} with good asset management and Good Industry Practice. However, there was no requirement to provide supporting evidence, and indeed it was expressly stated in the SORR that:

> "The Bidder should provide supporting evidence to address elements (i) to (iv) of 5.2(b). Supporting evidence will only be evaluated under the Bidder's response to Requirement 5.2." {J/10/138}

This criticism is therefore wholly unsustainable in respect of Requirement 5.3(j).

461. Paragraph 66(1) of the NDA's Re-Amended Defence, the pleading that deals with this, raises the criticism of insufficient explanation by RSS in the Tender Submission regarding proactive asset management {A/9/31}. However, this criticism is in my judgment wholly misplaced. The management of the regime for

the modular flasks, for example, includes regular inspections, testing and maintenance and also the holding of an inventory of longer lead spare items in Figure 405-26 {Q/21/30}. Each of the assets has specific examples of proactive management included. Mr Grey's different attempts to justify the score simply made the earlier criticisms even weaker than they initially appeared to be (which was very weak). He said for example that the reference to "continually review critical assets" in the consensus rationale was "superfluous" even though this was a pleaded point upon which the NDA had relied.

462. In my judgment there was manifest error in the scoring of this Requirement, not only on the basis of the wrong test being applied regarding criticality, but also as demonstrated in the consensus rationale, the 11 April 2014 Letter, and also the NDA's pleadings (although Energy Solutions maintains, correctly, that the latter were not available prior to issue of proceedings so strictly speaking only falls for consideration at the second stage of the test).

463. However, even if there were any doubt about that conclusion, the position is made even more stark if a comparison is made with the identical Requirement in the CFP bid {XD-CON/16/1}. RSS had listed four critical assets, and provided a reasonable level of detail concerning the management of those assets. CFP identified approximately no less than 75 critical assets {XD-CON/16/38} in seven "critical systems" and failed to provide *any* specific management proposals for any of the assets specifically at all. General wording was used – and I reproduce this verbatim – as follows:

> "All critical assets will capture captured into the Ventyx asset database and flagged as critical. Critical assets will have an asset management plan associated with them that not only identifies the impact of failure but also maintenance arrangement to reduce the likelihood of failure or should a failure occur then how to restores the asset as quickly as possible to maintain the output of the system."
>
> [The expression "will capture captured" appears in the original and must mean "will be captured".]

464. This was given a score of 5, the maximum score. The consensus rationale stated {U/7/55}:

> "The bidder has addressed the requirements and scoring criteria. The submission could have been improved by being more discriminatory in its approach to the identification and management of critical assets."

465. In its Closing Submissions the NDA describes the RSS bid as containing:

> "…no more than a high-level and generic statement that monitoring, assurance visits and review of the safety case will take place."

If that were an accurate description of the RSS bid – and I do not consider that it is – it is difficult to see how the same criticism could not be levelled, with far greater force, against CFP which was given the maximum score. The point concerning equality of treatment with CFP's bid is not addressed by the NDA in its Closing Submissions at all. Rather, concentration is upon a "Lessons Learned" document {V/241/1}, which was an RSS internal debriefing process. However, it should be remembered that at the time that internal document was drafted, RSS did not know exactly what CFP had put in its bid (or more accurately, quite how much CFP had left out) yet still achieved a score of 5. Regardless of what was said in that document, including self-criticism by RSS about the size of teams, use of data in the data room and use of site visits, it does not seem to me to be relevant to the manifestly erroneous evaluation performed by the NDA on this Requirement, and the obviously different treatment of the RSS bid compared to that of CFP.

466. There was, in my judgment, demonstrably different and unequal treatment of the two bidders on the same Requirement being judged against exactly the same scoring criteria in the SORR. There is no rational explanation for this different treatment at all, and the differing outcomes in the scoring simply cannot be justified on any sensible basis, even though Mr Grey tried very hard to do so. In particular his claim that CFP had "weaved in their approach throughout the document" {Day13Z-CON/73} is not made out when the submission is read either superficially or thoroughly. That finding also disposes of the detailed criticisms put by Mr Giffin QC in cross-examination of Mr Davies. The type of detail which Mr Giffin QC was alleging was missing from the RSS Tender Submission – the number of journeys of movements of the modular flasks contained exotic fuels, the continuing of the existing maintenance regime of the flasks at Harwell, whether there were sufficient M2 flasks, the details of the refurbishment required for the Wylfa crane – would all be relevant for a detailed plan, but that was not what the SORR required. It is also not what CFP included to merit its maximum score.

467. In my judgment, and considering each of the four critical assets, the details provided in the Tender Submission, the SORR and bearing in mind this was a strategy and not a detailed plan, I find that the correct score for this Requirement was 5.

468. The issue is therefore answered as follows:

Agreed Issue 19: The score of 1 was not lawfully awarded given the explanation by RSS of how it would manage the modular flasks, M2 flasks, Wylfa flask handling crane and Wylfa pile cap equipment which it had identified as critical assets. The correct score would have been one of 5.

Sample Project 1 – Preparing Chapelcross CXPP and B141 for Interim State: Node 410 Requirement 5.3(c) identification of critical assets

469. The final Requirement concerned with critical assets is that relating to Sample Project 1. This involved removing ILW from Chapelcross and then, after a period of years, deplanting the CXPP and B141 and demolishing them. For this Node, RSS identified the CXPP cave crane and CXPP Process Area Ventilation System as critical assets in the RSS Tender Submission. This was given a score of 3. The Agreed Issue is as follows:

> Agreed Issue 20. The issue is whether a score of 3 was lawfully awarded given the explanation by RSS of how it would manage the CXPP cave crane and CXPP process area ventilation system which it had identified as critical assets.

470. Evidence was given on this Requirement for Energy Solutions by Mr Colwill, and Mr Board gave evidence on Sample Project 1 generally. Mr Grey gave the bulk of evidence for the NDA on this Requirement; although Dr Clark also gave a very limited amount of evidence about this in the context of Sample Projects generally, but he was not one of the SMEs for this Node. The other two SMEs for this Node were (in addition to Mr Grey) Mr Harrop and Mr Woolmer.

471. The Cave is the name given for the storage location for the waste. The Cave Crane is a small gantry crane that provides the means to retrieve ILW packages stored in the Cave (so that they can be transported and processed). It is a bespoke item (the expression used by Energy Solutions was an "original design from a non-crane manufacturer") and had been in use since 1977. It has a history of non-repetitive failures and repair requiring extended down time (although that had been reduced following recovery of the initial commissioning instructions, which doubtless provided more information on this piece of equipment). RSS recognised that there was a high probability of continued incidents of down time required for the crane to be repaired sporadically. The Consensus Rationale stated {U/4/56}:

> "The ownership and approach to managing assets overall is clear....The response to dealing with past performance and future demand is a non material inconsistency (it is noted that the crane use will be minimised) and shows a lack of understanding of how this is done in good practice environments by modelling ageing mechanisms and applying a risk based strategy to managing the assets. The response does not effectively deal with the bidder's own recognition that failures have happened in the past, learning from the failures is helping to inform their strategy and that strategy is further being informed by an assessment of what that means for the asset management regime going forward relying on a reactive rather than a risk based approach which the bidder claims will be executed. This is a non material inconsistency."

472. The reason given for the score is that RSS's Tender Response contained "a non material inconsistency" with its proposed proactive management approach. The inconsistency is not properly identified and in my view is a misplaced criticism. Seeing an inconsistency, where there is none, is a manifest error in my judgment. Mr Grey said that it might have been better if the consensus rationale had referred to:

> "… an omission, in that the asset management approach did not make sense without further information that was missing." {ZA-CON/2/81}

However, the Consensus Rationale itself recorded that "the ownership and the approach to managing assets overall is clear" {U/4/56} and it is difficult to see

what the omission is. The consensus comments did not deal with the ventilation system at all, and this therefore falls to be considered in terms of the second stage of the test I must apply if the reasons available to Energy Solutions at the time of issuing proceedings demonstrate unlawfulness.

473. Mr Grey said that RSS'S approach (and one that he criticised) was:

> "…to nurse the CXPP cave crane through to March 2017 on a reactive basis (i.e. to wait until it breaks down again)." {ZA-CON/2/76}

I find that to be an inaccurate characterisation of the Tender Submission for this Requirement. Figure 410-18 identified that maintenance (as required by the site maintenance plan) included planning so that appropriate preventative maintenance would be carried out during scheduled downtime between planned campaigns of ILW removal {Q/26/18}. The proposal was for a team, which was identified, to work out the appropriate surveillance and maintenance for each asset taking account of the functional performance requirements and any specific vulnerabilities identified {Q/26/17}. This would consider whether adjustments in operations, maintenance and monitoring regimes would be required and this was shown in Figure 410-20 {Q/26/20}. This is not "waiting until it breaks down again".

474. Given the nature of the failures to date – which were, as RSS stated "unique and not repetitive" – it could not be predicted which components of the Cave Crane would fail. RSS stated that:

> "If a failure appears to become repetitive, replacement parts will be fabricated and stocked for future repairs." {Q/26/18}

Energy Solutions also draws attention to the fact that the crane was only planned to be used until March 2017.

475. The artificiality of the position adopted both by Mr Grey in his evidence, and the NDA, is demonstrated by the suggestion that it would have been possible to have considered which components had <u>not</u> failed since 1977 and to have tried to "model their ageing, future demand and capability" in order to anticipate whether they would fail by March 2017 {ZA-CON/2/80} {Day13Z-CON/104}. The Consensus Rationale specifically criticised RSS for failing to show how it would be "modelling ageing mechanisms".

476. There was no stated requirement for such modelling to have been done by any of the bidders. Lack of modelling does not appear anywhere in the scoring criteria. The evidence of Mr Grey on this point, and the approach of the NDA to this Requirement, demonstrates in my judgment the NDA demanding a counsel of perfection on the part of RSS concerning the Cave Crane. Certainly, an RWIND tenderer could have interpreted the SORR as not requiring such modelling.

477. In any event, Mr Grey could not explain how such modelling could be done nor could he identify such details as had (or had not) been made available regarding performance of the crane from 1977 onwards in the data room to enable this to be done {Day13Z-CON/104}. RSS had in any case proposed to fabricate and stock replacement parts for future repairs if any failure appeared to become repetitive. This was criticised by Mr Grey {Day13Z-CON/106} on the basis that "what they hadn't told us was what that meant". At times during Mr Grey's evidence on this subject it appeared that he was determined to justify the score awarded, regardless of how unreasonable his position became.

478. The NDA also stated that RSS's Tender Response failed to explain how its approach took account of the effects of future changes in levels of usage {A/10/42}. This is factually incorrect, as future demand is expressly recognised and dealt with as a specific topic at Figure 410-18 {Q/26/18}.

479. The NDA maintains that for this Node, the same point was expressed "as an inconsistency between the text on good practice asset management, and how that was or was not applied to the specific assets" whereas on other Nodes it was stated to be an omission to put the management proposals in the context of past performance/future demand and capability. However, the NDA submitted that:

> "…which label is put upon the point is immaterial to the substance of the point and to the score awarded."

Mr Grey said that:

> "…some deficiencies could be characterised in either way, depending upon how the evaluators looked at it". {ZA-CON/2/81}

480. I do not consider that approach to be correct. The former point relates to good practice asset management, and whether that was to be applied to the specific asset in question. That could amount to a failure to observe good practice. The latter point is a failure to identify management proposals within the relevant context, in other words what has happened in the past and what it is proposed to do in the future. They are different points. The NDA wishes to have them dealt with as the same because the consensus rationale (prepared by a team of SMEs, having applied what I have already found to be the wrong measure of good industry practice) identified what was said to be an inconsistency. Upon analysis, and using the correct approach to good industry practice, there is no inconsistency and nothing can be pointed to by the NDA within the relevant part of the RSS Tender Submission as being inconsistent. However, to avoid the obvious consequence – namely a finding of manifest error and an increased score – the NDA and Mr Grey sought to explain the consensus rationale as meaning something entirely different, namely that something was missing that should have been included.

481. Even if that approach were to be justified – and I do not accept that it is – it was manifestly erroneous for the SMEs to require modelling of the type identified, and marking the submission as though such modelling *were* required. Since such modelling was nowhere stated in the SORR as being required, and I find that good industry practice would not have required such modelling, the NDA cannot escape

a finding of manifest error so far as the Cave Crane is concerned. It is correct that the SORR itself {J/10/13} provides (in paragraph 1.9):

> "Guidance on the concept of a 'material omission' or a 'material inconsistency'".

These are both defined in terms of their effect. However, this does not mean that "omissions" and "inconsistencies" are synonymous.

482. The ventilation system is not mentioned in the consensus comments. If however the Stage 1 reasons demonstrate unlawfulness, I have to consider the correct score. In evidence Mr Grey made what I consider to be a very powerful point in relation to the ventilation system. This was that the change of regime from an operational one to that of decommissioning meant that the CXPP Process Area Ventilation System was going to be used differently. Although he agreed with Mr Hunter QC that the mechanical duty would be the same, he said {Day13Z-CON/116}:

> "A. CXPP was there to facilitate the removal of tritium from the pins, over an operational regime. During the process of doing that, tritium was released into the environment, it was absorbed into the various surfaces, and so on and so forth, and the ventilation system was designed and implemented with the operations in mind.
>
> The change to a decommissioning regime would then change what you were doing. It would release more tritium, more dust, so on and so forth. So the demand on that system would change."

483. I find that it was not manifestly erroneous on the part of the SMEs to look for some sort of analysis within the RSS Tender Submission for how this change of use would have an effect upon the maintenance regime of the Ventilation System. This point was not addressed at all by RSS, which I consider to be have been an omission. In my judgment therefore, the score for this Requirement remains 3. The answer to the issue is therefore as follows.

Agreed Issue 20: The score of 3 was not lawfully awarded given the reasons provided by the NDA prior to the issue of proceedings. However, upon analysing the correct score, the approach adopted by RSS concerning how it would manage the CXPP Process Area Ventilation System, which it had identified as a critical asset, contained an omission, namely consideration of the different demands upon that system as a result of the change from an operational to a decommissioning regime. Accordingly, the correct score would have been one of 3 in any event.

B2. Assumptions to bound scope and cost – Nodes 405, 410, 408

484. The SORR required identification of the assumptions to bound, or delineate, both scope and cost.

485. The Nodes affected by this issue are numbered and entitled as follows:

1. Node 405 Spent Fuel and Nuclear Materials Management;

2. Node 410 Sample Project 1: Preparing Chapelcross CXPP and B141 for Interim State;

3. Node 408 Delivery of Winfrith Interim End State.

The Nodes are not dealt with in numerical order in the Agreed List of Issues, which is why Node 410 is dealt with in this judgment before Node 408.

486. The Requirements are 5.3(k) for Node 405, and 5.3(i) for each of the other two Nodes. These state:

1. Node 405.5.3(k): "A table must be included in this section to detail any assumptions that Bidders are making in order to bound the scope and cost. Such assumptions must be specific to the approach and clearly bounded. The rationale for making the assumptions should be explained together with the identification of any risks associated with the assumptions. Please see paragraph 1.4 in the Introduction." The headings in the table were to be "Assumption; Rationale for assumption; Associated risks" {J/10/136}.

2. Node 410.5.3(i): "A description of how the Regulatory Requirements will be managed to secure the specific requirements of the Client Specification that relate to Spent Fuels and Nuclear Materials Management including:

(i) Identification of key Regulatory challenges on which the strategy is dependent, including any notable technical details that will need to be justified in order to obtain Regulatory concurrence;

(ii) Description of the enabling works that will be undertaken to address these challenges; and

(iii) Description of how the Bidder will undertake engagement with Regulators on securing approvals (if any) necessary to deliver the strategy and the ongoing development and implementation of the strategy" {J/10/195}.

Care should be taken because confusingly, Requirement 5.3(i) makes use of the lower case (i) in two places, firstly for the Requirement alphabetically between Requirements 5.3(h) and 5.3(j), and also a lower case Roman numeral (i) as the first of (i) to (iii).

3. Node 408.5.3(i): "A table to detail any assumptions that Bidders are making in order to bound the scope and cost. Such assumptions must be specific to the approach and clearly bounded. The rationale for making the assumptions should

be explained including the identification of any risks associated with the assumptions. Please see paragraph 1.4 in the Introduction." The headings in the table were also to be "Assumption; Rationale for assumption; Associated risks" {J/10/172}.

487. The scoring criteria for the Requirement were set out in Table L, "*Assumptions*", in Appendix 2 of the SORR {J/10/332}. This provided the following:

1. A score of 5 (Excellent) was for where the response "provides information which: "Addresses all elements of the Requirement; Identifies the Bidder's assumptions and demonstrate, in the opinion of the evaluators, how these fully bind the scope of the Evaluation Node; Provides the rationale for the Bidder's assumptions; and Contains no omissions or inconsistencies."

2. A score of 3 (Fair) was for where the response "Addresses all elements of the Requirement; Identifies the Bidder's assumptions but, in the opinion of the evaluators, does not demonstrate how these fully bind the scope of the Evaluation Node; Provides the rationale for the Bidder's assumptions; and Contains no material omissions or material inconsistencies."

3. A score of 1 (Unacceptable) was for where the response "Does not address all elements of the Requirement; or Addresses all elements of the Requirement but contains material omissions or material inconsistencies, including a failure to identify a key handover point that sets the scope boundaries."

488. For Node 410.5.3(i) the RSS tender was awarded a 1, for "Unacceptable". For the other two, RSS was awarded a 3. For each of them, the maximum mark available was 5, which is what Energy Solutions asserts should have been awarded, absent manifest error by the SMEs. Energy Solutions maintains, in summary, that the SMEs confused assumptions with two other types of boundaries, namely start and end conditions; and internal and external interdependencies and interfaces.

489. Again, the evaluations of these Nodes was done by SME teams led by Mr Grey (Nodes 405 and 410) and Dr Clark (Node 408). Each of these witnesses gave evidence on these Nodes, together with Ms Thomas regarding Node 410. Mr Board gave evidence for Energy Solutions on all three of them, together with Mr Davies (Node 405) and Mr Matthews (Node 408). It is said by Energy Solutions that Mr Grey misapplied concepts as to what constituted an assumption at all, and penalised the RSS bid as a result. Dr Clark's team is said to have made a misconceived criticism of what was a manifestly valid assumption to bound scope. These evaluations are therefore said by Energy Solutions to be manifestly erroneous.

490. The SORR does not define "assumptions". It is however a widely used word. Synonyms for it are belief, theory, hypothesis and presumption. In this context, and because the scope of the individual projects were lacking in delineation or definition (as they had to be, given the subject matter and lack of knowledge in certain areas), bidders were required to state what their assumptions were, to provide the "bounding" of the particular Nodes. In a fully detailed and worked-up specification for particular decommissioning works, for example, such assumptions would not have been necessary. This procurement competition could not provide a

fully detailed and worked-up specification as has been explained. Accordingly, the bidders' assumptions were required.

491. There was a great deal of semantic debate in the evidence, predominantly with Mr Grey, about what an assumption in fact was. Mr Grey disagreed that it had anything to do with uncertainty {Day13-NC/119}. In his view an "assumption" would be needed even if, for example, the boundary for a project had been set by an end condition or an Authority Assumption (which was an assumption made by the NDA and communicated to the bidders).

492. As stated in one of the NDA's documents on its cost-estimating programme controls procedure, PCP-09 {V/110/88}:

> "assumptions are used to bridge gaps in planning knowledge in order to bound scope, schedule and cost estimates....There should generally be an attendant risk that the assumption will prove not to be true....".

Mr Grey was not minded to accept any points based on that document in respect of the technical Nodes, because PCP-09 was dealing with costs and the technical Nodes were not. It should be borne in mind that PCP-09 was an NDA document. Further, it is obviously sensible that the term "assumption" would be applied as meaning the same across different Nodes, regardless of whether those Nodes dealt with cost or technical matters. It would be somewhat bizarre if the same word had two different meanings depending upon whether it appeared in a Costs Node or a Technical Node. I find that it meant the same in both types of Nodes. Assumptions are not facts, or knowledge. They are used to bridge gaps in facts or knowledge. The reason that the different Nodes required assumptions to be identified was because different tenderers would, almost certainly, have made different assumptions, and the Tender Responses needed to identify what these were, and what risks attached to them. That was the purpose of requiring the table(s).

493. Mr Davies stated that in his view the function of an "*assumption*" was to deal with uncertainty. Mr Davies, in my judgment, explained this accurately when during his cross-examination he said {Day5Z-CON/63}:

> "The principal purpose of the assumption is to act as a bridge in the planning process. So it is where you are very unsure about what you are going to do, as opposed to – I mean, if you were very sure about where something was going you wouldn't need an assumption."

He amplified this as follows {Day 5Z-CON/68}:

> "Yes, I think this is a – again, this is in the context of a plan. There are degrees of uncertainty. The plan is by its nature a construction, but on the basis that you know something is particularly uncertain, it will need an assumption. If something is fairly well understood, then it won't."

494. A start, or end, condition is a parameter defining the scope of any particular project or Node, set by the NDA. It is self-evidently not an assumption by the bidder. An Authority Assumption is similarly not an assumption by the bidder either. It is an assumption stated by the NDA. Characterising an assumption within this tender process as something used to deal with uncertainty is broadly accurate, because there would be no point in asking for a table of "assumptions" (as the SORR did), and seeking explanation for the rationale for making it and the risks attached to it, unless there was some uncertainty attached to each "assumption". Not only was this, in my judgment, the correct approach to reading the SORR, but it was the approach that would have been taken by a RWIND tenderer.

495. An assumption would not be needed if, for example, the boundary for a project has been set by an end condition, or by an Authority Assumption. However, Mr Grey's approach was that an assumption by RSS would still be required even in those circumstances {Day13Z-CON/119}. In my judgment this is wrong and manifestly erroneous. Start and end conditions are themselves the fixed parameters of the particular project. They are not themselves "*assumptions*" – and certainly not assumptions by the bidders – and should not have been required to be listed as "*assumptions*". They did have to be identified separately in accordance with the SORR. If there were uncertainties associated with start and end conditions, however, "*assumptions*" may have been made about such uncertainties and risks associated with those, and the rationale for such assumptions provided. It is not possible to state that in no case at all would an end condition, for example, require or not require an assumption by the bidder.

496. However, an Authority Assumption would not need to be included in the table identified in this part of the SORR. That is because an Authority Assumption would not be a "Bidder's Assumption" at all, by definition. If it were an assumption stated by the NDA, then it is not an assumption being made by the bidder. Further, and from a practical point of view, there would be no point in having all the Authority's Assumptions simply repeated and re-listed in a table. In my judgment the SORR did not require the bidders to do this, and a RWIND tenderer could not have been expected to read the SORR as requiring this. Mr Grey's view of this was manifestly erroneous.

497. Separate identification was required of "Internal and external interdependencies and interfaces". If uncertainties were associated with them, however, again an "*assumption*" may be required, but not invariably. There is a conceptual distinction between defining the boundaries of the project (the project start and end conditions and the interfaces and/or interdependencies with other projects) and stating any assumptions. This Requirement applied to bidders' assumptions, which is where an assumption (or assumptions) was (or were) required by the bidder to define what the scope of the project or scope of work was, when there was uncertainty.

Spent Fuel and Nuclear Materials Management - Node 405.5.3(k)

498. The issues that go to this Requirement are set out as follows in the Agreed List of Issues {AA/10/1}, using the following numbering:

> Agreed Issue 21. The issue is whether a score of 3 was lawfully awarded on the basis that RSS's assumptions did not fully bound the scope at the end of the project.
>
> Agreed Issue 22. It is accepted by the Defendant that RSS's assumptions did not fail to deal with regulatory approvals.
>
> Agreed Issue 23. The Defendant contends that RSS's assumptions did not fully bound the scope of the project by failing to include assumptions dealing with the demobilisation of the programme and project teams and transfer of ownership of fuel route assets, and/or the acceptance of responsibility for spent fuel by Sellafield Ltd.

499. This Requirement was given a score of 3, rather than the mark which Energy Solutions maintain should have been awarded which was a 5. Specific evidence on this Node was given by Mr Board and Mr Davies for Energy Solutions, and Mr Grey for the NDA. RSS had set out 20 assumptions in its Tender Submission {Q/21/32}. Given the difference in the scoring criteria, this means that the SMEs must have concluded that RSS'S bid did:

> "…not demonstrate how these [ie the 20 assumptions] fully bind the scope of the Evaluation Node."

500. However, grasping the NDA's reason or reasons for this conclusion has proved rather difficult. The Consensus Rationale stated {U/4/49}:

> "The assumptions presented define those that bound the scope at the start of the projects, to a limited extent, and as the projects progress but do not fully bound the scope in terms of completion of the projects which is an omission but is not considered to be material".

501. This is a very vague statement. It is said that the assumptions "do not fully bound the scope in terms of completion of the projects", which can be read as a failure to define an end condition, which is something different to an assumption in any event. The NDA was asked by Energy Solutions to clarify this, and its response was in Appendix 5 of the 11 April 2014 Letter {U/23/14} which stated:

> "The RSS Tender Response was scored a 3 because in the opinion of the SMEs, the response did not demonstrate that the scope had been fully bound. In particular the scope for the end of the project was not fully defined".

502. This is verging on not being clarification at all, as it merely repeats the vague statement in the consensus rationale using slightly different terminology. However, it states that the failure was not fully defining "the scope for the end of the project", and that this was the particular failure in question. This clarification could, and in my judgment should, be read as meaning that the NDA considered that there was a failure by RSS to define an end condition, and in any event was certainly not something concerned with an assumption. In particular, any

assumption that should have been included but was not, is not identified, even if that were part of the scoring criteria for a mark of 3 (which it was not). Also, the way in which the "scope had not been fully bound" is not identified at all.

503. The NDA's pleadings went further, and in the Re-Re-Amended Defence (and associated Further Information) eventually the case turned out to be a single omitted assumption. This concerned "the time taken to obtain necessary regulatory approvals at the end of a project"; this is set out in the Re-Re-Amended Defence paragraph 68(2) {A/10/33} and in the Further Information 18/19 {A/25/11}**.** This complaint by the NDA seemed, on the face of the assumptions, to be a manifestly bad one, not least because one of the assumptions, ID TO-0458, expressly deals with "fuel free verification…..after the last fuel leaves site" and states specifically as an associated risk:

> "As a result of delays in assessment and approval by ONR, there is a risk that fuel free verification is not confirmed for 6 months."

504. Since ONR is the Nuclear Regulator, this assumption squarely and expressly deals with the time taken to obtain regulatory approvals at the end of a project. Mr Grey accepted this in his written evidence – paragraph 358 of his first witness statement, and paragraph 166 of his second witness statement, and this was confirmed by him in cross-examination {ZA-CON/2/88}; {C/9/49}; {Day 13Z-CON/144}. During the trial it was formally accepted by the NDA that "RSS's assumptions did not fail to deal with regulatory approvals" because that is now stated expressly in Issue 22 of the Agreed List of Issues {XAA-CON/3/5}.

505. So far as the available reasons are concerned therefore – what Energy Solutions refer to as "the Admissible Reasons" – the complaint by Energy Solutions is made out in respect of this Node which was evaluated in a manifestly erroneous manner. It is in fact wholly illogical for the NDA to state that the RSS tender failed to provide an assumption that dealt with the time taken to obtain necessary regulatory approvals at the end of a project, when in express terms it did so. Further, the SMEs were plainly and in any event applying the wrong meaning to the term "assumption", which is an issue of law in respect of which they had no margin of appreciation. Their evaluation was therefore unlawful and in breach of the NDA's obligations under the Regulations. The answer to Agreed Issue 21 is therefore that the score was not lawfully awarded. Agreed Issue 22 recites the acceptance by the NDA.

506. In Agreed Issue 23 the NDA relied upon other reasons to justify the score of 3. These are failing to include assumptions dealing with the demobilisation of the programme and project teams and transfer of ownership of fuel route assets, and/or the acceptance of responsibility for spent fuel by Sellafield Ltd.

507. I have to assess myself what the score would have been had the evaluation been performed lawfully. The NDA maintain that RSS's assumptions did not fully bound the scope of the project by failing to include assumptions dealing with the demobilisation of the programme and project teams and transfer of ownership of fuel route assets, and/or the acceptance of responsibility for spent fuel by Sellafield Ltd. It can be seen that this is wholly different to any of the reasons given

previously by the NDA, either in the detailed 11 April 2014 Letter or its pleadings. It is something that therefore may well have occurred to the NDA after proceedings were instituted. Energy Solutions urge me to reject it simply because it is not pleaded. However, I made clear to the parties that ordinarily I was not going to decide issues on technical pleading points. Although this might be said to be more than a mere technical pleading point – more of a gaping omission in the NDA's pleadings – I record my views on it for completeness.

508. This is based on Mr Grey's evidence but he accepted that he was not "the expert on it" {Day13Z-CON/148} and that he would have relied on Dr Rhodes and Mr Vaughan, neither of whom were called. There is therefore only thin evidence available from the NDA on this issue. The first assumption said to be missing is one regarding dismantling of the organisational structures. However, the programme ends with the achievement of fuel free verification at Category 4 security status at Wylfa. This is an end condition as shown in Figure 405-9 {Q/21/12}. The Tender Response says that:

> "The organisation can be changed at the same time as fuel-free status is declared." {Q/21/14}

Accordingly RSS's "approach to transition for people" included:

> "…timely preparations aimed at ensuring a smooth phase transition at the critical point…"
>
> [and]
>
> "…set up of a specific project to manage all aspects of reorganisation through management of change with our Resource Management Centre." {Q/21/15}

Once they were within that project, the people were outside the scope of this Node. Mr Davies made this clear in his evidence, but that evidence is not necessary as this can be seen on the face of the Tender Submission itself. What happens after the end of the programme is unnecessary to bound the scope of the project. There is no uncertainty that requires an assumption to bound scope. When this was put to Mr Grey he said in response {Day13Z-CON/150}:

> "We don't know whether the scope that is described in the body of the document is the correct scope because there's no scope bounding assumption associated with it."

This is not sensible evidence, and I cannot accept it. Energy Solutions submits it is absurd. There is no need for an "assumption" if there is no uncertainty. If Mr Grey were correct, every part of the definition of each project's scope in the tender responses (whether by way of start or end conditions, or interfaces) would require an "assumption", and they plainly did not. Neither RSS nor CFP approached the bids in this way, and I find that an RWIND tenderer would not have read the SORR in that way either. The second assumption said to have been omitted is:

> "Sellafield Limited has accepted responsibility for the fuel."

That is an end point that again requires no assumption; there is no uncertainty associated with Sellafield Ltd doing so. Sellafield is where the spent fuel is reprocessed.

509. This was set out in clear terms by the NDA. The Client Specification required the successful bidder to:

> "…transfer all Spent Fuel off-Site to Sellafield for reprocessing in line with the extant Magnox Operating Programme planning guidance dates…"{K/6/42}

The NDA had to receive a:

> "Statement that all Magnox Spent Fuel has been sent offsite to Sellafield accepted by Accountable Person(s)".

The end conditions for the project included the transfer of the relevant fuel to storage in Sellafield and this was set out in RSS's Tender Response {Q/21/12}. As the response made clear in other sections, namely 4.5.3(a)(iv) {Q/21/14} and 4.5.3(d) {Q/21/18}, (both of which scored maximum marks) Sellafield accepted responsibility for the fuel as it was transferred to it during the course of the project pursuant to the "Agreement to receive material". When the end conditions were reached there would have been a completion of the transfer of responsibility pursuant to the "Agreement to receive material". There was no need for an assumption to bound scope as this was dealt with by the end conditions. There was nowhere for the spent fuel to be sent, other than to Sellafield.

510. Therefore even if this point had been pleaded by the NDA, I would have rejected it. It is a bad point, or more accurately two or three bad points, relating to personnel and fuel transfer. The answers to the Agreed Issues are therefore as follows:

Agreed Issue 21: the score of 3 was not lawfully awarded by the NDA and was manifestly erroneous.

Agreed Issue 23: the contentions advanced by the NDA are not pleaded. However, even if they had been, they are bad points and do not justify the score of 3 on other grounds.

There is no agreed issue seeking the specific score in the event of a finding of manifest error and the need for the court to re-mark the Requirement. However, the correct score when considering this Requirement against the scoring criteria is one of 5.

Sample Project 1: Preparing Chapelcross CXPP and B141 for Interim State - Node 410.5.3(i)

511. This Sample Project involved removing ILW from Chapelcross and then, after a gap of six years, demolishing and what is called "deplanting" the CXPP and B141 facilities. Both of these are buildings; CXPP is the Chapelcross Procssing Plant,

and the other building is simply called B141. Evidence for this was given by Mr Board for Energy Solutions, and Mr Grey and Ms Thomas for the NDA.

512. There is a single issue in relation to this Requirement in the Agreed List of Issues {AA/10/5} which is as follows:

> Agreed Issue 24. The issue is whether a score of 1 was lawfully awarded on the basis that RSS's assumptions should have included the construction of the interim storage facility (ISF), as a key handover point or one whose omission as an assumption was sufficiently serious to be a material omission.

513. There was another project, the subject of a different Node, called Integrated Waste Management or IWM. The Technical Node for this was Node 407, and the introduction to that Node gives a good outline description of it. This stated {Q/23/1}:

> "This response addresses the Authority Statement of Response Requirements (SORR) for Integrated Waste Management (IWM). Section 407.5.1 of this response provides an indicative Integrated Waste Strategy (IWS) which encompasses, at a high level, all waste management activities that will be undertaken by Magnox and RSRL during the duration of the contract, e.g., associated with Intermediate Level Waste (ILW) retrieval and packaging; Fuel Element Debris (FED) retrieval and treatment; Pond clean-up; and Deplant and Demolition (D&D) Programmes activities etc."

514. So far as waste is concerned, the Node 410 Sample Project as defined by RSS was only responsible for packaging any waste in containers so that it could be disposed of (what was called "disposition"). Node 407, IWM, was responsible for transporting those containers onsite and offsite and for the disposition of such waste to "offsite facility or onsite storage": this was set out in Figure 410-22 {Q/26/22}. Mr Grey accepted that the scope of the Node 410 project did not include those matters {Day 13Z-CON/122}.

515. RSS made the assumption (reflecting that division of responsibility between the two Nodes) that IWM would be responsible for the transport of containers onsite and offsite and disposition of waste, since it would be responsible for the management and costs of waste transport and disposition. This was made clear in Figure 410-24 which specified TO-0345 as the relevant assumption {Q/26/25}. This stated:

> "Integrated Waste Management is responsible for the transport of containers onsite and offsite and disposition of all waste."

The Rationale for Assumption against this stated:

> "RSS IWM is responsible for the management and costs for waste transport and disposition."

Against "Associated Risks" the following entry appeared in the RSS Tender Submission:

> "Bounds scope between the Sample Project and IWM. Schedule conflicts in receiving containers from projects at storage facility of disposition queues."

This therefore reinforced that this assumption was bounding the scope between this Node, and the Node that dealt with IWM.

516. Initially, this Requirement was scored a 5 by the SMEs. That was however reduced, firstly to a score of 3, and then following the Burges Salmon Review it was reduced again, this time to a score of 1. This is a rather marked swing from the maximum score available, to the minimum, based on consideration by the same SMEs of the same material in the tender submission against the same scoring criteria. The evolution of this score is aptly summarised in part of the cross-examination of Mr Grey {Day 13Z-CON/125}:

> "Q: Can we look at what you said when you evaluated this, at {T/130/623}. Do you see at the top of the page, on 18th December, you originally wrote in consensus a score of 5:
>
> "A table has been included listing assumptions, the rationale for the assumption and the associated risks."
>
> Do you see that?
>
> A. Yes.
>
> Q. But your first assessment was that there were no omissions from the assumptions table, agreed?
>
> A. That is correct.
>
> Q. Then, the next day you have added in a new two sentences saying that:
>
> "Whilst there is an assumption in respect of waste management in general and an assumption in respect of ISF construction completion would have been expected. Given the importance to the project of the ISF this is considered to be an omission."
>
> And you scored it at 3, didn't you, that day?
>
> A. Yes.
>
> Q. It is right, isn't it, that in fact you printed off and signed the consensus at that point with the score of 3?
>
> A. I don't recall.

> Q. Then two months later there was the Burges Salmon review; isn't that right? We can pick that up at page {T/130/622}.
>
> Do you see on 17th February you changed the score but not the rationale? Do you see that? So it became a 1.
>
> A. Yes.
>
> Q. Is it right that you can't recall how that came about?
>
> A. Not in detail, as I mentioned before. The usual output from the Burges Salmon review was an apparent mismatch between the score and the consensus rationale. We clearly took a look at it again and decided that the rationale looked about right and it was the score that we decided that needed to be adjusted to reflect that.
>
> Q. But, in fact, if the rationale had stayed as it was, the correct score was 3, wasn't it, because that was the correct score for a non-material omission, isn't it?
>
> A. 3 is the correct score for a non-material omission, that is correct.
>
> Q. That's what you originally put in your consensus rationale and scored it at 3. This entry, the score no longer matches the rationale, doesn't it?
>
> A. I think there is two parts to that. I think originally the absence of the ISF flagged up that there was a mismatch. We took a look at it again by the look of it and said: yes, the ISF is missing and needs to score a 1.
>
> Q. Then what happened is that on 28th February the word "material" is added in before "omission", yes?
>
> A. Yes.
>
> Q. Is that another change following some further Burges Salmon review; is that right?
>
> A. I don't recall.
>
> Q. That was the final published version of the consensus rationale, wasn't it?
>
> A. It is the last entry, so it must have been, yes."

517. The Burges Salmon Review and the lack of information relating to its content has been dealt with elsewhere in this judgment. This is an example where that review led to a changed score being awarded by the SMEs, reducing the score that had

been previously agreed by the SMEs and signed off. In this case, I do not see how Mr Grey's generic explanation for how the result of that review would lead to a changed score, namely to correct "an apparent mismatch between the score and the consensus rationale" could explain the change. This is because the consensus rationale did not refer to the omission as a "material omission", as at that stage the SMEs had identified a non-material omission. The word "material" was added, as Mr Hunter QC explored with Mr Grey in the passage of cross-examination above, 11 days *after* the score had been changed. In other words, the score was reduced, then the rationale was later changed to reflect that reduced score. If the approach of the SMEs after learning of the results of the Burges Salmon Review was to check to see that the score matched the rationale, there would be no logical explanation for that sequence of events. I find this explanation by Mr Grey not only wholly unsatisfactory, but entirely illogical.

518. In any event, the reasons given in the consensus rationale do not make sense when considered against the subject matter of the Node.

519. The term ISF refers to the Interim Storage Facility. This facility was to be used to store waste, and was to be constructed specifically for that purpose. Construction of that project was not part of this Node at all. It is difficult to see therefore how this Node, which was responsible solely for packaging waste into containers, could be said to suffer from an omission (material or otherwise) relating to the ISF, because Node 407 was to be responsible for transporting those containers onsite and offsite and for the disposition of such waste to "offsite facility or onsite storage", as stated in Figure 410-22 {Q/26/22}. This was clearly set out in the assumptions to bound scope.

520. Mr Grey's cross-examination on this point was illuminating. The assumption was put to him {Day 13Z-CON/122}.

> "Q. Do you see there the assumption relating to TO-0345?
>
> A. Yes, I do.
>
> Q. That's about: "Integrated Waste Management is responsible for the transport of containers onsite and off-site and disposition of all waste." Do you see that?
>
> A. I can see that.
>
> Q. First of all, that is an accurate statement, isn't it, as to what integrated waste management was responsible for?
>
> A. It is, but it is not an assumption that I would recognise as being useful.
>
> Q. <u>Well, isn't the corollary of that that the scope of this project does not include transport of the containers on site and off site and disposition of all waste?</u>
>
> A. <u>That's a fair statement.</u>

> Q. So it clarifies, doesn't it, the demarcation between what's in the scope of this sample project and what's in the scope of the integrated waste management project, yes?
>
> A. I disagree with that".
>
> [emphasis added]

521. This evidence makes it clear to me that Mr Grey accepted that the function of the assumption was to make it clear that transport of the containers on site, and off site, and disposition of all waste, was not part of this Node at all. Given that acceptance, it is difficult to see why the ISF should have been thought of as forming any part of this Node – it would clearly, in my judgment, form part of Node 407, IWM, which was wholly separate.

522. The NDA stated, in Appendix 4 of the 11 April 2014 letter, when asked why it considered there was any omission {U/23/12} that:

> "…. the evaluators accepted ....the completion/availability of Interim Storage Facility being outside the scope of the project".

However, this went on to state that the SMEs had identified:

> "…a failure by RSS to identify the ISF as a key handover point".

It was said that a failure to identify a key handover point was deemed to be a "material omission"; and that, accordingly:

> "…since RSS did not identify the ISF as a key handover point, RSS was automatically scored 1".

It is hard to see how any accurate summary of what had happened could sensibly be described as RSS being "automatically scored" a 1, given it had been initially given a score of 5, and then a score of 3, with that score then finally being reduced to 1. The same expression, "automatically scored" was also used by the NDA in its reasons relating to the scoring of Requirement 5.3(c), identification of critical assets, in Sample Project 5 "The Management of Active Effluent at the Sizewell A Site" in Node 414, where that score too had been reduced from a higher one.

523. However, regardless of the criticism that can be levelled at the use of the expression "automatically scored" in these circumstances, there was no reference to any failure to identify a key handover point in the consensus rationale. Mr Grey accepted that he must have been involved in formulating this response {Day 13Z-CON/129} and {Day 13Z-CON/130} although he could not remember actually doing so.

524. The scoring criteria does identify (under Table L, for "a failure to identify a key handover point that sets the scope boundaries" {J/10/332}) a score of 1 for such a failure in identification of a handover point. However, the ISF could not be a handover point anyway – it is a building, and the waste would have been handed over to the IWM programme long before it arrived at the ISF, as that other Node

deals with everything to do with the waste after it had been packaged. The responsibility of the project in Node 410 ceased and handover to another project, IWM, occurred once the waste had been packaged, as Mr Grey himself accepted {Day 13Z-CON/135}. This was also made clear elsewhere in the submission, for example in Figure 410-22 {Q/26/22} that dealt with Key Internal and External Interdependencies and Interfaces. There is nothing in this supplementary reason that makes sense. Mr Grey's first witness statement accepted in paragraph 398 {ZA-CON/2/98} that "the handover is to the Integrated Waste Management Programme".

525. In Issue 24 of the Agreed List of Issues {XAA-CON/3/5}, the parties raised the following question as an issue that states:

> "24. The issue is whether a score of 1 was lawfully awarded on the basis that RSS's assumptions should have included the construction of the interim storage facility (ISF), as a key handover point or one whose omission as an assumption was sufficiently serious to be a material omission."

526. In its Closing Submissions, Energy Solutions state that this is a "new case". Although that appears to be the case based on the word "or", I made it clear during the trial that it was undesirable for issues in these proceedings to be resolved on the basis of technical pleading points. It is also in the Agreed List of Issues. However, whether it is a new case or not, it is clear that it was plainly not the basis upon which the SMEs had scored this Requirement at 1 at the time. Mr Grey expressly stated that the reason the SMEs had in fact given RSS a score of 1 was the failure to identify the construction of the ISF as a key handover point {Day 13Z-CON/134} and {ZA-CON/2/90}. That was also stated in his first witness statement at paragraph 371 {ZA-CON/2/90}. There is also no explanation why this alleged omission would fundamentally undermine confidence in relation to RSS's strategy or approach for this Sample Project, or its ability to deliver the Requirements or required outcomes or the terms of the SLCA or PBA (as paragraph 1.9(b)(i)(F) of the SORR requires for this to justify such a score) {J/10/13}.

527. NDA submitted that it was clearly *prima facie* correct (and certainly not manifestly erroneous) for the SMEs to think that some assumption in respect of the availability, and hence completion of construction, of the ISF was required in order to bound the scope of this Sample Project. However, that submission simply fails to grasp the location of the ISF (in project, not physical, terms) as being entirely outwith this Node. If the assumption clearly stated, as this did, that Node 410 dealt only with the packaging of waste, then by definition everything else to do with waste after that packaging has occurred would be within the IWM, which is a separate Node entirely. The NDA submitted that assumption TO-0345:

> "…leaves open the point at which responsibility transfers from Sample Project 1 to Integrated Waste Management, and in particular how matters rest if, at the time when the waste is ready to be packaged and moved, the ISF is not available to receive it."

This submission elides two crucially different elements, and the term "when the waste is ready to be packaged and moved" simply makes the same manifest error as NDA made during the evaluation. The first element is packaging the waste – that is clearly within this Node 410. The second element is moving it – that is not within this Node at all, given the delineation or demarcation of the two Nodes as identified by RSS.

528. As Energy Solutions pointed out in its closing submissions, this way of putting the case has nothing to do with the physical construction of the ISF, a matter which is concerned with the place to where the packaged waste may be taken, not from where it may be picked up. It is common ground that the ISF was not to be used to package the waste, it was a facility that was to be used to store it after it had been packaged, and after it had been transferred (in terms of responsibility) to the IWM. The NDA rely upon part of the text against Requirement 410.5.1(a) Strategy for Defining Interim State that stated:

> "The Project is also constrained by the commissioning of the ILW interim storage facility. The ILW in CXPP and B141 cannot be packaged until the route for an environmentally controlled storage facility is available".

Mr Board's explanation for this was that this went to the project schedule (meaning duration and timing) and not to the scope of the project. I accept that explanation. The assumptions are to bound the scope of the project in question, not the schedule or programme. The NDA submits that "scope, schedule and cost are inextricably linked". In a sense that is correct, because they are all elements of any project, but it does not help the NDA on this part of the evaluation. That is because this Requirement was expressly stated to be about "assumptions to bound scope and cost", and *not* schedule.

529. The NDA also rely upon the feedback comments provided during the dialogue process by NDA on the Second Interim Drop on the ISF and its relevance to assumptions {M/80/1} {M/80/3} which raised the question about whether "the work is dependent ion [sic] the ISF and if so if there is an assumption. Is there an assumption to be made about agreement on IS definition?" The RSS notes at this stage stated:

> "5.3(i) PASS (but needs more on hand-over for waste management)
>
> List does not appear to be complete: e.g. is work dependent on the ISF; dependent on IS definition (bound scope and cost)".

However, although the assumption stayed the same (albeit there is no fourth column in the actual tender submission for assumptions, whereas at the Second Interim Drop stage, which used the "XX" prefix, there was one for "Challenges/Complexities" {N/30/22}), this argument by the NDA overlooks the other differences within the Tender Submission compared to the Second Interim Drop which deals with the same topic. Examples are the text at {Q/26/2} which states "The Project is also constrained by the commissioning of the ILW storage facility…." and the relevant entries in Figure 410-7, the Benefits Dependency Map

{Q/26/7}. The former does not appear at all in that part of the Second Interim Drop submission, and the latter figure is an evolution of XX-5 Benefits Realisation {N/30/5}. Figure 410-7 includes as an outcome "Containers transferred to CXPP for processing" and "Pellet waste in compliant package for Interim Storage Facility (ISF)". When Mr Board was cross-examined about these different entries in the tender submission (rather than any slightly different entries in the Second Interim Drop) he stated {Day7-NC/9}:

> "A. My reading of it, my Lord, is that, yes, the interim storage facility could affect the schedule of the project. It constrains the schedule of the project, it may alter that, and there does need to be a route for environmentally controlled storage. But that doesn't necessarily have to be the ISF."

530. He explained that there were other options for storage of the waste, but these did not necessarily have to be the ISF and how such storage was organised was for the IWM project, not Sample Project 1. I accept that explanation also.

531. It is not necessary to deal in any detail with the further argument raised by Energy Solutions concerning why no assumption had been included about construction of the ISF based upon the NDA's PCP-09 guidelines on cost estimating {V/110/88}. This deals with guidance that assumptions should not be used to state that other parts of the SLC would perform its work as required. The rationale for this is obvious, as to do so would simply be reciting many assumptions that other areas of work were to be performed by the same organisation as expected. Although I broadly accept the submissions of Energy Solutions on this point, it is not determinative of this head of challenge due to my findings on the primary submissions.

532. In my judgment, the evaluation of this Requirement by the SMEs was manifestly erroneous. There was no missing assumption and it was manifestly erroneous to conclude there was. The ISF formed no part of Node 410, and the assumption with the reference TO-0345 was sufficient. The fact that the ISF was referred to as having potential impact upon the project schedule (whether as a constraint or otherwise) is not relevant given the assumption, which bound the scope of Sample Project 1. I also consider that the reasons provided by the NDA to Energy Solutions in the consensus rationale and 11 April 2014 letter are in breach of the NDA's obligations of transparency. This is because the evidence available to the court makes it clear that the score of 1 was not awarded because of the supposed "material omission" at all. Indeed, the omission (if it were considered to be an omission) was not identified as "material" until 11 days after the score of 1 had been awarded. It was not the reason for the score of 1, and I find that the phrase "automatically scored" is wholly misleading concerning the award of the score, and lacking in transparency. The answer to Agreed Issue 24 is that the score of 1 was not lawfully awarded.

533. There is no separate issue agreed by the parties about what the correct score would have been, or should be. However, the parties plainly require me to make a finding about what the score would have been, given I have found manifest error in the evaluation that was conducted. Energy Solutions expressly submit that the score that would have been given was 5. Paragraphs 327 to 348 of the NDA's Closing

Submissions seek only to defend the score of 1, but do not in the alternative seek to have a score of 3 (rather than 5) awarded. In any event, I have carefully considered the contents of the Tender Submission and compared it with the scoring criteria. I consider that the correct score would have been 5, which I note was the score initially considered by the SMEs themselves to have been the correct one.

Delivery of Winfrith Interim End State ("IES") – Node 408.5.3(i)

534. The issue in relation to this in the Agreed List of Issues is as follows.

> Agreed Issue 25. Whether RSS's assumption that *"no soil contamination requires remediation"* was inconsistent with Fig 408-6 in its tender response.

535. The evaluation of this Requirement resulted in RSS tender being awarded a score of 3. Mr Board and Mr Matthews gave evidence on this for Energy Solutions, and Dr Clark gave evidence specific to the Requirement for the NDA, together with general evidence by Mr Grey. The table of assumptions set out 11 different assumptions {Q/24/41}. One of these was given the identifier TO-0128 and stated "No soil contamination exists which requires remediation". Against the "associated risks" column in the table, the following entry appears "See item TO-0128 in the Threats table". That table, which was given the title "Figure 408-6 Threats" was said to identify the "activities to mitigate the top five threats….." (this description being in the text under Requirement 408.5.1(d)(iii) {Q/24/6} which introduced the figure itself). The third column in Figure 408-6 is headed "Mitigation Activities in Scope".

536. The threat is stated in the following terms:

> "Past facility spills and leaking underground contaminated piping/equipment have left contamination levels greater than anticipated, requiring removal of contaminated soils that exceed the IES criteria." {Q/24/7}

The "mitigation activities in scope" that go with this entry are:

> "IESR Manager accelerates characterisation of soils and performs groundwater modelling. If warranted, soil removal action or other remediation (in-ground barrier, stabilisation, etc) is performed."

Under "Residual Issues" on the first page of the RSS response, the third bullet point is:

> "…the amount of remediation required to clean up ground contamination, especially actinides left in the A59 area". {Q/24/1}

A59 was a particular area of the Winfrith site; actinides are 15 metallic chemical elements from actinium (atomic number 89) to lawrencium (atomic number 103). They are radioactive and the series includes thorium, uranium and plutonium.

537. There is therefore, on one reading of the RSS tender, a potential conflict between one of the top five threats "being contamination levels greater than anticipated, requiring removal of contaminated soils that exceed the IES criteria", with certain mitigation activities within scope being removal of that contaminated soil (or other remediation works); and on the other hand, an assumption being stated that "no soil contamination exists which requires remediation". The former suggests soil remediation is *within* scope; the latter states that there is an assumption that has been made that "no soil contamination exists which requires remediation".

538. The Consensus Rationale stated {U/4/54}:

> "Assumptions in Fig 408-36. Mostly reasonable.
>
> There are inconsistencies and a lack of clarity throughout the submission with respect to the extent of the activities which will be undertaken to remediate ground and groundwater contamination. The assumption here is that there is "no soil contamination that requires remediation" which is inconsistent with other parts of the bid that suggest that remediation will take place (including the intention to only leave the immobile contaminants in place - Page 1 and the third residual issue on Page 1, inferring remediation of ground contamination in the A59 area). Also the assumption that no soil contamination requires remediation is unrealistic".

539. The 11 April 2014 Letter stated in Appendix 2 {U/23/9} the following:

> "The evaluators concluded that, as a result of including an inaccurate assumption which seemed to exclude work which the bidder had suggested was within scope, the bidder could not have bound the technical scope of the Evaluation Node fully and, in turn, the scope of costs could not be accurate".

540. It is submitted by Energy Solutions that all of these reasons have been abandoned by the NDA. It is correct that the case advanced at trial by the NDA focused on Figure 408-6 which was identified in Further Information following the Defence. The NDA stated that it would rely "solely" on another part of the response, namely Fig 408-6 {Q/24/7}, which obviously would exclude the entries on page 1 that were identified in the consensus rationale. It is said by Energy Solutions that the NDA thus abandoned reliance on the passages on page 1 of the response that were said in the consensus rationale to have given rise to the score. The NDA, notwithstanding the use of the word "solely" in its own pleading providing Further Information (admittedly not settled by counsel) submits that:

> "…the other parts of the response which were referred to in the consensus rationale are not irrelevant, because they provide further context for the interpretation of Figure 408-6".

This seems to me to be a puzzling statement, attempting to bring back into consideration the references to page 1 included in the consensus reasons. The NDA itself seems potentially confused as to what reasons it wishes to rely upon, and

those that it does not. However, it is clear that the central element of the justification mounted by the NDA for the score of 3 is Figure 408-6.

541. It is correct that the Further Information identified the reason relied upon as Figure 408-6. However, I do not read the consensus rationale itself as being specifically limited to the matters identified on page 1, and wholly excluding reference to other parts of the submission, including Figure 408-06. The consensus rationale states that there are

> "…inconsistencies and a lack of clarity throughout the submission with respect to the extent of the activities which will be undertaken to remediate ground and groundwater contamination. The assumption here is that there is "no soil contamination that requires remediation" which is inconsistent with other parts of the bid that suggest that remediation will take place (including the intention to only leave the immobile contaminants in place - Page 1 and the third residual issue on Page 1, inferring remediation of ground contamination in the A59 area) {U/4/54}."
>
> [emphasis added]

Energy Solutions would have the word "including" as meaning "comprising" or "by reference only" or some other limiting phrase.

542. Given the NDA only relies upon those elements within page 1 of the RSS tender in order to "give context" to Figure 408-6, it is not necessary to analyse with precision whether the assumption that no soil would require remediation was consistent, or inconsistent, with the amount of remediation to clean up ground contamination being identified as a "residual issue" on page 1. On the face of it, that assumption could appear inconsistent depending upon the interpretation that is put upon the phrase "residual issue".

543. In any event, whether the assumption was realistic or not would not have affected the scoring of this Requirement. Dr Clark accepted this in paragraph 216 of his first statement and paragraph 103 of his second statement {XC-CON/2/69}; {C/13/25}. That reflects the fact that this Requirement in the Node required assumptions which clearly bound the scope of the project. The costs point was effectively abandoned too by the NDA, because Dr Clark stated that:

> "…how this issue was addressed in the Cost and Programme Underpinning Evaluation Node 108 was irrelevant to the scoring of Evaluation Node 408".{XC-CON/2/71}

In any event, the cost was dealt with as a contingency as it would have to be, because the amount of contamination would not be known (and hence the extent of remediation works necessary could not be known either) on the information available to the bidders.

544. In my judgment, however, the consensus rationale and the reasons provided in the letter of 11 April 2014 should not be subject to overly-detailed semantic analysis or

over-literal interpretation. Literalism is, generally, to be avoided, particularly in relation to the consensus rationale. In my judgment, the wording of the consensus rationale is sufficiently broad to include inconsistency between the assumption, and Figure 408-6, which is the NDA's pleaded case as identified in the Further Information.

545. However, Figure 408-6 formed part of the response to Requirement 5.1(d) for which the SMEs gave a score of 5 {U/4/53} stating that:

> "…in the evaluators' opinion there are no omissions and inconsistencies".

Accordingly, if there were genuinely any inconsistencies, a score of 5 should not have been given for Requirement 5.1(d). Indeed, that score can be interpreted as the SMEs expressly concluding at the time that there were *no* inconsistencies. Dr Clark said he took the scoring criteria to mean no inconsistencies within the Figure itself, or other parts of the tender response {Day 10Z-CON/96}. Given the assumption that no soil contamination existed that would require remediation was part of the tender response, the two parts of the response were either inconsistent with one another, or they were consistent. This means that the contention advanced by the NDA, that there was an inconsistency between the assumption that no soil remediation was required and Figure 408-6, is itself inconsistent with the SMEs' own evaluation at the time of Requirement 5.1(d). Dr Clark was unable to offer any explanation for that. This means either that SMEs did read Figure 408-6 in a way which was consistent with the assumption at the time, or that the two are not inconsistent.

546. In my judgment, the way that the NDA's explanation for the conclusion that led to a score of 3 has changed, demonstrates how unclear the NDA itself is as to how it interpreted the supposedly errant assumption at the time. Although, potentially, it could be said that an assumption that there would be no soil contamination is inconsistent with a "threat" that there is, the two can be reconciled with a little thought. The explanation proffered by Energy Solutions for how the assumption is consistent with the presence of soil contamination as one of the top five threats is as follows.

547. The context for understanding the assumption and Figure 408-6 is provided by RSS's preferred option for this Project. This, Option 3B (which is at {Q/24/12}), was to:

> "…conduct initial ground surveys to confirm no past facility spills or underground contamination requiring removal of contaminated soils. Conduct early discussions to reach agreement on IES criteria with the Regulator, and use precedents to allow the use of contaminated rubble as backfill".

There was self-evidently a risk associated with this option that "regulators may not agree to on-site burial of wastes and allowing contamination to remain": this is made clear in Figure 408-14 that details the Options {Q/24/12}**.** The problem, when addressing soil remediation and the reason for the assumption made in RSS's Tender Response, was that environmental characterisation and groundwater

modelling of the soils had not been completed. In the absence of such work, the likelihood of soil removal being required was estimated at between 50-80% as shown in Figure 408-6 {Q/24/7}. That reflected the fact that there was a high likelihood that regulators would require removal of contaminated soils if such studies were not completed. It was assumed, however, that regulators would accept risk-based criteria or "clean-up standards"; this is shown in threat TO-0076 {Q/24/7} within Figure 408-6. The mitigation to reduce this risk was accordingly for such studies to be completed and for the IESR Manager to develop a persuasive case for leaving contamination on site with suitable managerial and physical controls based on residual risks compared to "dig and dispose" methodology {Day7Z-CON/41}. The residual risk that soil removal would be required should have been small after such mitigating measures; even if it were not small, it probably would have reduced. However, it remained as a risk. It was necessary therefore to make an assumption identifying how the tender dealt with this topic.

548. It seems to me that the assumption could have been, for example, that *all* (or, say, a stated percentage) of soil would be contaminated and require remediation. It could have been, as the assumption actually made, that none would be. Whatever the extent of the assumption that was made, an assumption of some kind dealing with contamination had to be made, because the situation and the amount of contamination was unknown. This gap in knowledge therefore had to be bridged. The approach had to be identified and it had to be identified in an assumption. The difficulty with Dr Clark's approach and understanding of the percentage probabilities in Figure 408-06 is that, given RSS had correctly identified soil contamination and remediation as a risk, any assumption that failed to "match" those figures or that approach would have been seen by him as an inconsistency.

549. If there had been any real concern about inconsistency at the time – and I do not accept that there should have been, if the other parts of the tender submission such as {Q/24/12} had been fully considered – then this point is precisely the sort of point that could, and should, have been clarified by the issuing of a Bidder Clarification Request. Had the SMEs been in doubt or been unclear about it, they should have asked for clarification, as Dr Clark accepted {Day10Z-CON/102}. Any subjective confusion they were experiencing could have been resolved by using this process. There are two aspects to the explanation of the evaluation of this Requirement by the SMEs that I find to be unsatisfactory. The SMEs were instructed "if in doubt, score up" and also "if in doubt, clarify". They did neither in this instance.

550. Although finding an explanation unsatisfactory is not, however, necessarily the same as finding the evaluation to have been sufficiently manifestly erroneous that it is open to challenge, it does demonstrate to me that the NDA in these proceedings is seeking to justify the score of 3 on grounds that cannot be maintained. I do not accept that there is obvious or even potential inconsistency on the face of the tender response itself. The potential inconsistency only arises because of the way that the NDA has sought to explain why it scored this Requirement in the way that it did.

551. The SMEs seem to have approached the matter – and defined it as an "inaccurate assumption" – because they believed some soil would be contaminated and require remediation. The identification of the top five threats by RSS meant that the tender

itself expressly recognised this. However, given this was an assumption to bound the scope of the Node, it was entirely logical and consistent to identify the assumption in the way that RSS did. It could not be described as "inaccurate". As with many assumptions, it could turn out to be incorrect, as was recognised by the "Associated Risk" identifying item TO-0128 in the Threats Table. However, most (or certainly some) assumptions might turn out to be incorrect. If it could be predicted with certainty that they would all be correct, then they would not be assumptions at all.

552. In my judgment the evaluation of this Requirement was performed manifestly erroneously, and also in breach of the NDA's obligations of equal treatment and transparency. The answer to Agreed Issue 25 is that the assumption was not inconsistent with Figure 408-6. Again, there is no issue that specifically addresses what the score ought to be, in the event that I have found that the evaluation was manifestly erroneous. Carefully considering the content of the tender submission on this Requirement with the scoring criteria and the evidence, it is clear to me that Energy Solutions' submissions are correct on this Node and the correct score absent manifest error would have been 5. The assumption is a perfectly valid and clearly stated one, and there is no inconsistency.

B3. Common Support Functions and Services – Node 409

553. This Node, 409, was concerned with functions and services that were common to all the sites. Both this Node and Node 303, Nominated Staff Appointment, tended to use modern business language and terminology more than the others. This could, on occasion, lead the unwary into frustration in terms of the application (or lack of it) of plain English. However, such use of language is a function of modern life, and this procurement competition was no exception. Although the use of language in this way does not have a direct impact upon any of the findings in this judgment, it is part of the background both of the Tender Submission and the evaluation exercise. A single example will suffice. The first sentence of the explanation of strategy dealing with the approach that was to deliver RSS'S High Level Objectives stated the following {Q/25/1}:

> "A Demand-Driven Approach at an Appropriate Size and Scale: An emphasis on providing outcome-based, quality and cost-effective delivery of [Common Support] functions, activities, and services that enable safe, secure, and compliant mission delivery and are more oriented around front line needs."

This use, by both parties, of modern jargon is of relevance to one of the Requirements in issue, namely 409.5.1(a), because the parties cannot agree on what "competencies" in fact are.

554. RSS intended to use PricewaterhouseCoopers LLP ("PwC") as a nominated subcontractor performing the role of CS Transformation Partner. There was no Client Specification requirement for this Node, although certain Common Support functions would meet Client Specification requirements within other Evaluation Nodes.

555. There are three Requirements within this Node that are at issue in these proceedings. The Node was evaluated by a SME team led by Mr Grey and assisted by Mr Rushton and Mr Heesom, although only Mr Grey gave evidence for the NDA for all the Requirements under consideration on this Node. Mr Colwill gave evidence for Energy Solutions.

556. The three Requirements are:

> 1. Requirement 409.5.1(a) "Strategy and High Level Objectives" – essentially a description of strategy;
>
> 2. Requirement 409.5.1(d) "Challenges, Risks, Mitigations (sic) and Impacts" – a description of challenges and risks.
>
> In fact the heading for this Requirement uses the word "Minitigations" {Q/25/7}, which is plainly a typographical error;
>
> 3. Requirement 409.5.3(e) "Remaining Fit for Purpose Through Learning From Experience". Essentially this concerns what were called strategic tolerances.

557. On each of these the SME team awarded the RSS tender a score of 3. The claim brought by Energy Solutions is that such scores are in each case manifestly erroneous, and that a lawful evaluation of the tender submission would have resulted in a mark of 5 in each case.

Requirement 409.5.1(a) "Strategy and High Level Objectives"

558. The issue relates to "competencies". It was agreed by the parties in the following terms in the Agreed List of Issues.

> Agreed Issue 26. The issue is whether a score of 3 was lawfully awarded on the basis that the RSS Tender Response had not addressed the needed competencies.
>
> Agreed Issue 27. Within that issue, specific sub-issues are:
>
> (i) What was the nature and particularity of the description of competencies (a) that the SORR required or permitted and (b) that the Defendant was entitled to look for in the evaluation of RSS's response;
>
> (ii) Whether the "*key capabilities/skills/knowledge"* required in relation to the matters identified in Figure 409-45 of RSS's tender response should be treated as competencies.

559. Central to this issue therefore, is the question of what in fact competencies are, and whether they were sufficiently identified or particularised in the RSS tender submission.

560. The Requirement in the SORR stated as follows {J/10/179}:

> "Bidders must describe their strategy for Common Support Functions including:
>
> (a) A description of their strategy for the delivery of the Common Support Functions and the high level objectives of this strategy".

561. The scoring criteria which applied to this Requirement were those in Table A of Appendix 2 {J/10/310}. In summary these were:

> 1. a score of 5 if the response: "Demonstrates the objectives, timescale and key elements of the strategy including consideration of the full lifecycle of the Sites, available and needed competencies and the ongoing management of safety and security";
>
> 2. a score of 3 if the response: "Demonstrates the objectives, timescale and key elements of the strategy but does not address the lifecycle of the Sites, available and needed competencies and the ongoing management of safety and security"; and
>
> 3. a score of 1 if the response: "Does not demonstrate the objectives, timescale and/or key elements of the strategy".

562. So far as competencies are concerned, therefore, a response that demonstrated "*consideration*" of available and needed competencies should have scored 5 (assuming the other elements for that score were also present, such as objectives and timescale), whereas one that did "*not address*" them would only score 3.

563. RSS approached the matter of competencies in (or against, or within) certain common support functions and activities. These functions were business (which was sub-divided into Executive and delivery, SCM, PPP, finance and accounting and so on), human resources, technical and engineering (T&E), HSSSEQ, communications and socio-economic, and independent assurance. This was made clear in the Tender Response in column 2 of page 2 {Q/25/2}. These functions were more specifically described, including what their activities, purposes and scope were, in Appendix (i) Figure 409-50 {Q/25/47-48}. As stated in {Q/25/6}:

> "The capabilities and competencies required by functions during the main phase of delivery are seen in Figure 409-45, Head Office Organisation Structure for Main Phase of Delivery and further discussed in Section 409.5.3(i)".

Section 409.5.3(i) described the approach over several pages {Q/25/41}. Figure 409-45 is a highly detailed graphic over two pages {Q/25/44} in which the key capabilities, skills and knowledge needed by each function were addressed. Capabilities are also identified in various places, such as the second column at {Q/25/46} which deals with capabilities of directors and line managers. "Developed capabilities" was also referred to for certain functions in the third column of Figure 409-5 {Q/25/4}.

564. The Consensus Rationale stated {U/4/55} that:

> "The bidder has responded to the requirements and scoring criteria but has not clearly or fully defined what competencies will be required referring to roles".

This essentially means that the roles do not have the competencies associated with those roles identified.

565. Energy Solutions maintain that these reasons show that the score of 3 "was clearly wrong". The reasons recognise that RSS addressed the competencies needed and that in fact RSS had given consideration to them. There was no requirement in the scoring criteria to "*fully define*" the competencies required or to link them to particular roles. The SORR imposed no requirement for a full definition of competencies required for roles. What the SORR required as a matter of construction of its terms is a matter of law not evidence, but for what it is worth, Mr Grey accepted this interpretation of the SORR {Day12Z-CON/45}. It is also said by Energy Solutions that it would have been quite impossible in the space available in the tender submissions for RSS to have done this in any event. Moreover, as Mr Grey accepted, a bidder could not reasonably be expected to fully define the competencies required for all the numerous roles in Common Support {Day12Z-CON/45}.

566. In Appendix 1 of the 11 April 2011 Letter, the NDA slightly changed the explanation. The reason for the score was then stated to be {U/23/5}:

> "The SMEs found the appropriate references to roles but did not find clear and full descriptions of competencies".

Energy Solutions criticise this reason for being no better than the one stated in the consensus rationale. Effectively, this interpreted the SORR as requiring "*clear and full descriptions*" or "*clear and full definitions*" for each of the competencies needed, and rely upon a failure to provide this as justifying a score of less than 5. Energy Solutions points out that the SORR did not require such clear and full descriptions. What the SORR required was for the SMEs to assess whether or not RSS had considered or addressed the available and needed competencies. Mr Grey said in his evidence that, when evaluating the tender responses, something more than mere "*consideration*" of the available and needed competencies had to be demonstrated to score 5 {Day 12Z-CON/22}.

567. In my view, Mr Grey was indeed applying something other than the requirements stated in the SORR by saying that "something more" was needed to score 5. Indeed, he had some difficulty in defining what that "something more" should have been. Certainly there is no assistance provided in the SORR as to what might constitute the elusive "something more" that the NDA required. The available and needed competencies had to be addressed for a bidder to score 5. If these were not addressed, then a lower score was justified. But to impose a different, more detailed or higher standard in respect of identification of competencies in order to achieve a score of 5 is not made out on the terms of the SORR.

568. However, to support its challenge on this Requirement, Energy Solutions also rely upon the approach of the SMEs to the tender response provided by CFP on this point. Mr Grey's evidence was that listing and identifying particular roles or

disciplines would have been insufficient to show consideration of the needed competencies {Day12Z-CON/31}. However, that is how the CFP tender was scored, because CFP scored a 5 for the equivalent requirement in Node 406 {U/7/55} even though the Consensus Rationale expressly stated that:

> "…whilst roles have been described this requires evaluators to infer the competencies"
>
> [emphasis added].

Energy Solutions point out that this is an entirely different approach to the one adopted to the RSS Tender Submission. If CFP was entitled to be scored 5, even though inference was required for competencies to be satisfied, it seems lacking in equal treatment to have given RSS a score of 3 when no such inference is necessary. Further, the approach in fact used by the SMEs to score the CFP tender on this Requirement is directly contrary to the reasons provided in the 11 April 2014 Letter by the NDA to RSS for why a score of 5 was not awarded to RSS. Roles had been identified by RSS in Figure 409-45 {Q/25/44}.

569. The NDA submits that Energy Solutions effectively relies upon Figure 409-45 {Q/25/44}, within section 409.5.3(i), namely a chart entitled "Head Office Organisation Structure for Main Phase of Delivery". This chart does not directly refer to competencies, but identifies 13 different functions (such as supply chain, legal, external sales and so on). In most of those areas the chart contains a box headed "Key Roles" (e.g. Head of Finance, Management Accounting Team Leader) and also includes a box headed "Key Capabilities/Skills/Knowledge", containing a number of bullet points. The NDA points out that although the bullet points are said by Energy Solutions to represent the identified competencies, they are not described as such.

570. If as an example the bullet points for the first function on the chart are considered, namely HSSSEQ (Health, Safety, Security, Safeguards, Environment and Quality), they were:

- System management
- Surveillance/audits, inspectors
- Emergency response, health, safety
- Records management
- Dosimetry [which means the measurement of the absorbed dose delivered by ionizing radiation], permits, consents
- Nuclear materials
- Badging, guard force

- Engineering, security, environmental, quality solutions management

571. If these bullet points for the first function on the chart are considered, the individual matters listed under "Key Capabilities/Skills/Knowledge" were almost all in the nature of some specific task or area of activity in which personnel in the relevant functional area would need to engage. They could fairly be described as "sub-functions", or perhaps "responsibilities". The only function where this is perhaps not true is "Exec and Delivery Team", where reference is made (for example) to leadership and communication, and to strategic direction. It is implicit within these submissions by the NDA that "functions", "sub-functions" and/or "responsibilities" are not competencies. There is no doubt the word "competencies" is not used for the box, so the issue arises as to whether "Key Capabilities/Skills/Knowledge" amounts to the same thing.

572. There was some debate in the trial with the witnesses about precisely what the term "competencies" denotes. Mr Grey referred to a definition used by the IAEA and ONR, namely that competence is:

> "…the ability to put skills and knowledge into practice in order to perform a job in an effective and efficient manner to an established standard" {V/260/5}.

573. This document was published by the ONR in 2014 and is titled "Training and Assuring Personnel Competence". In paragraphs 5.1 and 5.2, "Advice to Inspectors", the following is stated:

> "5.1 It is essential that all personnel whose activities have the potential to impact on nuclear safety are suitably qualified and experienced (SQEP) to carry out their jobs….The licensee should therefore put in place robust arrangements for identifying its competence needs and assuring these are met and maintained."
>
> 5.2 Training is a fundamental mechanism through which personnel acquire, and maintain, the skills and knowledge needed to perform a job to defined standards. In other words, training should be instrumental in developing and sustaining competence. IAEA has defined competence as 'the ability to put skills and knowledge into practice in order to perform a job in an effective and efficient manner to an established standard'. ONR concurs with this definition, which is widely accepted within the international nuclear community. Other factors contributing to a person's competence include the person's prior experience, aptitudes, attitudes, behaviours, skills and qualifications. Competence can therefore broadly be equated to SQEP."
>
> [emphasis added]

574. Competence, the word used in the text relied upon by the NDA, is a noun and in this sense is broadly equated to being suitably qualified and experienced. In my judgment this is very close to, if not exactly the same as, the dictionary definition of competence which is (in this sense) sufficiency of qualification; capacity to deal adequately with a subject (taken from the Oxford English Dictionary). That is certainly, in my judgment, how an RWIND tenderer would have interpreted it. Competency means sufficiency of qualification, capacity, and also includes the condition of being competent in something.

575. Obviously context has a part to play in the meaning of the term. Sometimes it might have a specialised meaning, such as being legally competent. As an example, if one said that Mr X was competent as a witness, it could mean that Mr X had the legal capacity to give evidence as a witness. If one said that Mr X was competent as an expert witness, it could mean that the performance of Mr X in giving evidence as an expert in that particular field was perfectly satisfactory. The same statement could potentially mean that Mr X had the sufficient degree of expertise to be qualified to give expert evidence. Mr Grey's evidence was that competency was a "pretty well understood" term, utilised quite extensively in the nuclear industry {Day12Z-CON/24-25}. Based on the contents of the ONR publication, I find that competence does not have a particularly specialised or unique meaning within the nuclear industry; its meaning is the same as in everyday language. However, Mr Grey did not accept the equation of capabilities, skills and knowledge with competencies, and in these proceedings neither does the NDA. Rather, he explained competencies as being about the ability to *apply* matters such as skills, knowledge and qualifications {Day12Z-CON/27}. That is undoubtedly one element of competency; if a person has a particular skill, but cannot apply it, they would not be likely to be competent in whichever role requires application of that skill. They would not have the capacity to deal adequately with that subject. The NDA submits that Mr Grey's interpretation of what a competency is "is entirely consistent with the established industry definitions" but it appears that Mr Grey's interpretation entirely ignores the "sufficiency of qualification" – or in other words the necessary skills and capabilities – meaning of the word.

576. The NDA also argues that the "competencies" sought under Requirement 5.1(a) cannot have been exactly the same as skills and capabilities, because the latter were the subject of Requirement 5.3(b). In any event, the NDA submits, the boxes in Figure 409-45 did not identify particular types of skill or knowledge, but simply listed activities to be undertaken. The NDA in its Defence at paragraph 78(1) {A/10/39} suggested that, instead of lacking sufficient particularity, RSS had not addressed the competencies needed at all and had merely provided:

> "…in reality....a list of aspects of the roles in question, and certainly not...a satisfactory identification of competencies".

Energy Solutions criticise this on a number of grounds. Firstly, it post-dated issue of proceedings. Secondly, it misunderstood what RSS'S Tender Response said and:

> "…left opaque what the NDA was contending that the "*competencies*" were that RSS had not satisfactorily identified."

577. I do not consider there is sufficient difference between a lack of "satisfactory identification of competencies" on the one hand, and not clearly or fully defining what competencies will be required referring to roles and/or not finding "clear and full descriptions of competencies" on the other, to hold these reasons inadmissible in the sense contended for by Energy Solutions generally. However, there is considerable force in the point made by Energy Solutions that the NDA left opaque which competencies it is said RSS had not satisfactorily identified.

578. In any event, in the context of Requirement 409.5.1(a) the "competencies" needed are not those an individual may require to perform a role. As Mr Grey accepted {Day12Z-CON/23}, the "competencies" addressed in the SORR were those required to enable the common support functions to deliver the bidder's strategy. Thus Requirement 5.1(a) required bidders to provide "a description of their strategy for the delivery of Common Support functions" and the scoring criteria identified the "needed competencies" as one of the "key elements of the strategy" for which consideration had to be shown.

579. The NDA highlighted examples from the list given under HSSSEQ set out above, such as "emergency response, health, safety" or "records management" which are in the nature of tasks. The NDA submits that it is obvious that in order to perform those tasks successfully, there are relevant skills and knowledge and capabilities that will be required, but it is said by the NDA that the Figure told the SMEs:

> "…nothing specific about what they are – it just identifies the areas in which skills, knowledge and capabilities will be required".

In my view, this is sufficient to comply with the Requirement. As Mr Colwill of Energy Solutions said on this subject in cross-examination {Day3Z-CON/63}:

> "...if you think about competencies at a functional level, which was the way we had, and a competence being something, to do something successfully and efficiently is effectively what a competence is looking for, we felt that these types of descriptors were efficient in terms of departments responsible for carrying out assurance on behalf of the business would need to have the competence of being able to successfully carry out audit, be able to carry out licensing and to be able to undertake that type of activities. And they were the competencies in order to carry out those activities also."
>
> [emphasis added]

This mirrored, in broad terms, what he had said in his written evidence.

580. I do agree with the NDA that the tender submission by RSS on this requirement is not particularly detailed in terms of explanation of all the different competencies that would be utilised. However, the amount of detail has to be considered against what the SORR required the bidders to include. The NDA submits that there is no reason to read the word "roles" in the different reasons provided for the score given as suggesting that the SMEs thought it was necessary to address competencies on a

person by person basis, as opposed to linking them to the particular roles that needed to be carried out within the organisation (whether that was on the basis of roles being fulfilled by a particular individual, or by a team of people). However, that is how those passages are naturally to be understood, in my view, and certainly an RWIND tenderer could have understood them in that way. Mr Grey agreed in evidence that it was clearly unnecessary to give a full definition of the competencies required for all the roles in common support {Day12Z-CON/45}. What is more, there simply would not have been the space available to do so, given the strict page limit for the Node.

581. Table A in the SORR, as a matter of construction, only required that bidders give "consideration" to available and needed competencies. In my judgment, the SMEs were in fact looking for more than that, but an RWIND tenderer would not have known this from the SORR. Mr Grey agreed in cross-examination that the evaluators had expected something more than mere "consideration" {Day12Z-CON/22}. This shows that he, the lead SME, was not applying the terms of the SORR, and it is logical to draw the conclusion that the other two SMEs, not called in evidence by the NDA, were not either. I am not persuaded by the points argued by the NDA in this respect, namely that in reading the criteria for scores of 5 and a score of 3 consistently with each other (which must be done), the difference between competencies being "addressed" must mean that "consideration" requires something more. The concept of "addressing" available and needed competencies must itself be interpreted in the context that the Requirement is ultimately about describing a strategy for the *delivery* of common support functions. In that context, a bidder has clearly not "addressed" available and needed competencies, or given "consideration" to that, unless it has engaged with the question of what competencies are actually going to be needed. The NDA submits that it was for the SMEs to exercise judgment about whether the available and needed competencies had been sufficiently "addressed". It undoubtedly was a matter of judgment, and a margin of appreciation is available to the NDA in this respect, but applying something other than the terms of the SORR is manifestly erroneous in my judgment.

582. There was what at times appeared to be almost endless semantic debate about the meaning of "competencies", the words "addressed" and "consideration", when the evidence about this Requirement was heard. It must also be remembered that there was no Client Specification for this Node. What was needed, in my judgment, was a description of what the particular functions required in terms of capability, skills and knowledge in relation to particular activities to deliver the common support strategy. That description could only be provided at a high level. In my view, that was what the SORR clearly required and the scope for endless semantic debate by Leading Counsel on both sides simply demonstrated that the necessity for competencies set out in the SORR could not sensibly be construed as though it were a highly technical legal instrument.

583. In my judgment, competencies are, or certainly include, key capabilities and skills, and require either the possession or application of knowledge. A competence, or competency, in this respect must mean (or include) the requirements for an individual properly to perform a specific job or role. An RWIND tenderer could have interpreted the word in the SORR as meaning this.

584. There might have been some scope for the NDA to advance a respectable defence to the criticisms made in respect of this Requirement had its SMEs evaluated other tenders using the extraordinarily detailed distinction about what the word "competencies" does, or does not, mean. However, they did not do so. In CFP's Tender Response to Requirement 5.1(6) in Node 411 (Sample Project 2), which had the same Requirement, to be evaluated by reference to the same scoring criteria (Requirement 5.1(6)), CFP had stated in rather bald terms as follows {ZB-CON/19/5}:

> "Required competencies include skills and knowledge associated with characterisation, design and assessment, hazard removal and building modification work such as roofing and cladding".

This was perfectly acceptable to the SMEs, and CFP's Tender Response scored 5 as having addressed the Requirements and scoring criteria {U/7/63}. In my view, that approach to the CFP Tender by the SMEs on this Requirement demonstrates markedly unequal treatment compared to RSS. There is no material difference between the CFP view of competencies and the one contained in the RSS Tender Response. Similarly, in response to the equivalent Requirement 5.1(6) in Node 413 (Sample Project 4), CFP's Tender Response was again scored 5 although the consensus rationale recorded {U/7/65} that "competencies covered superficially (named by discipline only)".

585. I find the comparison between how CFP's bid was marked, and the criticism made of RSS'S bid by the NDA, instructive. This is particularly so, given the NDA were under an obligation to treat all bidders equally. As Mr Grey admitted {Day14Z-CON/49} in its response RSS set out considerably more about competencies than CFP did in its response. It is therefore clear to me that the approach being urged upon me in these proceedings by the NDA in terms of what competencies are, and how application of the scoring criteria should have been applied, was not one adopted by the NDA itself when evaluating this particular Requirement for the CFP Tender Response.

586. In my judgment the score of 3 for this Requirement was awarded on a manifestly erroneous basis, namely a failure by the SMEs properly to understand what "competencies" were and how they had to be addressed in the Tender Response. The nature and particularity of the competencies was required at a very high level, and the SORR permitted these being defined by reference to functions. Key capabilities, skills and knowledge are in any event all integral parts of what constitutes a competency or competencies. The score of 3 was also awarded in breach of the obligation of equal treatment that applied to the CFP and RSS bids.

587. The score suffers from being arrived at after a process of evaluation that adopted a different approach to competencies than the one applied to the CFP Tender Response. The score was awarded applying manifestly unequal treatment to the two bidders in question, namely RSS and CFP. The high level approach by CFP was permitted, but RSS were held to a different and higher standard, that was not contained in the SORR. Accordingly, the answer to Agreed Issue 26 is that the score of 3 was not lawfully awarded.

588. I have dealt with the sub-issues of Agreed Issue 27 above. There remains a residual matter which is not dealt with in the Agreed List of Issues, namely the correct score to be applied to this Requirement applying the correct approach to competencies. Applying my findings to the content of the tender submission and the evidence, I find that the correct score for the RSS tender for this Requirement would have been one of 5.

Requirement 409.5.1(d) "Challenges, Risks, Mitigations (sic) and Impacts"

589. The issue relates to "risk tolerance". This is not to be confused with the following Requirement in which the issue concerns "strategic tolerances". It was agreed by the parties in the following terms:

Agreed Issue 28. The issue is whether a score of 3 was lawfully awarded on the basis that the RSS response had not addressed the scoring criteria in respect of risk tolerance.

Agreed Issue 29. A specific issue is whether risk tolerance requires a statement of the range within which risk can be borne or mitigated without fatally undermining the project.

590. The SORR in relation to this Requirement 409.5.1(d) stated as follows {J/10/179}:

> "Bidders must describe their strategy for Common Support Functions including:
>
> (d) Provide a description of no more than 5 of the highest rated challenges and (using the tabular form described below) no more than 10 of the highest rated risks (5 threat and 5 opportunity) associated with the implementation of the Bidder's strategy for delivering the outcomes required in the Client Specification, any threat mitigation activities and activities to exploit the opportunities the Bidder proposes to undertake to address such threats and opportunities and the impact of those activities on the threats or opportunity, as applicable, including...."

591. The scoring criteria which applied to the evaluation of this Requirement were those in Table B of Appendix 2 {J/10/312}. In summary these stated:

1. a score of 5 if the response: "Demonstrates a structured approach to the management of threats and opportunities including determining risk ownership, tolerance and the approach to information gathering and monitoring";

2. a score of 3 if the response: "Demonstrates its approach to the management of threats and opportunities including determining risk ownership, but may not provide for a structured approach to management or address tolerance and the approach to information gathering and monitoring"; and

> 3. a score of 1 if the response "Does not demonstrate its approach to the management of threats or opportunities".

592. RSS's Tender Response for Node 409 addressed Requirement 5.1(d) between pages 9-12 {Q/25/7} with the required tables appearing on pages 11 and 12 {Q/25/9}. RSS gave a similar description of what it termed its "structured approach to risk management" in each of the different Nodes where a Requirement of this nature applied. In the case of this Node, the response to Requirement 5.1(d) appears at {Q/25/7-8}. It covered "ownership" of the risks, and maintenance of a risk register to be updated on a monthly basis, and for a monthly risk review process. The response said:

> "Our approach to risk tolerance and the extent to which particular risks are elevated to the attention of the SLCs' Executives and Boards will be based on the risks PID score. Risk owners will be advised of risks that are above the escalation threshold of a PID score of four. Any risk above a PID score of ten is escalated to the Executive."

The response also referred to Figure 409-9 {Q/25/8} in connection with the assignment of the appropriate PID score. PID stands for Probability Impact Diagram.

593. That Figure was again in a form common across the Nodes in which this approach was set out. It was entitled "RSS Impact Ranges" and showed six different costs brackets (from <£1m, up to >£200m), and six different time brackets for impact on schedule. It did not show how assessed probability would be combined with these impact ranges to produce a PID score, although in my view this was not necessary and was not specified in the SORR.

594. The SME team awarded a score of 3. Energy Solutions' case is that this should have been a score of 5. The Consensus Rationale {U/4/55} stated simply that:

> "The bidder has responded to the requirement and the scoring criteria but has not addressed the scoring criteria in respect of risk tolerance".

595. This was in error, and manifestly so, because RSS's Tender Response specifically addressed risk tolerance in terms. It expressly stated {Q/25/8}:

> "Each month risks are rated on probability and impact. Our approach to risk tolerance and the extent to which particular risks are elevated to the attention of the SLC's Executives and Boards will be based on the risk's PID score. Risk owners will be advised of risks that are above the escalation threshold of a PID score of four. Any risk above a PID score of ten is escalated to the Executive".

596. In short it stated in plain terms that a risk below a PID score of four would be tolerated, but if the score given upon application of that process was in excess of

that (what was called an "escalation threshold") the "risk owner" would be notified. If the score was above 10 the Executive would be informed.

597. In the 11 April 2014 Letter, the NDA changed the explanation and accepted that a statement of risk tolerance was included in the Node. Appendix 1 of that letter stated that there was another reason for the score {U/23/5}, namely that it "lacked structure". The letter stated:

> "The concept of risk tolerance is important from a strategic point of view. The scoring table B required bidders not only to identify risk tolerances but to set out a structured approach to risk management. To score a 5 the bidder must "demonstrate a structured approach to the management of threats and opportunities including determining risk ownership, tolerances and the approach to information gathering and monitoring".
>
> The evaluators found that the response lacked structure (per the scoring criteria). The score does not relate to the absence of the statement of risk tolerance (which was included in this Evaluation Node) but rather the absence of a structured approach to the management of the risk tolerance which the question required. RSS appear to have relied on a statement which referred to their broader risk management approach rather than matching/aligning it to the specific challenges required under the criterion…
>
> The Authority's evaluations took account of the statement at page 10 of RSS's response to the Evaluation Node which refers to tolerances."
>
> [emphasis added]

598. Mr Grey said in cross examination that the further explanation in Appendix 1 of the letter was not an accurate statement of the reasons for the score. He said the letter should *not* have said that the score did not relate to the absence of the statement of risk tolerance ({Day11Z-CON/119} to {Day11Z-CON/120}, because it was a criticism he maintained. He did however accept that, as the lead SME, he must have been asked about the response before it was sent {Day11Z-CON/118}. He stated that he could not explain "why I accepted that" {Day11Z-CON/120}, by which he meant the statement with which he disagreed. Whether Mr Grey approved the statement in the Appendix withdrawing the reason that there was a failure to identify risk tolerances or not, the Tender Response clearly did refer to, and specifically identify, this topic and the NDA complaint that it was not present is, in my judgment, groundless. The withdrawal of that criticism in the Appendix (though not by Mr Grey) was therefore understandable and sensible.

599. The complaint about "lack of structure" also has a fatal difficulty, namely the fact that it was disavowed, both by the NDA in its own pleading, and also by Mr Grey in his evidence. Mr Grey accepted this had not been part of the SME's reasoning {Day11Z-CON/123}. The NDA had already pleaded the following in its Defence at paragraph 80(2) {A/10/41}:

> "... [the NDA]'s initial response in correspondence... failed properly to understand the nature of the criticism made by the SMEs, and does not accurately state the Defendant's case".

600. The NDA's explanation for the score was set out in paragraph 80(1) of its Defence {A/10/40}, namely that RSS had failed to identify that risk tolerance was not the same as:

> "…simple level of risk, or the point at which risk renders a process or output undeliverable".

I do not consider this to be an accurate summary of what the Tender Submission contained. This was accepted by Mr Grey in his cross-examination {Day 11Z-CON/127} in the following exchange:

> "Q: …….I have to suggest to you, Mr Grey, nowhere in the part of RSS's response which addresses this is it suggested that it regarded risk tolerance as the point at which risk renders a process or output undeliverable.
>
> A. That is correct, my Lord. I think these words that were going into the defence were morphing in response to questions that had been raised by RSS through the process. I believe, and I recall to the best that I can, that that's the reason that those kind of words were being used here. I agree that those things did not appear in RSS's tender."
>
> [emphasis added]

601. This is a good example of Mr Grey's approach robustly to defend the NDA's position. Here, in seeking to explain or defend inaccuracies in part of the NDA's pleaded Defence {A/10/40}, which was a document settled by Leading and Junior Counsel and amended three times, his stance was that this was at least partially caused by questions raised by RSS. However, the Defence also sought to define risk tolerance in a particular way, and on the basis of that definition, stated that it had not been dealt with in the Tender Response.

602. The Re-Re-Amended Defence stated, in a passage which is not shown as having been added by amendment:

> "Risk tolerance is a range in which the risk can be borne or mitigated without fatally undermining the project or output, so allowing for intervention to achieve risk management or mitigation before reaching an end point where the process or output is fatally compromised. This was not the nature of what RSS put forward in its response".

603. The NDA's own Guidance on Risk Management, PCP-10, defines "tolerate" as that which "may be tolerable without any further action being taken" and, where the alternatives to tolerating a risk are treating, transferring or terminating it. That definition is in line with the normal meaning of "to tolerate". It might be a range –

for example on the PID score it could be said the tolerance is the range 0 to four – however it would be more usual to set a risk tolerance at a particular level. In any event, something being fatally undermined or fatally compromised forms no part of it, even in the NDA's own Guidance document.

604. Mr Grey said that his view of risk tolerance was "*roughly aligned*" with this definition when he was evaluating RSS's Tender Response {Day11Z-CON/128}. Energy Solutions submits that whether this is correct or not, it is plainly wrong. In paragraph 441 of Mr Grey's first witness statement he had recognised that:

> "…the purpose of setting a tolerance is so that the issue can be escalated if the tolerance is breached". {ZA-CON/2/109}

That, of course was exactly what RSS set out in its tender response - escalation would occur at a PID score of 4. Mr Grey accepted that risk tolerance is:

> "…the point up to which you will tolerate the risk." {Day11Z-CON/130}

605. The NDA's case on this, in so far as it rested on Mr Grey's evidence, changed yet further when Mr Grey was cross-examined because he effectively disavowed his own witness statement {Day 11Z-CON/131}, {Day 11Z-CON/132}, saying that he had made an error in paragraph 441 which he could not explain {Day 11Z-CON/133} and {Day 11Z-CON/134}:

> "Q:…..So that's your witness statement, Mr Grey.
>
> A. That is correct.
>
> Q. You just told me you didn't agree with that, didn't you?
>
> A. I did. I think that's an error I have made there.
>
> Q. Well, which is the error?
>
> A. In my statement.
>
> Q. So did you evaluate RSS's tender response using the approach to tolerance set out in your statement or the one you have just given?
>
> A. My statement covers a number of aspects. If you are referring to that single sentence, my response is the same: we evaluated it not against what I have stated there, but against what I made in my comments just a few moments ago.
>
> Q. Do you accept, Mr Grey, that if you had evaluated RSS's response against the definition of tolerance set out in paragraph 441 [of the witness statement], then RSS had addressed the risk tolerance in that sense?

> A. I disagree with that. I refer back to my point about the process that was described in the bid about the use of the PID scores and the fact that whilst PID scores were presented, due to the rest of the information that was presented in the bid it was impossible for us to understand what that meant.
>
> Q. Can you explain how it was that this error in paragraph 441 came about?
>
> A. I can't explain that."

606. Mr Grey's evidence on this subject was wholly unconvincing and wholly unsatisfactory. It was however illuminating in this sense, in that it demonstrated the lack of explanation available from the very personnel who had been tasked with performing the evaluation, and the difficulty that Mr Grey (the lead SME) had in explaining what had been done and why in terms of reaching the score awarded to RSS. Despite his best efforts, it was difficult for Mr Hunter QC to pin Mr Grey down on what deficiencies were in reality said to be present in the RSS Tender Submission to justify the score of 3. Entirely understandably, Mr Hunter QC took the pleadings as representing the case being advanced by NDA. This was an over-optimistic approach by Energy Solutions to the clarity expected of NDA's reasons.

607. Mr Grey developed a further line of defence and confirmed orally {Day11Z-CON/138:10}:

> "…we were disappointed that the response did not set out specific tolerances for the specific risks that were identified".

This point had been identified in the NDA's Opening Note; Appendix 1 paragraph 163 {AA/3/33} and had been included in Mr Grey's first witness statement {ZA-CON/2/108}. Not only had it not been pleaded anywhere, more pertinently in terms of evidence it had not been recorded in any record of any of the SMEs' reasoning at the time. Neither Mr Rushton nor Mr Heesom were called to give evidence; nor was this matter mentioned in the Consensus Rationale {U/4/55}. Mr Grey was forced to accept, on his explanation, that the Consensus Rationale could not be an accurate statement of the reasons why a score of 3 was awarded {Day11Z-CON/122}. There was, even more importantly, no requirement in the SORR to specify risk tolerances for specific risks.

608. The NDA made the following submissions about what the issue was. The fundamental point in relation to Requirement 409.5.1(d) was said to be whether it was legitimate to take the view that, in order to address tolerance, it was necessary to show how tolerances specific to Node 409 would be identified and managed, as opposed to putting forward a generic proposal for the escalation of risks scoring at a certain level against a standard set of impact ranges and an (unspecified) standard set of probabilities. The previous failure to communicate that clearly as the real point counts against the NDA, in my judgment, but that does not obviate the need to adjudge it now.

609. Due to my findings on the two stage approach to reasons earlier in this judgment, the point has to be addressed now, but I do not accept that the way the NDA's

reasons have changed on this matter are wholly irrelevant to an assessment of the correct approach to risk tolerances, particularly as the subject matter is providing reasons for an evaluation. The requirement to give reasons is an obligation upon the NDA. Further, there was no requirement in the SORR that stated that "it was necessary to show how tolerances specific to Node 409 would be identified and managed" as contended for now by the NDA. That is something that the NDA is seeking to impose now to justify what was done, which in my view is not in accordance with the terms of the SORR. There is no way that an RWIND tenderer could have been expected to know that this was required by the NDA even if that is the correct interpretation of the Requirement.

610. The NDA, in its Closing Submissions accepted that:

> "…it has to be acknowledged that there has not been consistency in how the reason for that score has been explained". {AA/19/102}

Mr Grey's consistent and strenuous efforts to defend the score of 3 was expressed in the following understated way in the NDA Closing Submissions:

> "It is undeniable that Mr Grey has found it difficult to communicate clearly the nature of the criticism that the evaluators had here." {AA/19/103}

With considerable restraint, I would describe those submissions by the NDA as being understated to a very great degree.

611. The defence by the NDA to the complaints by Energy Solutions regarding the evaluation of this particular Requirement would, in my judgment, be verging on the hopeless in any event. The NDA and Mr Grey have deployed a number of criticisms of the RSS Tender Response, none of which are, in my judgment, justified. However, the RSS Tender Response was a standard one that was used across a number of Nodes, 11 in total. A total of six of those 11 other Nodes involved Mr Grey as the lead SME. On all five of the others, the relevant Requirement was given a score of 5 and the Consensus Rationale made no references to any of the points Mr Grey sought to make about the correct approach to risk tolerance. This was shown in a table put to him {AA/12/1} which was called Exhibit C2.

612. It is correct that there were some minor differences in the responses to several other Nodes (namely those numbered 405, 407, 408 and 413) which contained additional discussion of how the Portfolio Risk Board would take responsibility for assessing whether a risk should be tolerated, treated, transferred or terminated: {Q/24/6}; {Q/21/5-6}; {Q/23/17-18}; {Q/29/5}. However, the broad content of the material was the same and notwithstanding those very minor differences, it is correct to characterise the RSS Tender Submissions approach to risk tolerances as being verging on identical across these different Nodes.

613. The NDA contends that the different treatment by the SMEs of near-identical responses is just the result of different evaluators reaching different conclusions that were open to them. However, for these six Nodes, it is not a matter of different

evaluators making different judgments. Mr Grey, who was the lead SME on this Node, was also the lead SME on six other Nodes where the same, standardised approach was adopted in relation to which he and the other SMEs scored RSS's Tender Response the maximum of 5. Mr Rushton was also a co-SME with him on Node 411. Moreover, after scoring RSS's Tender Response 3 on this Node, Mr Grey subsequently scored the same response at 5 on four other Nodes, and one of those was Node 411 which was finally evaluated on 27 February 2014. In none of the other Nodes were *any* of the various criticisms that have been advanced against RSS's Tender Response in respect of this Node mentioned.

614. The difference in scoring this Node cannot be explained by different personnel coming to different views on the same material. In my judgment, it cannot be rationally explained at all. The score of 3 given for this Requirement on this Node stands out as being wholly different on almost identical material to each of the others which were given a score of 5.

615. The NDA as part of its concerted defence of this Requirement, also contended in its Opening Submissions that the same approach was applied to CFP's Tender Response on this Requirement. CFP attracted the same criticism in the Consensus Rationale as RSS's Tender Response and was also scored at 3; NDA Opening Submissions Appendix 1 {AA/3/33}.

616. At the time Opening Submissions were served, the NDA had not disclosed CFP's Tender Response to Node 409 – itself rather curious, given the positive averment by the NDA that it had applied the same approach to CFP's bid – but this disclosure finally occurred during the trial itself. Energy Solutions submits that now this material has been disclosed it can be seen that the criticism of CFP's Tender Response by the SMEs, namely that "*risk tolerance*" had not been addressed, *was* justified in relation to that bid. CFP's Tender Response to Requirement 5.1(d) made no mention whatsoever of risk tolerance. While that criticism was appropriate for CFP's Tender Response, it was completely incorrect for that of RSS. One possible explanation for the radically different treatment of the RSS Tender Response for 409.5.1(d) (compared to the other Nodes) by the NDA was that the SMEs had simply cut and pasted their consensus rationale for the CFP Tender Response into the consensus rationale for RSS.

617. This was put to Mr Grey who said {Day 14Z-CON/51} "Not as far as I'm aware". It does not matter, in my judgment, how this came about, other than to say that the original criticisms of the RSS Tender Response and the reasons given for the score by the NDA are plainly wrong and manifestly erroneous. The subsequent attempts at justification by the NDA are misplaced and cannot be sustained. Also, given the entirely different content of the CFP Tender Response and the RSS Tender Response were given the same score, this is also a situation of unequal treatment by the NDA.

618. I therefore find that the score of 3 for this Requirement was manifestly erroneous, in breach of the obligation of equal treatment, and was not lawfully awarded. That is the answer to Agreed Issue 28. The answer to Agreed Issue 29 is whether, on a risk analysis scale with an escalation threshold, this is expressed as the tolerance having a range of 0-four or not, or the risk tolerance being above four, there is no part of this analysis concerning at what point (or outside what range) any risk

would "fatally undermine a project". The threshold is simply the point at which action has to be taken. The appropriate score for this Requirement is 5; this is also consistent with the score given by the SMEs on all the other 11 occasions that they came to evaluate the same material on the other Nodes in the RSS Tender Submission. It is the score that I find would have been awarded absent the manifest errors in evaluation.

Requirement 409.5.3(e) "Remaining Fit for Purpose Through Learning From experience"

619. The issue regarding this Requirement concerns what are called strategic tolerances. Energy Solutions' case is that the RSS Tender Submission should have scored 5 when it was, in manifest error, given a score of 3 by the NDA in the evaluation.

620. The issue is agreed by the parties in the following terms:

> Agreed Issue 30. The issue is whether a score of 3 was lawfully awarded on the basis that the strategic tolerances identified by RSS were not true strategic tolerances, and whether that score would otherwise have been awarded on the basis of the matters put forward in the RSS tender response as strategic tolerances.

621. This point in issue on this Requirement concerns what are called strategic tolerances. The relevant SORR Requirement 5.3(e) stated {J/10/183}:

> "Bidders must provide a description of their approach to implementing the strategy including, as a minimum, the following sections:
>
> (e) How the ongoing development and update of the approach will be achieved to ensure that it remains fit for purpose through learning from experience within and outside the Magnox SLC and the RSRL SLC".

622. The RSS Tender Submission had a section of the text headed "Strategic Tolerances". This came from the scoring criteria which applied to this Requirement, which were those in Table I of Appendix 2 {J/10/326}. The relevant part of the scoring criteria were as follows:

> 1. For a score of 5 the response: "Outlines the strategic tolerances and the processes that will be established to confirm and monitor them";
>
> 2. For a score of 3 the response: "Describes the processes that will be put in place to monitor strategic tolerances"; and
>
> 3. For a score of 1 the response "Does not outline the processes that will be established to monitor strategic tolerances".

623. The scoring criteria therefore has, in respect of strategic tolerances, the processes required to monitor them to justify a score of 3, whereas for a score of 5 these have to be outlined, with processes "established to confirm and monitor them". RSS's Tender Response addressed Requirement 5.3(e) at pages 39-40 {Q/25/36} and in

Figure 409-38 with the same title, namely "*Strategic Tolerances*". The text explained that strategic tolerances:

> "…indicate the boundaries within which the enduring validity of the approach remains [which will] define key parameters of performance and serve as control points and limits, at which point the overall CS strategy and/or approach should fundamentally change".

It described how such tolerances would be established, reviewed and monitored and outlined three strategic tolerances in the Figure. That table or Figure had four columns, namely "Process", "Tolerance", "Confirm and Monitor" and "Responsibility" {Q/25/36}.

624. The Consensus Rationale {U/4/55} stated the following by way of reasons for the score that had been awarded:

> "The bidder has responded to the requirement and the scoring criteria. The tolerances have been outlined as has the approach to managing them. <u>However the tolerances have been expressed as limits and are hence not true strategic tolerances</u>".
>
> [emphasis added]

Nothing further was added to this in the 11 April 2014 Letter.

625. In paragraph 82(1) of the Re-Re-Amended Defence {A/10/40}, the NDA asserted that "RSS's response failed to outline strategic tolerances" and (referring back to paragraph 80(1) {A/10/40}) that a "strategic tolerance" had the same meaning as the pleaded meaning of "risk tolerance":

> "The range in which the risk can be borne or mitigated without fatally undermining the project or output, so allowing for intervention to achieve risk management or mitigation before reaching an end point where the process or output is fatally compromised."

626. Energy Solutions maintain this was unlawful and criticise this on a number of grounds. Firstly, it is said that it is a different reason to the one advanced in the Consensus Rationale. Secondly, it is said that it "is clearly wrong". On the first point, it could be argued that a failure to outline strategic tolerances was the same as not identifying "true" strategic tolerances. However, on the second point, Dr Clark accepted {Day10Z-CON/103} that strategic tolerances involve a different type of concept from risk tolerance. The notion that they amount to the same thing is therefore not made out on the NDA's own evidence. However, a tolerance does not have to be a range, in my judgment, for the same reasons as explained in respect of risk tolerances. Thus strategic tolerances are not the same as risk tolerances, but in both cases it is incorrect to characterise them as having to be:

> "…<u>the range</u> in which the risk can be borne or mitigated without fatally undermining the project or output".

They can also be expressed as a point or score (which is perhaps just another way of describing the upper limit of a range).

627. Mr Grey stated in his witness statement at paragraph 449 {ZA-CON/2/113} the following in terms of a definition:

> "Strategic tolerances are qualitative or quantitative indicators about the health of your strategy that, if breached, trigger a review of the strategy."

This could, potentially, be seen as an attempt to hold on to the "range" argument, but seemed to avoid acceptance of what appeared to be a difference between the parties about a tolerance being a point at which some action was required.

628. Paragraph 289(b) of the Amended Particulars of Claim {A/4/63} states:

> "There is no reason why a tolerance expressed as a limit is not a "true" strategic tolerance. An approach whereby strategic tolerances are expressed as limits which, if exceeded, would indicate a fundamental failure of either strategy or approach and require an appropriate change to be made is consistent with good industry practice and good project management practice."

I agree with, and accept, that analysis.

629. Mr Grey also accepted, eventually, that a "strategic tolerance is a limit" {Day12Z-CON/13}. Any other view would have been inconsistent with the SMEs' appraisal of CFP's Tender Response to this Requirement, which was given a score of 5. That had included text under the heading "Key metrics and strategic tolerances" and Table 16 {ZC-CON/5/25} which was entitled "Key Performance Metrics", with four columns "Metric Title", "Description", "Core Processes" and "Tolerance". These were also limits such as "<1 of each type across the portfolio" for "Nuclear/RIDDOR/Environmental" and ">75% employee usage" for "Utilisation/Overall Site FTE/Contractor Usage/Forecasting".

630. However, turning to the three tolerances in particular identified in Figure 409-38, I do not consider that there is a manifest error in the SMEs scoring a 3 for this Requirement (rather than the sought score of 5) given the content of those tolerances. The first can be considered as illustrative:

> "Process
>
> Regulatory acceptance of Regionalised and Centralised CS model
>
> Tolerance
>
> If Regulators do not accept the proposed move to a Regionalised and then Centralised model, RSS will be unable to implement the planned CS Strategy
>
> Confirm and Monitor

> Early, regular engagement with Regulators to determine any areas of concern, with clear agreed actions to overcome them and enable the appropriate organisational model
>
> Responsibility
>
> Transformation Director/Commercial & Business Director"

631. Criticism is made of this by NDA in its Closing Submissions in the following terms:

> "….they simply describe the consequence of matters going wrong in a particular respect, or (at best) identify a point at which, because of those matters having gone wrong, the strategy has already failed".

So far as the one I have adopted as an example, this is a fair criticism. It is certainly in my judgment a criticism that can be made without manifest error. Regulatory approval in the nuclear industry is an important aspect of most changes, but particularly this one which involved a shift to a Regionalised and Centralised model as set out in the Client Specification. The description above is of limited assistance to the SMEs in terms of evaluating the Tender Submission. It touches in the barest terms upon how a failure of acceptance by the Regulator would be "confirmed and monitored", which was part of the scoring criteria for a score of 5. The tolerance itself is stated as being "If Regulators do not accept the proposed move to a Regionalised and then Centralised model, RSS will be unable to implement the planned CS Strategy". That is a statement that is on its face correct, but not a particularly helpful one regarding a tolerance in terms of keeping the strategy fit for purpose, which both parties agreed was the overall aim. The NDA point out that it is noticeable that RSS's purported tolerances were largely a paraphrase of items which appeared in the table of threats at Figure 409-11 {Q/25/9}, or the table of assumptions at Figure 409-44 {Q/25/42-43}.

632. The NDA also submitted that in some places RSS took a different approach to tolerances, such as in Node 405 (Spent Fuel and Nuclear Materials Management), where RSS used the example of Magnox fuel management and the MOP9 strategy to set out certain rates at which reprocessing and flask maintenance should take place, or other rates and limits, which were to be tracked in the "monthly dashboard" (a monitoring mechanism) along with trend assessments {Q/21/26}. This allowed for timely intervention if the relevant rates fell below those specified. The explanation given by Mr Davies {Day5Z-CON/61} regarding the strategic tolerances in Node 405 is relied upon by the NDA as being similar to the approach adopted by Dr Clark and Mr Grey:

> "These are in many ways boundaries, or they are tolerances that are set so that if they become breached, it is a trigger to everybody, including the NDA, that there's something quite seriously wrong with the programme. As it says, you track those on a reasonably sensible frequency and report it in to whatever management arrangement you thought was necessary. If, by some means, there was some kind of management action

> that could be taken to, if you like, steer the boat away from the rock, then obviously it would be sensible to do that. But if there wasn't then you would have to reconsider your strategy."

633. I do not accept Mr Colwill's explanation in cross-examination {Day4Z-CON/73} to {Day4Z-CON/77} where he tried to demonstrate that the strategic tolerances set out by RSS for Node 409 were no different in nature to those set out for Node 405. He said that if rates, for example, were not met:

> "…it is a point where you are effectively failing. You cannot achieve what you set out to do."

He said that in both cases, what was set out was a point at which the strategy changes. However, he acknowledged {Day4Z-CON/77} that what had been done in Node 405 allowed action to be taken depending upon what was shown up by monthly tracking of the rate. This allowed action at a point prior to failure. Mr Colwill did not seek to contend that the strategic tolerances in Node 409 were anything other than descriptions of points at which failure had already occurred {Day4Z-CON/79}. However, he suggested that in the context of common support functions there was nothing else that could be done – the matters in question were "binary in nature".

634. This is correct up to a point, but in terms of the Regulatory Approval example above, in my judgment it is difficult to see how that can be described as a tolerance at all, whether this is expressed as a limit or not. It is more accurately categorised, in my judgment, as a risk. The approach to strategic tolerances by RSS on Node 409 suffers by comparison with RSS's own approach to the very same subject on Node 405. It is perhaps not surprising that the Requirement on the latter Node was given a score of 5, and on Node 409 a lower score of 3.

635. This is therefore a case where the Consensus Rationale is not supportable and in my judgment is wrong, and the contentions in the Re-Re-Amended Defence are also incorrect. However, on the evidence, I do not find that there would be any material difference even had the evaluation been performed in the way contended for, and adopting the approach to, strategic tolerances contended for by Energy Solutions. The correct answer to Issue 30 is therefore that the score of 3 was not lawfully awarded, but in my judgment the same score would or should in any event have been awarded on the basis of the matters put forward in the RSS Tender Response as strategic tolerances when compared against the requirements of the SORR.

B4. Nominated Staff Appointment – Node 303

636. This Node, 303, is in issue in respect of two Requirements for the RSS Tender, namely 303.5.2 and 303.5.3. On the first, the RSS Tender was given a score of 4 and Energy Solutions maintains had the evaluation been done without manifest error this should have been a score of 5. On the second, a score of 3 was awarded and Energy Solutions' case is that too was manifestly erroneous and ought to have been a 5. However, the NDA's case is that it ought to have been scored with a 2, which would have meant (given the status of this Requirement as a Threshold/Scoring one) that RSS would have been eliminated from the

competition. It is also relevant for three different Requirements for the CFP Tender, namely 303.5.2, 303.5.3 and 303.5.4. It is convenient to deal with the principles together, as the way CFP's Tender was evaluated is relied upon by Energy Solutions as demonstrating manifest error/unlawfulness on its own submission. On the first Requirement, 303.5.2, CFP was given a score of 5 whereas Energy Solutions maintain this was manifestly erroneous and it should have been a 4. On Requirement 303.5.3, CFP was given a score of 3 whereas Energy Solutions maintain it should have been a score of 2. Finally, Requirement 303.5.4 was a Pass/Fail with CFP achieving a Pass, whereas Energy Solutions maintains it should have been awarded a Fail and eliminated from the competition.

637. The issues that arise in the Agreed List of Issues are numbered 31 to 36 and are as follows. As can be seen, Issue 31 is framed in rather surprising terms by the parties:

> **Construction of the SORR**
>
> Agreed Issue 31: The issues of construction and the parties' position are identified in their respective opening submissions.
>
> **Requirement 303.5.2**
>
> Agreed Issue 32: The issue is whether a score of 4 (rather than 5) was lawfully awarded on the basis of what were considered to be deficiencies (if any) in the supporting evidence provided by RSS in relation to the processes addressing element (c).
>
> Agreed Issue 33: Specific sub-issues are whether the criticisms of the supporting evidence made by the Defendant disclose a manifest error of assessment – (i) in themselves; and/or (ii) having regard to the assessment of CFP's response.
>
> **Requirement 303.5.3**
>
> Agreed Issue 34: The issue raised by the Claimant is whether a score of 3 (rather than 5) was lawfully awarded on the basis of what were considered to be deficiencies (if any) in the supporting evidence provided by RSS in relation to the processes addressing elements (a) and (b).
>
> Agreed Issue 35: Specific sub-issues are whether the criticisms of the supporting evidence made by the Defendant disclose a manifest error of assessment – (i) in themselves; and/or (ii) having regard to the assessment of CFP's response.
>
> Agreed Issue 36: The issue raised by the Defendant is whether the score that should lawfully have been awarded to RSS was 2 rather than 3.

638. Agreed Issue 31 can be seen as a historical remnant from the parties' previously unhelpful approach to agreeing Issues prior to the trial. It is difficult to describe

Agreed Issue 31 in its final form as properly constituting an issue at all. However, as will be seen upon analysis of what the point, or points, of construction are in relation to the SORR, this might have been adopted by either or both of the parties for forensic reasons.

639. Ms Wilson gave evidence on this Node for Energy Solutions and Ms Hanson gave evidence for the NDA. She was the lead SME for this Node. Mr Bowes also gave evidence about it, predominantly the approach to construction of the SORR.

Construction of the SORR

640. Requirements 5.2 and 5.3 include a number of separate elements identified by letters such as (a), (b) and (c) {J/10/46}. This part, 303.5, of the SORR {J/10/45} began with the following statement:

> "Bidders must submit their strategy for Nominated Staff Appointments relating to the SLCA which must demonstrate for each Requirement at 5.1(a) to (f); 5.2(a) to (d), 5.3(a) to (c) and 5.5:
>
> The process that the Bidder will put in place to ensure the Requirements will be delivered with respect to the Nominated Staff;
>
> The anticipated outputs from each process; and
>
> The Bidder's rationale for its choice of process to delivering the anticipated outputs and supporting evidence."

641. The response to Section 5.1 required responses to elements (a) to (f). The response to Section 5.2 required responses to elements (a) to (d). The response to Section 5.3 required responses to elements (a) to (c). Section 5.4 was evaluated on a different, pass/fail basis which can be ignored for present purposes and Section 5.5 was a single element.

642. Both Requirements 5.2 and 5.3 were to be evaluated in accordance with Table 2. This was made clear in paragraph 303.6.1(f) {J/10/50}. Table 2 stated {J/10/51} as follows:

1. a score of 5 if the response: *"describes the processes that the Bidder will put in place to address all the individual elements of each Requirement; Describes the anticipated outputs for each of the processes; Provides the Bidder's rationale for its choice of process to deliver the outputs in relation to each of the processes; and Provides supporting evidence that in the opinion of the evaluators is relevant to give confidence in the delivery of the outputs for each of the processes."*

2. a score of 4 if the response: "*.... provides supporting evidence that in the opinion of the evaluators is relevant to give confidence in the delivery of the outputs for 75% or more of the processes."*

3. a score of 3 if the response: *"....provides supporting evidence that in the opinion of the evaluators is relevant to give confidence in the delivery of the outputs for 50% or more of the processes."*

4. a score of 2 if the response: "….provides supporting evidence that in the opinion of the evaluators is relevant to give confidence in the delivery of the outputs for 25% or more but less than 50% of the processes."

643. There are competing arguments on how this scoring is to be construed as applying. Energy Solutions' position is that, on a proper construction of the SORR, the scoring for each Requirement, 5.2 and 5.3, is required to be done on an overall basis by reference to the response to each Requirement as a whole. In particular the correct approach to the evaluation of supporting evidence was to consider whether there were evidence that was relevant to give confidence in the delivery of the outputs for all (or some other percentage) of the processes identified in response to the Requirement as a whole.

644. The NDA's position on this cannot be stated so succinctly. It is difficult to state with precision what the NDA's position on construction in fact is. The issue is effectively in relation to whether the SMEs should have evaluated this Requirement on an element by element basis, or globally.

645. The Consensus Rationale for Requirements 5.2 and 5.3, both for RSS and CFP {U/4/26} {U/7/33} provided comments on the supporting evidence provided for each element. These were expressed in such a way as to suggest that the scoring of each Requirement was reached by means of a global assessment of the response to each Requirement as a whole. This used phrases such as "Describes the processes that the Bidder will put in place to address all the individual elements of this Requirement" and in the summary states:

> "Having reviewed the evidence provided we have concluded that, although there was some for each part of this requirement in 2 subsections it was too limited to be 100%. We have agreed that evidence for the entire section is between 50 and 74% and have scored as such."

646. However, in Appendix 3 of the 11 April 2014 Letter {U/23/10} the NDA stated instead that the scores had been reached by dividing the Requirements into their elements (each representing an equal proportion of the overall score, regardless of the number of processes relevant to each), scoring each of those elements separately and then aggregating the separate scores to reach an overall score for the Requirement. An example of this is the answer to question 2 {U/23/10} in respect of Requirement 5.3 which stated:

> "Each element of 5.3 (a)-(c) constitutes 33.3%. Since no evidence was provided that was deemed to be relevant for 5.3(a), supporting evidence was provided for a maximum of 66.6% or the processes, scoring a 3."

This is plainly not consistent with assessing the matter overall or globally.

647. However, the Defence originally stated that the SME team had in fact used the first approach (the global assessment) and also that it was the correct approach {A/5/21}. This part of the pleading stated:

> "In short, the SMEs considered that, where RSS had provided a satisfactory answer in relation to one process, and unsatisfactory answers in relation to two processes, the right overall conclusion, looking at matters in the round, was that it had provided sufficient supporting evidence to give confidence in two-thirds of the outputs for Requirement 5.3, so entitling it to a score of 3 under this requirement."

However, although that same passage was phrased identically in the Re-Re-Amended Defence {A/10/21} this went on to state:

> "This approach was believed by the SMEs at the time to be an appropriate one, but the Defendant will say that it was in fact incorrect."

The pleading then goes on to identify the approach that should have been used as the "per output/per process" one. It does however state that RSS should have been awarded a 2, not a 3, and excluded from the competition as a result.

648. However, and regardless of how the 11 April 2014 Letter came to state such an incorrect (on the NDA's case) methodology (in relation to which no explanation has been provided), and although it appears that in fact the SMEs used the global approach – Ms Hanson, the lead SME for this Node, said in her oral evidence {Day15Z-CON/91} that she considered that the correct approach was the first one i.e. an overall assessment of the response – the NDA now contends that as a matter of construction the approach identified in the 11 April 2014 Letter is the correct one. Although the figure of one out of three, or 33%, of the processes were said to be present (the same figure as in the Letter) the outcome on this occasion should have been a score of 2 (not a score of 3, as said in the Letter).

649. The construction that the NDA now advances is that each element attracted an equal percentage of the mark for the relevant Requirement. That is asserted on the basis that a bidder could only ever identify one process for each element and that a separate process had to be identified for each element. Accordingly, on this approach, it is said that what the SMEs should have considered was whether the supporting evidence gave confidence in the delivery of whatever outputs the bidder described for each element, or simply whether the supporting evidence gave confidence in the delivery of each element.

650. The NDA, by its Leading Counsel Mr Giffin QC, cross-examined Mr Bowes on Day 3 {Day3Z-CON/2} and Ms Wilson on Day 5 {Day5Z-CON/89} seeking to establish that they agreed with the NDA's latest interpretation and, in the case of Ms Wilson, that the construction contended for by Energy Solutions at the trial was not the one on which the Tender Response had been prepared. However, as Energy Solutions submits, such evidence is not admissible so far as the point of construction is concerned, although given the other issues associated with this Node in addition to the point of construction I permitted it to continue. In any

event, in my judgment the parties were entitled to a degree of latitude in this respect as it can be difficult to draw the precise line between admissibility on points of construction and evidence of fact going, here, to causation in terms of what an alternative score should have been. However, none of the material put to the witnesses was clearly based on "one process per element" in any event.

651. It was put to Ms Wilson that parts of her first witness statement were framed addressing supporting evidence in respect of particular elements. This overlooked that in paragraph 78 of her statement {B/5/33}, she had explained how the section on supporting evidence in RSS's Tender Response was structured. The paragraphs to which she was taken were those where she addressed what had been stated in the Consensus Rationale about the supporting evidence for each of the elements.

652. The NDA submits that Section 6.1(e) stated that the bidder should provide supporting evidence "in relation to the following Requirements only", namely 5.1, 5.2, 5.3 and 5.5. It is apparent that the word "Requirement" is used in the SORR to refer to more than one different thing in relation to this Node. At the start of Section 303.5, it is clearly being used to refer to each lettered element as a Requirement. My attention was drawn to Section 6.1(e), where the word "requirement" is used to refer to the whole of a section such as Section 5.1. Therefore the same word, "requirement", could also mean a section. Each of Requirements 5.1, 5.2, 5.3 and 5.5 was to be evaluated and scored in accordance with Table 2 {J/10/50-52}. Section 1.8(a)(i) of the SORR {J/10/12} provided that:

> "For the purposes of evaluation, `Requirement' means a requirement of the SORR at the level which is being evaluated for example:
>
> Requirements 5.1, 5.2, 5.3, 5.4 and 5.5 of the Nominated Staff Appointment Evaluation Node".

The NDA submitted that:

> "It is clear, therefore, that scores were to be awarded at the 5.1, 5.2, 5.3 and 5.5 level. There would not be separate scores for separate lettered elements. Beyond that, however, these provisions do not assist with how the marking scheme is to be applied."

Given the SORR represents the rules of the competition, and the NDA admit effectively that the SORR "does not assist" (in other words, does not identify) how the marking scheme is to be applied, it is clear that the evaluation for these Requirements was facing potential difficulties from an early stage. Further, the SORR should be applied as it would be understood by an RWIND tenderer.

653. The best way to set out in digestible form the position on construction advocated for by the NDA is to set out verbatim certain parts of the NDA's Closing Submissions. Ordinarily I would not do so, however the risk of summarising the NDA's position incorrectly (given its complexity) compels me to do so. Paragraph 455 onwards, and the concepts of "half-confidence" and "half-credit", give

particular difficulty, as neither of these concepts are identified in the SORR at all. The NDA Closing Submissions state:

> "448. There are two questions of construction which need to be determined. The first is whether the supporting evidence that was provided needed to relate specifically to each and every anticipated output described in the bidder's response. The second is how the question of confidence in relation to a percentage of processes should have been approached.
>
> 449. On the first question of construction, ES's case is that "supporting evidence" was required for each output for each process that the bidder in question chose to identify, and that CFP failed to provide such evidence and should have been marked down. Supporting evidence effectively meant here the bidder's past experience from which confidence in future delivery could be obtained.
>
> 450. On the second question, NDA's position is that the evaluators took an overly generous approach to RSS, with the result that it passed the threshold when it should otherwise have failed.
>
> 451. Ultimately, whilst the judgments about what counted as supporting evidence in relation to a particular matter were ones for the evaluators, subject to manifest error, the construction of the scoring tables is a matter that falls to be objectively determined. Therefore, whilst both Ms Hanson and Ms Wilson were cross-examined about these matters, there is necessarily a limit to how far that can take either party.
>
> 452. On the first question, it is submitted that the right answer is that: for each numbered Requirement to be scored, there are a number of lettered elements; for each element, the bidder will set out a process for addressing it; and for each element, there will be outputs which the process is designed to produce. So the starting-point is to ask whether, in relation to a particular lettered element, the bidder has produced supporting evidence that gives confidence in the delivery of the outputs relevant to that element.
>
> 453. That means the outputs for that element generally – it is not necessary to ask the question specifically about each and every different output that may have been listed by the bidder. Nor does the bidder necessarily have to produce supporting evidence which shows its past experience specifically in relation to every single thing it may have identified that could be called an output.
>
> 454. On the second question, the right approach is to look at the different lettered elements, and ask whether they have received,

in effect, a tick or a cross in terms of confidence in the delivery of the outputs. Then, when it comes to scoring the Requirement and knowing for what percentage of the processes there is confidence in the delivery of the outputs, it is necessary to ask how many lettered elements there are in that Requirement, and how many have received a tick. If a Requirement has four lettered elements, and three of them have received ticks, then the evidence provides confidence in the delivery of the outputs for 75% of the processes.

455. What that means in practical terms here is that, if only one out of four elements receives a tick for the supporting evidence, then it is not possible to say that there was "half confidence" about the other three elements, so leading to confidence in 62.5% of the processes overall. That is why RSS would have failed, if the evaluators' factual conclusions were correct, because under Requirement 303.5.3 it needed such an exercise in giving part credit for unsatisfactory elements to get over the threshold score. That was a three-element requirement. RSS's evidence was only regarded as giving confidence for element (c), counted as 33%, but it was given half credit under the other two elements (16.5% each), leading to a total of 66% and a score of 3, rather than 33% and a score of 2 (if no credit had been given for elements (a) and (b)).

456. It is submitted that this approach to the second question simply follows from the words used. The question of whether there is confidence in a particular matter is a binary question – either there is or there is not. The scoring table does not contemplate degrees of confidence.

457. Returning to the first question, it is submitted that the proposed construction (of looking at supporting evidence on an element by element basis) is correct, for the following reasons:

458. First, it is consistent with the language used in the scoring table. It is true that the table talks about "the processes" in the plural, but that is because the score that is ultimately awarded is for the Requirement as a whole. So in a four–element Requirement, there are four processes. The use of the plural makes sense wherever it appears;

459. Secondly, it avoids the consequence of the RSS submission, that the question of what evidence has to be provided, and exactly how the response falls to be scored, depends upon precisely how many distinct "processes" and how many distinct "outputs" the particular bidder happens to have identified. Avoiding that consequence is desirable if not essential, for two reasons. One is that it cannot be right to allow bidders the ability to manipulate the scoring system according to how they choose to structure their submission.

> The other is that (as the cross-examination demonstrated) the question of when one sentence in a submission amounts to a process or an output distinct from what is described in another sentence, is wholly arbitrary and incapable of objective application. There is no objective way of knowing when one process stops and another starts – whereas if the whole of a bidder's methodology for delivering what is called for by a particular lettered element in the SORR is treated as a single process, everything falls into place."

654. I must confess to having grave doubts about the correctness of this construction. The NDA's construction effectively treats each element as a *separate* Requirement to be evaluated. That is inconsistent with paragraph 1.8 of the SORR {J/10/12}. The SORR was not meant to be subject to minute linguistic scrutiny, or application, in the way proposed by the NDA, even if that way was capable of ready comprehension (which the above extract from the submissions shows, in my judgment and very clearly, it is not). Common sense goes a long way when one is approaching what are said to be competing arguments of construction. The amount that has to be read into the SORR in order to justify the "tick box" and arithmetical approach to arriving at a percentage contended for by the NDA is remarkable. It also would restrict the exercise of the SMEs' judgment to a considerable degree. I do not accept that the evaluation exercise was to be conducted in the way contended for by the NDA, and I do not accept that the SORR would be read in that way by a RWIND tenderer.

655. I prefer the construction contended for by Energy Solutions for the following reasons. Paragraph 1.8(a)(i) of the SORR clearly states that, in relation to the Nominated Staff Node, the Requirements to be evaluated are Requirements 5.2 and 5.3 etc. in marked contrast to many of the other Nodes where each of the elements (or indeed parts of such an element) are themselves Requirements to be evaluated separately {J/10/12}.

656. Further, when applying the Table 2 criteria, the relevant percentage to consider is the percentage of the "processes" that the bidder will put in place to address all the individual elements of the Requirement for which there is supporting evidence "relevant to give confidence in the delivery of the outputs" for those processes. Processes are to be put in place to address all the individual elements of the Requirement and such processes should deliver "outputs". But it is clear (from the first and second bullet points of each part of Table 2) that "elements" and "processes" are not the same as each other, and that the "outputs" of the processes are not the "elements" themselves.

657. It is also clear that it was for bidders as part of their response to describe the "processes" they proposed to put in place and the anticipated "outputs" of those processes. There was no limitation on the number of "processes" or "outputs" that might, by each bidder, be identified either generally or with respect to each element. Nor was there any requirement that one process could not address more than one element. Some might address two, or even more. One of the criticisms by the NDA of the Energy Solutions' approach was that:

> "…it cannot be right to allow bidders the ability to manipulate the scoring system according to how they choose to structure their submission".

However, this submission is wholly misconceived. All the tenderers, not just RSS, needed to know what the rules of the competition were so that they could comply with them, and so there was a level playing field when the NDA came to evaluate them. That is the ethos of the Regulations. Knowing how any part of the tender was to be evaluated by the NDA was not giving a bidder "the ability to manipulate the scoring system", it was giving the bidder an equal opportunity to submit a compliant tender that would be scored fairly against clearly ascertainable and objective criteria. Further, it was for each bidder to decide upon the number of processes and outputs, and what they were. That is not allowing a bidder "to manipulate the scoring system".

658. Table 2 required an assessment by the evaluators, for each process described in the response to the Requirement, to ascertain whether or not supporting evidence had been provided which "*in the opinion of the evaluators is relevant to give confidence in the delivery of the outputs"* for that process. Either evidence was provided "*that in the opinion of the evaluators is relevant to give confidence in the delivery of the outputs*" for that process, or it was not. Once the evaluators had ascertained, for each identified process, the answer to whether they considered there was evidence "*relevant to give confidence in the delivery of the outputs*" for that process, they could then continue to determine the appropriate score for the Requirement as a whole as a matter of exercising their evaluative judgement.

659. Finally, the NDA's construction of Table 2 means that it would have been impossible to score 4 in relation to Requirement 5.3, given that there are only three elements. That is, in my judgment, a rather telling final nail in the coffin of what is an extremely convoluted attempt by the NDA at having the SORR interpreted in such an artificial way to give, potentially, the NDA a forensic "knockout blow" had it been able to interpret Requirement 303.5.3 to justify giving the RSS tender a score of 2. Had the NDA been able to succeed on this part of the case, a finding that the RSS score would have been 2 would have led to RSS being disqualified. I am confident that it is this that must have driven these arguments, rather than their being objectively justified on the terms of the SORR.

660. I also note that the construction contended for by Energy Solutions was the approach in fact adopted by the SMEs at the time, although obviously as a matter of fact that does not have any effect upon the construction as a matter of law of the SORR. The fact that its own SMEs at the time awarded the Requirement a score of 3, and applied the SORR in the way explained in the Consensus Rationale, and also in the Defence as originally pleaded, suggests that this point of construction was a forensic exercise by NDA of limited merit.

661. The answer to Agreed Issue 31 is in my judgment that the construction of the SORR contended for by Energy Solutions is the correct one.

Requirement 303.5.2 Approach to Nominated Staff Development of the Management Team

662. This Requirement had different elements within it. 303.5.2(c) was entitled "Filling of any identified gaps in skills and competencies". This was also touched upon in Requirement 303.5.4(c)(ii) which required "Details of how the Magnox SLC and RSRL SLC staff will be developed for succession purposes to fill Nominated Staff roles where appropriate…." The Agreed List of Issues for Requirement 303.5.2(c) are as follows:

> Agreed Issue 32. The issue is whether a score of 4 (rather than 5) was lawfully awarded on the basis of what were considered to be deficiencies (if any) in the supporting evidence provided by RSS in relation to the processes addressing element (c).
>
> Agreed Issue 33. Specific sub-issues are whether the criticisms of the supporting evidence made by the Defendant disclose a manifest error of assessment – (i) in themselves; and/or (ii) having regard to the assessment of CFP's response.

663. It is therefore the supporting evidence that must be considered, together with the associated matter of whether the material available from the NDA (essentially criticisms of the supporting evidence) disclose a manifest error of assessment, either in itself and/or by reference to how the CFP response on this was evaluated. So far as supporting evidence is concerned, Figure 303-10 {Q/17/15} set out what was called a Compliance Matrix which identified the different Sections together with Graphics and Supporting Evidence (or SE) pages and Parts that went with each. Energy Solutions submits that Ms Hanson, who was not only the lead SME but designed the Node, and the other SMEs, failed to consider the section of RSS's Tender Response on supporting evidence, together with those parts of the response it was to support. This is based on the different way Ms Hanson explained how she went about her task, either starting with the Compliance Matrix, starting with the supporting evidence itself and then looking at the rest of the response, or vice versa. Energy Solutions use this to explain a potential way in which what are said to be manifestly erroneous criticisms made in the 11 April 2014 Letter (considered further below) came about.

664. I do not accept that Ms Hanson's evidence, taken collectively, demonstrates a flawed approach. Equally, I do not consider that an explanation has to be found if manifest error is present, for why the error(s) may have occurred. Everyone works in different ways and as long as the SMEs correctly took into account all the material in the Tender Submission (whether starting with the supporting evidence and working "backwards", as it were, or more conventionally the other way), and did not take into account irrelevant matters, it does not much matter. Ms Hanson accepted that ordinarily one would do the latter {Day15Z-CON/93}.

665. It is correct to describe Ms Hanson's account as not entirely consistent. She stated in paragraph 101 of her witness statement that the SMEs looked at the supporting evidence section, and in particular Part D, first and "we then looked at the rest of RSS's response to Requirement 5.2" {C/1/23}. She indicated that the SMEs adopted the same approach in relation to Requirement 5.3 {C/1/33}. In her cross-examination she stated at one point that:

> "…we looked at the process followed by outputs, rationale and then moved to the evidence". {Day15Z-CON/102}

She also said that:

> "…when we were looking at the evidence...we initially looked at the compliance matrix and followed that through" {Day15Z-CON/90}.

She also said:

> "when we couldn't find the supporting evidence in the area that we'd been signposted to in the compliance matrix, we then went back and reread the information back [in the earlier parts] to see if it was anywhere else". {Day15Z-CON/102}

In my judgment, Energy Solutions seeks to make too much of the order in which Ms Hanson and the SMEs approached the task.

666. However, changes in this type of explanatory evidence are one thing, and in matters of judgement the NDA are entitled to a margin of appreciation. It must also be remembered that there is a statutory obligation upon the NDA, and any authority in such a competition, to provide reasons to unsuccessful bidders. There is little point in having such an obligation if it can be satisfied by statements that are obviously wrong and keep changing, with later reasons contradicting the earlier ones. Additionally, such behaviour makes it very difficult to work out what the reasons for the particular evaluation in question in reality actually were at the time. I am not of the view that such constant changes in the reasons given by the NDA for why the score was in fact awarded can be wholly disregarded. If the NDA's own SMEs cannot sensibly explain why a particular Requirement was given a particular score, that is not a promising start if the Stage 1 reasons are wrong.

667. Requirement 5.2 itself required {J/10/46}**:**

> "A description of the Bidder's approach to Nominated Staff development of a Magnox SLC Management team and a RSRL Management team (or a combined Magnox SLC and RSRL SLC Management team if this is the Bidder's proposed solution) that must include:
>
> (a) Selecting a balanced team with complementary skills, knowledge and experience, to cover all identified roles and competencies;
>
> (b) Post-selection, developing the Nominated Staff into a cohesive and strategic and managerial unit;
>
> (c) Filling of any identified gaps in skills and competencies; and
>
> (d) A demonstration of leadership behaviours of the team as well as an ability to work competently as individuals. "

668. RSS's Tender Response cross-referred to two Supporting Evidence ("SE") statements, one from each member of the consortium, namely Energy Solutions {Q/17/9} and Bechtel {Q/17/11}. The response was given a score of 4, rather than one of 5.

669. The reasons for the score by NDA was explained in the following way in the Consensus Rationale {U/4/26}:

> "5.2(a) Describes the processes that the Bidder will put in place to address all the individual elements of this Requirement; Describes the anticipated outputs for this process; Provides the Bidder's rationale for its choice of process to deliver the outputs in relation to this process; and provides supporting evidence that in the opinion of the evaluators is relevant to give confidence in the delivery of the outputs for this process.
>
> 5.2(b) Describes the processes that the Bidder will put in place to address all the individual elements of this Requirement; Describes the anticipated outputs for this process; Provides the Bidder's rationale for its choice of process to deliver the outputs in relation to this process; and provides supporting evidence that in the opinion of the evaluators is relevant to give confidence in the delivery of the outputs for this process.
>
> 5.2(c) Describes the processes that the Bidder will put in place to address all the individual elements of this Requirement; Describes the anticipated outputs for this process; Provides the Bidder's rationale for its choice of process to deliver the outputs in relation to this process; and provides some supporting evidence that in the opinion of the evaluators is relevant to give confidence in the delivery of the outputs for this process. Very technical solutions without focussing on the softer, but just as important management and leadership skills sets.
>
> 5.2(d) Describes the processes that the Bidder will put in place to address all the individual elements of this Requirement; Describes the anticipated outputs for this process; Provides the Bidder's rationale for its choice of process to deliver the outputs in relation to this process; and provides supporting evidence that in the opinion of the evaluators is relevant to give confidence in the delivery of the outputs for this process.
>
> Having reviewed the evidence provided we have concluded that, although there was some for each part of this requirement in 1 subsection it was too limited to be 100%. We have agreed that evidence for the entire section is between 75 and 99% and have scored as such"
>
> [emphasis added]

670. In respect of element (c), the Consensus Rationale for CFP's Tender Response stated that it "provides limited supporting evidence" {U/7/33}. Energy Solutions points out, and relies upon the fact that, "limited" supporting evidence did not have an effect upon CFP's score. By contrast, the alleged provision of only "some" supporting evidence in RSS's Tender Response did. The only other distinction between the Consensus Rationale for RSS and CFP was the following criticism regarding RSS and element (c) which stated:

> "…very technical solutions without focussing on the softer, but just as important management and leadership skills sets".

671. The NDA stated the following in Appendix 11 of the 11 April 2014 Letter:

> "…
>
> The qualification of "some" has not impacted on the evaluation. The SORR did not set a "quantity of supporting evidence" test but did require that supporting evidence was relevant. Please refer to paragraph 1.5 of the Introduction to the SORR.
>
> …
>
> The process for deciding relevant % of supporting evidence is as follows:
>
> For each element of the Requirement, consensus panel decided whether the supporting evidence was relevant.
>
> The maximum of 100% was divided by the number of elements contained in a Requirement. For example, in 5.2 there were four elements and therefore each element accounted for 25%. Supporting evidence for (a), (b) and (d) only was considered relevant for the reasons set out above. Supporting evidence for (c) was considered to be only partially relevant for the reasons set out above.
>
> Therefore RSS deemed only to give confidence in the delivery of 75% or more of the processes and not 100% of the processes.
>
> …
>
> The reference to softer management and leadership skills did not impact upon the evaluation…"
>
> [emphasis added]

672. Accordingly, the letter explicitly stated that:

> "…the reference to softer management and leadership skills did not impact upon the evaluation".

The only difference could therefore be one between "limited" and "some". Ms Hanson accepted that the "softer management and leadership skills" criticism was abandoned in the letter {Day15Z-CON/121}. This therefore means that applying the Table 2 scoring criteria, the Consensus Rationale identified no basis for a score of 4. This is because, even in relation to element 5.2(c), the SMEs' conclusion was that the supporting evidence was relevant to give confidence in the delivery of the outcomes for the relevant processes identified in relation to that element. No reason is therefore identifiable for RSS not achieving a score of 5.

673. That this is the correct conclusion is supported by consideration of the rationale for CFP. The SMEs gave CFP a score of 5 for Requirement 5.2. The Consensus Rationale for CFP's response to 5.2(c) and RSS's response to 5.2(c) were almost identical {U/7/33}:

> "5.2(c) Describes the processes that the Bidder will put in place to address all the individual elements of this Requirement; Describes the anticipated outputs for this process; Provides the Bidder's rationale for its choice of process to deliver the outputs in relation to this process; and provides limited supporting evidence of how the Bidder identified the gaps. However, in the opinion of the evaluators it is relevant to give confidence in the delivery of the outputs for this process".

674. The NDA has accepted that the difference of language – "limited" or "some" – is of no consequence for the Scoring Criteria.

675. In any event, that difference in language only emerged following the Burges Salmon Review, when the reference to the supporting evidence in the Consensus Rationale for RSS was changed from "limited" {T/130/326} to "some" {T/130/325} as Ms Hanson accepted {Day15Z-CON/105}. This was done, even though, as Ms Hanson accepted {Day15Z-CON/106}, the SMEs themselves saw no difference between "*some*" and "*limited*". I have already dealt with the Burges Salmon Review earlier in this judgment. This is a good example of the SMEs putting something into the Consensus Rationale on legal advice, when only the end result is visible – the addition of certain words – which the SMEs themselves did not consider to make any difference. In this case, therefore, the words eventually chosen were of no difference to the SMEs, but the visible picture to the bidders became different after the post-Burges Salmon Review change.

676. The NDA stated in the 11 April 2014 Letter {U/23/28} that:

> "…there is no intended difference in meaning between "limited" and "some". It does not indicate an impact on the score".

Ms Hanson agreed with this {Day15Z-CON/121}. This does lead to the question therefore, to which there is no answer, as to why that change was made at all. Energy Solutions submits that the reality is that the respective evaluations of element (c) in the Consensus Rationales for RSS and CFP provided no reason for giving RSS a lower score than CFP. In my judgment, given the broadly similar tender submissions which deal with the same Requirement, the award of different

scores to the two bidders for no identifiable or justified reason is also breach of the obligation of equal treatment.

677. There is a further problem for the NDA on this Requirement in meeting the complaint that the evaluation of this Requirement is manifestly erroneous. It is that the explanation in Appendix 11 to the 11 April 2014 Letter adopts the "four part, 25% for each" approach which I have found to be wrong as a matter of construction. However, for completeness I will deal with the specific criticisms in any event. The specific criticisms do appear to arise from the NDA not considering the supporting evidence section as a whole. However, they are as follows and I will deal with each in turn. It is accepted by the NDA in paragraph 464 of its written Closing Submissions that:

> "…the comment about 'softer skills sets' is not about supporting evidence. It was in the nature of a feedback point…."

It was not therefore necessary to dwell in any detail on what such a phrase actually means. The NDA accept that it was "feedback" rather than determinative of the score.

1. Onboarding

678. For the uninitiated, "onboarding" is a term that relates to bringing someone "on board".

679. Specific criticism is made by the NDA that there was no analysis by RSS of what the arrangements for "onboarding" were, or how well the arrangements would work. The Consensus Rationale accepted {U/4/26} that RSS had described:

> "…the processes that [it] will put in place to address all the individual elements of this Requirement".

"Onboarding" was one of the processes. However and in any event, the arrangements for "*onboarding*" were illustrated on Figure 303-4 {Q/17/3} and were described in response to 303.5.2(c) at {Q/17/4}. Ms Hanson accepted in paragraph 31 of her Second Witness Statement {C/12/8} that:

> "…it is correct that the RSS tender response refers to and describes a process of 'onboarding'."

She also accepted that they were described fully in her oral evidence {Day15Z-CON/133}.

680. Although she also said in her written evidence that no evidence was provided about how or where the arrangements had previously been used, this criticism is not correct as this had been addressed by RSS in Part D of the Response itself {Q/17/11}. The success of the measures had also been described in Part A {Q/17/9}. This first ground is therefore factually incorrect. Stating that a particular point is not addressed or included in a tender, when it can be seen that the point was specifically addressed, is in my judgment manifestly erroneous.

2. Alignment with SLC Transition Plans

681. The second criticism of the NDA was that there was no evidence of past performance, and this was not met by the statement that initially RSS would ensure that these arrangements would be aligned with SLC Transition Plans at share transfer. Part D did however address this in passing, although not in great detail. The criticism was that there was no evidence, rather than criticising the quality or extent of the evidence that was provided. This is not a valid criticism, although had the criticism been that there was only limited evidence provided it would have had at least some basis.

3. MCP-10

682. I found the situation relating to MCP-10 the most surprising aspect of any of the evidence in this trial, by either party. Criticisms were made by the NDA of the statement in RSS's Tender Response {Q/17/11} that stated as follows:

> "Our process for filling gaps in skills and competences is drawn from our experience of leading the implementation of MCP10 and the continuing provision of SQEP Nominated Staff".

Ms Hanson criticised this as failing to provide any explanation concerning what "MCP-10" was. She agreed that this was the prime focus of her position {Day15Z-CON/122}. She said in paragraph 88 of her First Witness Statement {XC-CON/1/21} that a sentence explaining what MCP-10 was, and why it was relevant, would have been likely to have made all the difference to this part of the RSS Tender Submission and resulted in a score of 5. Therefore the lack of explanation of what MCP-10 stood for, or referred to, was central to this criticism, and central to the award of a score less than 5.

683. However, MCP-10 stands for "Management Control Procedure 10". It was the then-current learning and development procedure applicable throughout the whole Magnox SLC to ensure that gaps in skills and competencies were adequately filled in order to comply with Licence Condition 10 (as was stated at {Q/17/9}) for the Magnox sites. Licence Condition 10 is one of the conditions of the Nuclear Licence. Not only that, but the NDA itself had included MCP-10 within the data room and made it available for bidders. The NDA must therefore, one would hope, have known what the letters MCP-10 meant. Certainly an RWIND tenderer could have expected the NDA to know this. An extract of Ms Hanson's cross-examination on this subject (part of which I have already reproduced in paragraph 105 above) was as follows {Day15Z-CON/123} to {Day15Z-CON/125}:

> "Q: "MCP10" stands for "management control procedure 10", doesn't it?
>
> A. I believe it does.
>
> Q. If we look at it quickly so we can understand it {V/24.1/1}. Is that the document MCP10?

A. It appears to be. It is not a document. It is a Magnox internal one, so it is not the one that I would generally use.

Q. It was one of the documents in the NDA's data room provided to bidders; isn't that right?

A. I have no idea.

Q. It was the current procedure applicable across all the Magnox sites, which were ten of the 12 sites that were the subject of the bid, yes?

A. I understand in my preparation for this case that that was what it was when I looked at it. Yes, that's what I believe it was.

……..

Q. You accept this was the current development procedure, wasn't it, applicable at ten of the 12 sites?

A. Sorry, the current what procedure?

Q. Learning and development procedure. There had to be such a procedure to comply with the licence conditions, didn't there?

A. Was this the current one? I don't know if it was.

Q. If we go back to {V/24.1/1}, this is dated December 2012. Is this the one that was current when the competition was being run?

A. It does appear that it was.

Q. Isn't a bidder entitled reasonably to expect that a subject matter expert would be familiar with the relevant documents in the NDA's data room?

A. Up to a point. Do we know every document that is there? No. Do we have a general overview of the requirement by the site licensing company, not by the NDA, of the issues that relate to SQEP? Yes. Did I know in detail what the MCP10 process was? No. Should I have? No.

Q. At least one of the subject matter experts should be expected to know what the current procedure in relation to this in the data room was; would you agree?

A. My Lord, I don't agree."

[emphasis added]

684. I find this evidence verging on the incredible. Mr Hunter QC's final question – that at least one of the three SMEs should have known the current procedure – was expressly disagreed. The real point is even starker – it is that at least one of the three SMEs should have known that MCP-10 was an acronym that stood for the current procedure, not even what the current procedure contained. The evidence of the lead SME for this Node was therefore to the effect that none of the three Subject Matter Experts should have been expected to know that MCP-10 referred to the current procedure, which was expressly provided to each of the bidders by the NDA in the data room as part of the material available for their tender preparation. Even without the evidence of Ms Wilson (which is evidence I accept) that this had been used in dialogue sessions with the SMEs, who knew about the document and the terms of it {B/5/27}, I do not see how the lead SME for this Node could sensibly or reasonably hold this point of view. The assertion that not one of the three SMEs evaluating the node should be expected to know about such a document, which was, after all, made available by the NDA itself to the bidders in the data room, is verging on the extraordinary. The document contained the current procedure at 10 of the 12 Magnox sites, and was part of compliance with the existing Nuclear Licence Conditions. In my judgment, bidders were indeed entitled to assume that those evaluating their responses for the NDA would be familiar with the documents – or at the very least with the titles of those documents – which the NDA had itself provided to bidders for the purpose of the competition. Failure to be so aware, and to have marked down RSS's tender response for failing to explain what MCP-10 was, amounts to a manifest error in my view.

4. SQEP

685. The fourth criticism was that no explanation was provided by RSS as to how the continuing provision of SQEP staff might have been implemented previously. The SQEP process was illustrated on Figure 303-4 {Q/17/3}. The RSS's Tender Response stated in the "Rationale" section {Q/17/4} the following, namely:

> "The rationale for our choice of approach builds on both Parent Companies' experience of building and sustaining high performing teams."

That was the only reference to where it had been used before in that section. However, in Part A of the "Supporting Evidence" section {Q/17/9} there was extensive reference to where it had been used before, both by Energy Solutions but also before 2007 by the Reactor Sites Management Company, the forerunner to Energy Solutions.

686. There was also criticism by the NDA of the references in Part D to the Bechtel supporting evidence, namely that it failed to provide evidence that robust development plans had been used before and whether they had been successful. This is not factually correct either. Bechtel University was explained as being a tool in developing such plans, and detail was provided about what was provided by that facility. Its success in developing chemical engineers was set out in Part A. The Annual Leadership Review and Performance Based Leadership approaches were also stated in Part A, and examples were given {Q/17/12}.

687. Energy Solutions also submitted that the approach of the SMEs to scoring this Requirement for the RSS Tender cannot be reconciled with the far more lax approach to the CFP Tender, in particular Requirement 5.4. There is no need, given my findings on the criticisms of this Requirement in the RSS Tender above, to deal with that consistency argument for this Requirement in any detail as I find that the evaluation was manifestly erroneous. However, there was a failure to evaluate the two tenders equally which is a breach of the obligation upon the NDA of equal treatment. I will revert to this Requirement in the CFP Tender in Section C3 in Confidential Appendix 3.

688. So far as RSS'S tender was concerned, the SMEs stated that matters were not present or had not been addressed when they plainly had. In my judgment the RSS Tender should be given a score of 5 when the content of the submission is analysed against the scoring criteria.

689. It follows from the above that the SMEs' evaluation of Node 303 Requirement 5.2 which gave RSS a score of 4, was manifestly erroneous. The score of 4 cannot be objectively supported, even taking into account the margin of appreciation available to the SMEs. That score is flawed, on the face of the evaluation record itself. It is not supported by the stated reasoning and it is inconsistent with the score of 5 given to CFP for what were, essentially, identical reasons. Additionally and in any event, the further reasons mounted in the evidence at trial by the NDA cannot be accepted and are flawed. Had the SORR been lawfully applied, RSS would have been awarded 5 for its response to Requirement 5.2.

690. The answers therefore to the specific issues are as follows:

Agreed Issue 32: the score of 4 was not lawfully awarded. The score to be awarded on a lawful application of the SORR would be 5; and

Agreed Issue 33: the SMEs' criticisms of RSS's Tender Response disclose manifest errors of assessment in themselves.

Requirement 303.5.3 Nominated Staff talent identification and succession planning

691. Requirement 5.3 {J/10/46} had to provide a: "description of the Bidder's approach to Nominated Staff talent identification and succession planning". That description had at least to address three specific elements: "(a) Removal and debriefing", "(b) Incorporating the selected candidate into the established team" and "(c) Sharing of skills, knowledge and experience". The scoring was by reference to Table 2 which has been considered above on the point of construction.

692. In the Consensus Rationale for RSS {U/4/27}, the NDA explained the score of 3 that was awarded to the RSS Tender Submission in these terms:

> "5.3(a) Describes the processes that the Bidder will put in place to address all the individual elements of this Requirement; Describes the anticipated outputs for this process; Provides the Bidder's rationale for its choice of process to deliver the outputs in relation to this process; and provides <u>some</u> supporting evidence that in the opinion of the evaluators is relevant to give

> confidence in the delivery of the outputs for this process. Doesn't talk about debriefing or where they have undertaken these process [sic] previously.
>
> 5.3(b) Describes the processes that the Bidder will put in place to address all the individual elements of this Requirement; Describes the anticipated outputs for this process; Provides the Bidder's rationale for its choice of process to deliver the outputs in relation to this process; and provides some supporting evidence that in the opinion of the evaluators is relevant to give confidence in the delivery of the outputs for this process. The link to the previous section (5.3(a)) which was only limited was referenced here. Talks about the individual not the team impact and doesn't mention where this process has been used before.
>
> 5.3(c) Describes the processes that the Bidder will put in place to address all the individual elements of this Requirement; Describes the anticipated outputs for this process; Provides the Bidder's rationale for its choice of process to deliver the outputs in relation to this process; and provides supporting evidence that in the opinion of the evaluators is relevant to give confidence in the delivery of the outputs for this process.
>
> Having reviewed the evidence provided we have concluded that, although there was some for each part of this requirement in 2 subsections it was too limited to be 100%. We have agreed that evidence for the entire section is between 50 and 74% and have scored as such".
>
> [emphasis added]

As I have found, this was done by means of an overall assessment of the response to Requirement 5.3.

693. CFP was also awarded a score of 3. However, the Consensus Rationale recorded that in relation to 5.3(b) CFP had not provided any supporting evidence, in the opinion of the evaluators, relevant to give confidence in the outputs for the relevant process; and in relation to 5.3(c) it had only provided "*some*" such evidence {U/7/34}. Energy Solutions rely upon this as indicating that, in the SMEs' view, CFP's Tender Response was worse than RSS's. Moreover, the scoring suggested that when the same SMEs used the same phrase, "some supporting evidence that in the opinion of the evaluators is relevant to give confidence in the delivery of the outputs for this process", they must have meant different things by the same words. For RSS "some" meant "insufficient"; for CFP it meant "sufficient".

694. In Appendix 3 of the 11 April 2014 Letter {U/23/10}, the NDA stated the following:

> "5.3(a)

> ....Whilst RSS addressed removal and debriefing in its proposed processes, it failed to provide any supporting evidence on the debriefing process...The only reference in the evidence section...to debriefing was in the title...
>
> 5.3 (b)
>
> ....As outlined above [the evidence for 5.3(a)] was insufficient. There was also [no] reference to...how individuals would be integrated into the team. The response was missing examples of how they have applied what they say in practice.
>
> … Each element of 5.3 (a)-(c) constitutes 33.3%. Since no evidence was provided that was deemed to be relevant for 5.3(a), supporting evidence was provided for a maximum of 66.6% of the processes, scoring a 3".

695. There are two problems with this. Firstly, this was inconsistent with the Consensus Rationale and stated that the SMEs had in fact divided the Requirement into three, scored each part separately and awarded full marks for parts 5.3(b) and (c) but nothing for (a). This is not correct in fact as this is not what the SMEs did. Also, in relation to element (a), it stated that "no evidence", rather than (as the Consensus Rationale recognised) "some evidence", had been provided.

696. I have identified the initially pleaded position in the Defence above. Paragraph 54(2) and (4) {A/5/21} used expressions such as "looking at matters in the round", RSS had provided sufficient supporting evidence to give confidence in two thirds of the outputs for Requirement 5.3. It also accepted that, rather than there being "no evidence" with respect to element (a), "RSS's response provided some supporting evidence in relation to each of the three processes mentioned specifically in Requirement 5.3". However, there are no processes mentioned specifically in Requirement 5.3. This also suggested that the evidence was qualified with respect to element (c) as being only "*some*" evidence. The Defence also alleged that:

> "[i]n the opinion of the SMEs, the evidence provided by RSS in respect of those two processes [by which it appears the NDA meant the two elements (a) and (b)] was limited and generic, and did not give confidence in delivery in respect of outputs in either case".

This was the first occasion on which reference had been made to the evidence provided being "generic" and, rather than saying (as the Consensus Rationale had) that RSS had provided "some supporting evidence that in the opinion of the evaluators <u>is</u> relevant to give confidence in the delivery of the outputs for" [emphasis added] each of these elements, the Defence now stated the contrary, and that in their opinion it was *not* relevant to give such confidence.

697. The Re-Re-Amended Defence advanced what was essentially a new case. This was, while the SMEs had considered the overall or global approach to be appropriate at the time of evaluation, that this approach was in fact incorrect as a

matter of construction. I have found that this argument on construction by the NDA is not correct. It does not however advance the matter very much further in terms of what the SMEs did or did not do, or rather why they gave the score they did. The material available for consideration of this was sparse.

698. It follows however that the NDA had also abandoned the approach to scoring in the original Consensus Rationale in its Re-Re-Amended Defence, which means it must have abandoned the analysis in the 11 April 2014 Letter (that full marks were awarded for elements (b) and (c)) and this was also asserted to be erroneous by the Re-Re-Amended Defence.

699. Ms Hanson's first witness statement said in relation to Requirements 5.3 and 5.2 in paragraphs 40-41 that:

> "…if the supporting evidence identified by the Bidder for an individual element gave us confidence in delivery we would allocate 33% to this". {XC-CON/1/12}

She made a similar point stating "each was worth 33% for the purpose of the scoring criteria" in paragraph 197 of her first witness statement {XC-CON/1/41}. She stated that the SMEs had considered that they had 50% confidence in each of elements (a) and (b) and 100% confidence in (c), thus giving an overall score of 66% (i.e. 16.5% + 16.5% + 33%). She said in paragraph 202:

> "Having discussed and thought about it together, we agreed that the material we had considered when attempting to identify supporting evidence for 5.3(a) and (b) was not entirely irrelevant and that it would be appropriate to give RSS some credit for the material. We agreed that, in very rough terms, we should treat the material as sufficient to give 50% confidence in delivery of each of the elements (a) and (b) of the Requirement." {XC-CON/1/42}

700. Putting to one side entirely for present purposes the difficulty that the NDA has had in presenting a coherent explanation for how the score was in fact arrived at – which in my judgment is not a promising start – I turn to the substantive criticisms of what the RSS Tender Submission failed to contain. It is correct that each element was concerned with a different issue or area and called for something different by way of response. The question was whether, in each case, the evidence gave the SMEs confidence that the bidder could deliver what was called for in the context of each specific element. The NDA rightly point out that the matter or matters under consideration are those of evaluative judgement (in which a margin of appreciation is available). It is therefore unsurprising that evidence might be considered by the SMEs to be helpful under one element, but of less assistance (or even of no assistance at all) under another. That is of course correct, but when the reasons explained for a particular deficiency are that there is nothing dealing with a particular subject (such as debriefing, which is a real as opposed to hypothetical example) yet that subject *is* dealt with elsewhere, that criticism cannot sensibly be met by stating that it was being considered under a different element and not the one under consideration. There is either material present that deals with debriefing, or there is not. If the latter is stated by the SMEs – "debriefing is not dealt with" –

yet it is, that is not an evaluative judgment on the quality of the material dealing with debriefing. It is a statement that is wholly factually incorrect and, in my judgment, manifestly erroneous. It strongly suggests (if not definitively states) that the material on debriefing contained in the Tender Submission was simply not considered at all, because the SMEs had not even realised it was present, and had not even read it.

701. At times, the NDA's approach to the reasons for evaluation appeared to border on the cavalier. Reasons given to a dissatisfied tenderer are not set in stone, and are obviously produced in a different environment and against a different timescale to, say, those in a detailed witness statement which takes some weeks to prepare and will probably have more time available for the task. But the broad thrust of why an evaluation was concluded as it did, particularly when applying detailed scoring criteria to many separate requirements, as here, ought to be discernible. However, in order to arrive at the answer to the Agreed Issue, it is necessary to consider each of (a) (b) and (c) separately.

Element 303.5.3 (a) "Removal and debriefing"

702. The NDA stated in the Consensus Rationale that RSS did not:

> "…talk about debriefing or where they have undertaken these process [sic] previously". {U/4/27}

In the 11 April 2014 Letter the NDA stated that:

> "…the only reference in the evidence section...to debriefing was in the title." {U/23/10}

This is simply wrong in fact. Energy Solutions submits that the SMEs focussed on one section in one part of the supporting evidence provided without reading those parts as a whole, together with that evidence that was provided in support. However, I have found that a possible explanation does not assist. The situation has to be considered to see if there is a manifest error. If there is a manifest error, hypothesising about why it occurred does not seem to me to advance the matter to any particular degree.

703. The Tender Response on page 8 {Q/17/6} described the process, including debriefing the individual leaving, making plain that it was based on its experience of managing changes over six years as the PBO for Magnox and that:

> "the approach has been previously applied in a timely and successful manner, including for the integration of Magnox North and Magnox South and the leadership changes made in order to deliver the MODP."

That also explained when the process has been applied before. This was then referred to again in the supporting evidence section in order to support the statement that:

> "…throughout our tenure we have successfully incorporated new talent into the established teams" {Q/17/9}.

That is the "experience" including "the use of exit interviews" referred to later in the submission {Q/17/11}.

704. Ms Hanson in her cross-examination changed the focus of the complaint into one that RSS's Tender Response did not explain "to me properly what debriefing is" as it did not "go into detail of exactly what it is" {Day16Z-CON/10}. In a series of passages relied upon by the NDA, because they were reproduced verbatim in the NDA's Closing Submissions, she said the following.

> {Day15Z-CON/18-25} {Day16Z-CON11:20-25} and {Day16Z-CON/15:7-11}:
>
> "A. To a point I do. I agree that it shows a date. What I don't agree with is that it explains to me properly what debriefing is. They talk in the evidence concerning exit plans, handover plans, but then don't go into detail of exactly what it is. And therefore, it was very difficult to establish evidentially how or what or where they had done debriefing before.
>
> *The places and time were then put to the witness.*
>
> A. No, it absolutely -- in that section it mentions a place, Magnox North and South, which are the combined Magnox sites -- there are ten of them -- and a date. But what it doesn't do, by mentioning those, the place and the date, is it still doesn't make the link to debriefing and that was the bit that was missing
>
> *The places and time were then put to her.*
>
> A. I come back again to say I wasn't satisfied with debriefing, particularly from an evidence point of view. I bring you back to the evidence section, which doesn't give me details of what -- where they have used the debriefing part before"
>
> [emphasis added by the NDA in all cases]

705. In my view, this series of answers demonstrates the difficulty in grasping exactly what the factors were in the RSS Tender Submissions that led to the score. Firstly, it was said RSS did not state where they had done debriefing before, or when, and did not state what debriefing was. When these entries were pointed out, the complaint became that RSS did not make "the link to debriefing". The NDA case became that the link was missing. Then the witness said the evidence section did not give details "where they have used the debriefing part" in the evidence section.

706. This is not supportable and I reject Ms Hanson's attempts to portray the RSS Tender Submission as deficient in this way. Firstly, the meaning of "debriefing" did not have to be explained in the Tender Submission in my view. It is a widely

understood term in the industry (if not in society) and it has a dictionary meaning. Secondly, the word appears five times in the first paragraph including in the actual heading of the response. Had Ms Hanson and the other SMEs really needed to have it explained to them – which I reject, and which no RWIND tenderer could be expected to have known– this would have appeared in the Consensus Rationale. However, debriefing was sufficiently explained in the Tender Submission in my judgment. The numerous references to debriefing make it clear that the complaints that the RSS tender did not "talk about debriefing or where they have undertaken" this before, or that the "the only reference in the evidence section...to debriefing was in the title" are simply factually wrong and can be seen to be wrong almost instantly. Thirdly, the Tender Submission when read "globally" did identify where and when it had been used before, both by date and place. Ms Wilson for Energy Solutions explained in her evidence the structure of the supporting evidence section, and also that these should be considered "as a whole" or "holistically". Ms Hanson stated that this is what she had done {C/12/5}, but she also stated that she did *not* consider the SMEs were required "to take into account the Evaluators' own knowledge of matters that are not properly explained or described in the RSS tender response". In my judgment, the whole purpose of having SMEs was that they would have such general or specialist knowledge, and this would be used when they were performing their evaluation. They were, after all, experts in the subject matter.

707. The NDA also submit that the cross-examination of Ms Hanson was limited and that a large part of her evidence was "unchallenged" and therefore should be accepted. The parties in this case were kept to the agreed trial timetable, although there was some modest adjustment to that throughout the trial as sometimes happens. It was not possible to cross-examine on every single point, but I am satisfied that the main areas of challenge were put to Ms Hanson by Mr Hunter QC for Energy Solutions. I have also carefully considered all of Ms Hanson's written evidence, as I have with all the witnesses, and not just the parts upon which cross-examination occurred. There is no doubt that in the bulk of that evidence she gives a lengthy account of what was done. However, what was done is not as useful as *why* this was done. As an example, in paragraph 132 she stated the following {C/1/30}:

> "As I explained above (in relation to Requirement 5.2), the purpose of these changes was to clarify that the issue with these elements of the response was not about the quantity or volume or evidence, but rather the extent to which, in our opinion, they gave confidence in delivery."

Given that quantity, volume and evidence seems to me to be a fairly comprehensive list of the information required, I do struggle with the concept that there was no "issue with these elements" – which means nothing was wrong with them – but there were valid more general, subjective and vague concerns about "confidence in delivery", and that this is something different to the content being acceptable.

708. Simple and clear explanations or reasons do not have to be particularly lengthy to be useful, or cogent. The NDA had a great deal of difficulty in providing these.

709. In my judgment, there is no basis for applying the SORR in the manner contended for now by the NDA as a matter of construction. The proper approach was to have scored the Requirement in accordance with Table 2. In addition to that, the criticisms of the deficiencies in the RSS tender in this respect regarding (a) are wholly misplaced and manifestly erroneous.

Element 303.5.3(b) "Incorporating the selected candidate into the established team"

710. In relation to 5.3(b), "Incorporating the selected candidate into the established team", the first criticism by the NDA relating to element (a), debriefing, was maintained. That is flawed for the reasons I have given in above in relation to 5.3(a).

711. The remaining criticism was that RSS's Tender Response "talks about the individual not the team impact and doesn't mention where this process has been used before" {U/4/27} and in the 11 April 2014 Letter that:

> "…there was... [no] reference to… how the individuals would be integrated into the team". {U/23/10}

That criticism again is clearly wrong and again reflects a failure by the SMEs to take into account the full RSS Tender Response properly. The processes for incorporating candidates into the established team proposed to the extent not covered by 303.5.1 were numerous:

(1) the handover process (described in section 303.5.3(a));

(2) post-selection development of nominated staff into a cohesive, strategic and management unit (described in section 303.5.2(b));

(3) the training and development process with particular reference to "on-boarding" (described in section 303.5.2(c)); and

(4) assessment and selection of a balanced team to aid team integration (described in section 303.5.2(a)).

712. These four processes were all concerned with the subject matter of integrating individuals into a team. The response beginning at {Q/17/6} included the following relevant entries. Section 303.5.2(a) described "how we assess and select a balanced team, which aids team integration"; the handover process was one of the arrangements for incorporating candidates into the established team; and section 303.5.2(b) described "the development of a strategic cohesive team, with particular reference to team building initiatives". The key outputs of the processes under section 303.5.2(c) included:

> "…structured handover and integration of new team members
>
> [and]
>
> "….robust development plans to support individual and team development with any gaps filled".

713. It cannot therefore be stated that:

> "…there was... [no] reference to…how individuals would be integrated into the team".

This, again, was plainly incorrect. The SMEs had considered these outputs and supporting evidence for these relevant processes. The elements covered by Requirement 303.5.1 that were of relevance to 303.5.3 were 303.5.1(e) and 303.5.1(f) which were dealt with at the outset of the response to 303.5.3 {Q/17/3} and {Q/17/5}. Requirement 303.5.1 was given a score of 5 taking into account the processes directed at each of the elements (a) to (f). Ms Hanson accepted this {Day15Z-CON/144}.

714. There was no criticism in the Consensus Rationale about the processes referred to, or the supporting evidence provided for, with respect to 303.5.2(a) and 303.5.2(b), with which the SMEs were satisfied. Ms Hanson confirmed this in her oral evidence {Day15Z-CON/157}. The explanation proffered in evidence that there was a difference, because Requirement 303.5.2 was concerned only with setting up a new team at the outset, whereas 303.5.3 was concerned with incorporating new individuals into an established team, has no merit. If anything, the latter process is likely to be easier because there are likely to be fewer individuals moving as replacements into an already-established unit. It cannot be sensibly suggested that incorporating one new person into a team already established and working on a project – or all the projects – will present higher or more complex challenges than establishing such a team ab initio.

715. The NDA's Opening Submissions at Appendix 1 paragraph 17 {AA/3/4} stated that the SMEs' reservations related to "the debriefing aspect". These submissions went on to say that the information provided:

> "…was too generic about the handover process, and lacking in specifics about debriefing and how it had been carried out so as to capture the knowledge and experience of outgoing staff".

This was taken from paragraph 144 of Ms Hanson's first witness statement {C/1/32}. Regardless of the fact that this did not appear in the Consensus Rationale, it is a criticism (or number of criticisms) that cannot be sustained.

716. RSS's Tender Response to 303.5.3(a) dealt with removal, debriefing and handover {Q/17/6}. The debriefing process includes agreeing terms of reference for handover and knowledge transfer to the new Nominated Staff member within a timescale that enabled the best possible transition for the business and individuals involved. The activities in the handover period (of at least four weeks) included not merely the use of a handover document but shadow working for a suitable period, as well as initiating "on-boarding" arrangements and team integration activities. A handover period of three months was given (303.5.3(a), in the second bullet point under "Handover") as a specific example. The "Rationale" section {Q/17/6} stated that the key elements in the existing approach used had:

> "…ensured smooth transitions and <u>transfer of knowledge</u> from outgoing to incoming members of the team"

> [emphasis added] and
>
> "has been previously applied in a timely and successful manner, including for the integration of Magnox North and Magnox South and the leadership changes made in order to deliver the MODP".

This was referred to again in Part A of the supporting evidence section {Q/17/9} where it was also stated that:

> "…throughout our tenure we have successfully incorporated new talent into the established teams, successfully managing handovers and exits, fully inducting new members into the team and ensured knowledge has transferred".

717. Whether these complaints suggest "a focus on one section in one Part of the supporting evidence provided without reading those parts as a whole together with what they intended to provide evidence to support", as Energy Solutions submits, or not, they do demonstrate in my judgment that the SMEs for this Node and this element were simply not reading the material together, as a whole, as the SORR required them to do. There was no necessity for specific examples to be included, and this cannot be read into any part of the SORR in relation to these items. An RWIND tenderer could not know that specific examples were required. A bidder had to describe the processes it would put in place and the anticipated outputs from them. When the material is read as a whole, the specific criticisms that were raised by the NDA can all be dismissed as being wrong in fact and manifestly erroneous. Applying the SORR to the material that was provided in the RSS Tender Submission leads to the conclusion that the RSS Tender Submission, when considered against the scoring criteria in the SORR, merits a score of 5. Accordingly, Energy Solutions is entitled to have the RSS Requirements re-marked to the one that would have been given, namely a score of 5.

718. The answer to the issues are therefore as follows:

Issue 34. The score of 3 was not lawfully awarded and there were no deficiencies in the material provided in the RSS Tender Submission concerning the processes addressing elements (a) and (b).

Issue 35. The criticisms of the supporting evidence made by the NDA disclose a manifest error of assessment.

Issue 36. The issue raised by the NDA that the score that should lawfully have been awarded to RSS was 2 rather than 3 fails.

The score that would have been awarded had the material been assessed on a lawful basis and upon correct application of the SORR was 5.

The CFP tender submission

719. Scoring or evaluating a tender such as this is not an entirely subjective exercise. It does include large amounts of subjective judgment, but this must be applied

against objective criteria. The litmus test was "confidence in delivery". Ms Hanson explained that the difference in the scoring of the two bids (one from RSS, and the winning bid from CFP) was because the CFP supporting evidence, whilst limited, *did* give the evaluators confidence in delivery, whereas the RSS supporting evidence did not {Day15Z-CON/114}. Unless such a statement can be explained or substantiated with reasons, then it runs the risk of being no more than mere subjective assertion. The NDA had considerable difficulty in explaining the reasoning that led to the result of the evaluation, and in my view this demonstrates how the evaluation did stray towards, and into, the territory of purely subjective "feel". Ms Hanson's statement also amounts to simple assertion with inadequate, or indeed flawed, reasoning to justify it, so far as the RSS Tender Submission is concerned.

720. RSS raises particular objections concerning the score given to CFP under this Node.

721. On the first Requirement in question, 303.5.2, CFP was given a score of 5 whereas Energy Solutions maintain it should have been a 4. On Requirement 303.5.3, CFP was given a score of 3 whereas Energy Solutions maintain it should have been a score of 2. Finally, Requirement 303.5.4 was a Pass/Fail with CFP achieving a Pass, whereas Energy Solutions maintains it should have been awarded a Fail and eliminated from the competition.

722. I have considered the correct approach to construction of the SORR and the marking for Requirements 303.5.2 and 303.5.3 in the preceding section above. It does not follow that simply because RSS has succeeded in establishing a manifestly erroneous approach by the SMEs in the evaluation of the RSS Tender Submission, the CFP tender must also then be reconsidered or the score reduced. Reconsideration by the court would only arise if there was a manifest error in the way the CFP tender had been evaluated.

723. In any event, so far as Requirements 303.5.2 and 303.5.3 are concerned, the reductions in the CFP score were only pleaded in the alternative by Energy Solutions. Given I have come to the conclusion that had the SORR been correctly applied, RSS'S tender would have increased to a score of 5 on each of those, then these alternative questions do not arise.

724. However, so far as Requirement 303.5.4 is concerned, this is a Pass/Fail Requirement for which CFP was awarded a "Pass". Energy Solutions submits that the correct score should have been a "Fail". I deal with this issue in that section of the Judgment entitled "CFP Threshold Issues". Section C1 of this judgment deals with the relevant principles, and section C3 (which is in Confidential Appendix 3) deals with the relevant Node 303, Nominated Staff Appointment.

B5. Cost contingency – Nodes 110, 112, 113

725. This originally concerned Nodes 110, 112 and 113. However, it is only the latter that needs consideration due to a concession on Nodes 110 and 112 by the NDA. The issues are therefore:

Nodes 110 and 112: Requirement 5.9(c)

Agreed Issue 37. It is conceded by the NDA that a score of 5 rather than 1 should have been awarded to RSS in respect of each of these Requirements. This will not necessarily result in an increase of the RSS Tender Score due to the "cap" mechanism that restricted any bidder from being awarded more for a Costs Node than the score achieved on the relevant Technical Scope and Methodology Underpinning Evaluation Node.

Node 113: Requirement 5.9(c)

Agreed Issue 38. The issue is whether a score of 3 (rather than 5) was lawfully awarded to RSS in respect of this Requirement given the form of risk register provided in the RSS tender response in respect of this Node.

Agreed Issue 39. Within that issue, specific sub-issues are:

(i) Whether the risk register was lawfully treated as being relevant to Requirement 5.9(c);

(ii) Whether the conclusion that there was a deficiency in the supporting evidence was a lawful one on the basis of the risk register and the edited BCR response supplied to the evaluators;

(iii) Whether it was lawful to supply the BCR response to the evaluators in redacted form (rather than supplying it in full or issuing a further BCR), and (if not) whether that would have made any difference to the conclusion reached.

(iv) If the risk register was irrelevant to Requirement 5.9(c), the Defendant contends that a score of 3 (rather than 5) should have been awarded under Requirement 5.9(d).

726. There were a large number of Nodes concerned with Costs, or what is also called Costs Underpinning. Their general purpose {J/10/289} was:

> "…for Bidders to demonstrate the way in which they have calculated their costs in respect of the Sample Projects requirements in order to give the Authority confidence in the Phase 1 Target Cost and the Phase 2 Target Cost . . ."

In the case of each Sample Project, Requirement 5.9 dealt with "Contingency" {J/10/294}. Bidders were required to provide:

> "(a) The contingency declaration or contingency related bounding statements;
>
> (b) The methodology used for estimation of contingency, which must clearly set out the approach to estimating uncertainty, discrete risks and utilisation of management judgment (where applicable);
>
> (c) The justification for use of this methodology; and

> (d) The reasoning for identifying any risk-based/contingency weighted activities, and a description of such risk-based/contingency weighted activities".

Requirement 5.9(c) was identical in the different Nodes. It was to be evaluated in accordance with costs scoring Table B {J/10/355}. Requirement 5.9(d) was to be evaluated in accordance with cost scoring Table G {J/10/363}.

Node 113: Requirement 5.9(c)

727. This Node concerned what was called Sample Project 4, Historic ILW Management at Hinkley Point A and Oldbury. Mr Peel gave evidence on this Node for Energy Solutions and Ms Thomas for the NDA.

728. ILW is Intermediate Level Waste, that categorisation being in relation to its level of radioactivity. Under Table B, to obtain a score of 5, the response should have contained, in the opinion of the SMEs, both detailed reasoning/justification to support the bidder's chosen method/approach, and also should have provided detailed evidence to support the reasoning/justification given. If the evidence to support the reasoning/justification was only "limited", then a score of 3 would be awarded. RSS was awarded a score of 3, whereas Energy Solutions claim that had the evaluation been carried out lawfully and without manifest error, the correct score would have been 5.

729. The fundamental point in these issues in relation to this challenge relates to the extract from the Risk Register. The Risk Register extract that was included in the RSS Tender Submission was one that on its face related to Oldbury, and not Hinkley Point A. RSS maintained a Master Risk Register, and extracts from that were separately included in the different Nodes that required such material. The extract in respect of this Node and Requirement was in a Table headed "Risk Register (Threats/Opportunities)" {Q/11/25} and {Q/11/26}. The extract identifies 13 separate risks, each with their own separate Risk ID.

730. The Consensus Rationale for awarding RSS 3 stated {U/4/14} that:

> "RSS appear to have provided some evidence to explain the utilisation of the specific methodologies presented in relation to this type of project.
>
> In the evaluators' opinion provides limited evidence to support the reasoning/justification given".

731. Energy Solutions states that whether or not such evidence was provided was irrelevant for the purpose of the assessment of Requirement 5.9(c) since that concerned the "evidence to support the reasoning/justification given" for the "methodology" used for the estimation of contingency, not any evidence to be used in its application of or "awareness of risks" at particular sites. I reject this submission. Analysis, or awareness, of risks at the two sites that are the subject matter of this Node cannot be said not to be relevant either to methodology, or reasoning or justification, or indeed the evidence necessary to support the reasoning and/or justification. This would be the case in any event regardless of the

subject matter, simply as a matter of construction. "Evidence to support" either reasoning or justification cannot be said to be entirely divorced from the bidder's consideration and/or awareness of risk. This becomes an even more compelling interpretation when one considers that the subject matter of this Node concerned Intermediate Level Waste (which is radioactive). It simply cannot be said, in my judgment, that awareness of risk in connection with such subject matter is not relevant when assessing "evidence in support". It also arises within consideration of "methodology", because the description of this within Requirement 5.9(b) includes:

> "Both estimating uncertainty and discrete risks contribute to the estimation of contingency…..discrete risk events with likelihood (probability) and cost/schedule impact ranges were identified and tracked in the iCAPS Master Risk Register". {Q/11/123}

732. I consider that Energy Solutions' approach to this is wholly artificial. Evidence of the risks, or consideration of the risks, at either of the sites is in my view directly relevant to give the SMEs confidence that the methodology had been correctly applied for that site or Node. Energy Solutions argue that this was outside the assessment of Requirement 5.9(c) but I disagree. In my judgment, that was within the scope of Requirement 5.9(c).

733. The NDA argued in the alternative that if such evidence *was* irrelevant to Requirement 5.9(c), then RSS should have been awarded a score of 3 (rather than the score of 5 that was in fact awarded) in respect of Requirement 5.9(d). Energy Solutions submits that this is a new point that is not pleaded and was "unheralded in the NDA's Opening Note". I accept that it was not pleaded, and given it was not dealt with in Opening either, I would not categorise this as a purely technical pleading objection of a type to be given short shrift, as Energy Solutions' opportunity to deal with it is heavily limited. However, and in any event, that Requirement meant that bidders had to:

> "…provide: (i) the reasoning for identifying any risk-based/contingency weighted activities; and (ii) a description of such risk-based/contingency weighted activities". {J/10/294}

The response to this Requirement was to be evaluated in accordance with Table G {J/10/363}, not Table B. However, that would only arise if the consideration of risk could be said to be wholly unconnected with the evidential assessment necessary under Requirement 5.9(c). In my judgment it cannot and so this alternative does not arise. It is wholly artificial for Energy Solutions to concentrate on the fact that the word "risk" does not appear in Requirement 5.9(c) and hence state that it is irrelevant. Consideration of risk was directly relevant to the SMEs' view regarding how comprehensive the evidence was. However, if I am wrong about that, then the consideration of risk would indeed arise under Requirement 5.9(d). I do however consider that the risk register extract was properly considered under Requirement 5.9(c).

734. The point in issue therefore on the scoring of this Requirement is indeed the point relating to risks associated with the Hinkley site, what were called "Hinkley risks", and the Risk Register Extract that was provided with the Tender Submission.

735. Mr Peel had been involved in preparing this part of the Tender Submission for RSS and he explained that he considered that the most appropriate way to account for the risks and uncertainties associated with the project as a whole, was to calculate the Contingency required for each individual site. He had not considered it appropriate to calculate Contingency at a Node level. Accordingly, as he put it:

> "RSS therefore calculated the Contingency value in the overall Cost Proposal on a site by site basis to ensure that it accurately captured and accounted for the potential impact of the risks and uncertainties associated with the scope of work to be undertaken on each of the sites to deliver them to their applicable states." {B/3/16}

There is nothing wrong with such an approach; indeed, it seems to me to be eminently sensible. However, it means that both of the sites fell to be considered under this Node, as one would expect from the title of the Node and the description of the Sample Project.

736. The issue in these proceedings arises in the following circumstances. Firstly, this Node deals with both the Oldbury and Hinkley Point A sites. Secondly, the only place where risks associated with each particular site are identified in the Tender Submission was the extract from the Risk Register that was provided by RSS. There was no cross-referencing or incorporation exercise to the Master Risk Register, which did not form part of the tender submission and was not available to the SMEs. Thirdly, on its face, the extract at {Q/11/24} does not deal with Hinkley Point A risks – on its face it deals solely with Oldbury risks.

737. Ms Thomas was the lead SME for the NDA on this Node (as well as others) and explained in her evidence she noticed that:

> "RSS had only provided a risk register for Oldbury but had not provided a similar risk register for Hinkley". {C/1/32}

This led to the issuing of a BCR to which I will return. However, on the face of the register extract provided, Ms Thomas was, in my judgment, entirely justified in coming to this conclusion. Mr Peel gave evidence about this and was cross-examined. His explanation about the way in which this was prepared is as follows {B/8/12}. It should be noted that this Node was also called Sample Project 4 or SP4.

> "The Master Risk Register comprises 26 columns or categories of information. Many of these columns are included purely for internal tracking purposes. The Risk Register Extract was formatted to display the information to the NOA in the clearest manner possible within the page count allowed - it therefore by contrast includes only 9 columns, which were also re-labelled when the Risk Register Extract was formatted for inclusion in

> the response to node 113. In order to prepare the Risk Register Extract, we filtered the Master Risk Register by selecting "SP4 ILW Oldbury" in the column E of the Master Risk Register, which is titled "Node". Then, certain columns were removed and other columns were re-labelled for the reasons explained above. To clarify, we did not include "Hinkley" in the name of the category "SP4 ILW Oldbury" simply for space/formatting reasons. The intention of this category was always to display the risks relating to ILW processing for both Oldbury and Hinkley as Node 113 was about "Historic ILW Management at Hinkley Point A and Oldbury".

738. It can therefore be seen that although the intention was to include all of the risks in the extract from the Master Risk Register that related to this Node, the extract that was included did not on its face describe these risks as being Hinkley risks. The column "Site" in fact states simply Oldbury in every instance. I therefore consider that Ms Thomas' reading of this table was not only wholly accurate, but was the only sensible way in which the extract could be read, given how the columns were labelled by RSS. Mr Peel stated in his Second Witness Statement {B/8/13}:

> "The label used in the site column heading in the Risk Register Extract is, if viewed in isolation, not wholly accurate as it refers only to Oldbury. I do not know how this typographical error occurred (it is possible that the error occurred when the filtered version of the Master Risk Register was extracted for inclusion in the response to Node 113), however, I have compared the content of the line items in the Risk Register Extract to those in the Master Risk Register when it is filtered by the category "SP4 ILW Oldbury" and the information is consistent."

739. This appears to amount to evidence that the table included all of the relevant risks that should have been identified for the Sample Project, but that these had not been labelled as such. The label in the Tender Submission included not only the left hand column "site", but also the extreme right hand column which was where the site code was found. These were all Oldbury codes, as Mr Peel accepted in cross-examination {Day4/108}:

> "Q: I'm sorry, Mr Peel, just before we can go on to the bidder clarification request, can we go back to {Q/11/125} for a moment and leave it on the right-hand side, thank you. I have just been told something that I hadn't previously realised: that the right-hand column, the WBS – is that the work breakdown scope?
>
> A. Yes, sir.
>
> Q. I'm told that those codes are specific to particular sites within the NDA estate. Do you know about that?
>
> A. Yes.

> Q. Right. Do we see any Hinkley codes in that column?
>
> A. Those are all for site 26, which I believe is Oldbury."

740. Although Mr Peel then went on to explain how that had occurred, the fact of the matter is therefore that both the left hand, and right hand, descriptive columns of the table only identified Oldbury or the Oldbury site code. Neither column heading included reference to Hinkley.

741. Mr Hunter QC put a series of points in cross-examination of the NDA witnesses concerning the other references within the text in the extract which referred to Hinkley. However, this is not sufficient in my judgment to have those entries in question properly assessed or categorised as "Hinkley Point A risks" by any sensible reader who was taking the table at face value. Mr Peel put it this way:

> "If Ms Thomas looked only at the column heading and did not consider the content of the Risk Register Extract, then I can understand why that may have led her to the (erroneous) assumption that RSS had 'only provided a risk register for Oldbury but had not provided a similar risk register for Hinkley."{B/8/13}

I do not accept that Ms Thomas' assumption was erroneous. It was not just the column heading that referred solely to Oldbury, it was also the site specific coding too. Certain Oldbury risks did include reference to Hinkley within their description. However, that is not something that makes those risks what would be called "Hinkley risks", nor would it lead the reader to conclude that the extract did include all (or even any) of the relevant Hinkley risks.

742. Mr Peel maintained that the risks associated with Sample Project 4 on the Master Risk Register at RSS would be the same as those in the table – in other words, he maintained that it was a labelling problem, not one of substantive content. That may or may not be accurate, but the matter has to be approached from the point of view of the SMEs at the time, and the information available to them at the time. It must be remembered that they would not have had Mr Peel's evidence. Even if Mr Peel were right, I do not accept that the SMEs should have realised this, or even that the risk register extract should be read in the way contended for by Energy Solutions. It might have been a formatting issue when the extract was taken from the Master Risk Register, it might have been a typographical error, or it may have been a coding peculiarity, but there is nothing on the face of the table in my judgment that would, or should, have led the SMEs to come to any conclusion other than the one that Ms Thomas reached at the time, namely that the extract only concerned Oldbury risks.

743. Ms Thomas and her team did however raise a BCR on this very subject. This was raised on 3 December 2013 and asked the following {S/37/1}:

> "RSS to confirm that the risk register provided within Volume 3 Book 10 113.3 Contingency section is in support of Oldbury site activities only. RSS to response with a yes or no answer.

> If 'yes', please provide referencing where the Hinkley Risk Register can be evidenced by the Authority."

Although the original asked RSS "to response", this obviously meant "to respond".

744. The wording of this BCR is criticised by Energy Solutions because it is said that, had the answer been "no", there would have been no ability to provide further referencing. However, although Ms Thomas said this would have generated another BCR {Day 15Z-CON/39}, I do not consider this criticism of the NDA to be justified. BCRs were designed to seek clarification, not elicit further information. Had the answer been "No", I am not sure why Energy Solutions considers that RSS could or should have been entitled to provide further information. Either Hinkley risks had been properly included in the Tender Submission so that they could be taken account of in the evaluation, or they had not. Asking a "yes/no" question is not objectionable in my judgment. In any event, that is hypothetical because the answer provided by RSS was indeed "yes".

745. The rather lengthy answer that came from RSS was as follows {S/37/1} – {S/37/2}:

> "Yes, the risk register that we have provided within Volume 3 Book 10 113.3 Contingency section is in support of Oldbury site activities.
>
> Many individual risks on our Master Risk Register are applicable to multiple sites and multiple Nodes. Although RSS identified Hinkley risks and opportunities as a basis for our risk modelling and contingency calculation applicable to Hinkley site, we have found that we did not appropriately code those risks as applicable to this Node. We included the results of our risk modelling and contingency calculation within Volume 5, although we did not include the complete Master Risk Register in Volume 5. We will gladly provide evidence of the Hinkley risks if you deem it appropriate.
>
> (The Authority will note that several Oldbury risks within this Node submission make specific mention of Hinkley risks, and when appropriate these particular risks have been coded to impact the contingency calculation for both sites.)
>
> RSS modelled and applied contingency on a site-by-site basis as found in the Sample Project 4 Volume 5 (V5 | 117 | 446 of 476), a copy of which accompanies this BCR response. Site-level contingencies have been applied to individual site costs, deemed adequate to cover the costs associated with the risks. The total application of contingency across the whole evaluation node can be found within Section 113.1.4.2 Upper CWBS Level Base Cost Estimate Summary Cost on Page V3|113|8 of 239."

746. Even if the whole of this response had made its way from the CCT to the SMEs dealing with this Node and this Requirement, the first sentence alone demonstrates in my judgment that Ms Thomas was entirely correct in her belief. The extract was indeed as it appeared, namely dealing with Oldbury risks. This was confirmed by RSS in its answer to the BCR. Further, two particular sentences are of note. The first is "we have found that we did not appropriately code those risks as applicable to this Node"; the meaning of this could sensibly be said to be acceptance by RSS of a mistake. Had the risks been "coded appropriately", the suggestion seems to be that some other outcome would have occurred. Further, the sentence "We will gladly provide evidence of the Hinkley risks if you deem it appropriate" also suggests that they were not to be found elsewhere within the existing Tender Submission. This seems to me to constitute an offer to provide something further that was not at that point included within the Tender Submission. Both of those justify the stance taken by the NDA at the time and in these proceedings, to the effect that Hinkley risks were not included.

747. The whole BCR response did not make its way to the SMEs. The CCT were vigilant in considering the contents of all the BCRs that came in from bidders, before their contents were uploaded into AWARD, to ensure that only genuine clarification was provided to the SMEs. Therefore the two middle paragraphs of the answer were redacted. The SMEs did not see the text of those paragraphs.

748. Energy Solutions maintain that this was unfair, and that similar "beyond clarification" responses by CFP were uploaded without redaction. This argument does not assist Energy Solutions in my judgment, and I reject it. Each BCR and the answer provided has to be considered individually. Just become some were uploaded without redaction does not, in my view, mean that all the BCRs should have been. Also, Energy Solutions is in difficulty in this respect. Once it had confirmed to the NDA that the extract was solely in respect of Oldbury risks, RSS must have realised that it had a serious problem. It could not, by the rules of the competition, provide further detailed submission or additional information. However, equally it can only have wished not to draw too much attention to what was, in my view, an error. I consider that the full text of the BCR seems to have been designed to provide a sufficient smokescreen for RSS to answer "yes" and provide more information by way of reference and make an offer (which it did) to try and bolster the response based on material already submitted. It did not however – nor could it – provide the type of information provided in Mr Peel's witness statements for a whole host of reasons, not least that this information was nowhere contained in the Tender Response itself.

749. The complaint by Energy Solutions that a further BCR should have been raised by the NDA seems to me to be an exercise in avoiding responsibility for the error which had been made by RSS in the first place. It was the RSS team who had put the Tender Response together; it was RSS who tried to remedy the situation by the answer to the BCR. In neither situation was the correct approach to Hinkley Point A risks adopted, either in codification, labelling, or other identification. It is not an answer to the lacuna in Hinkley Point A risks for Energy Solutions to complain that the NDA should have issued a second BCR. In my judgment, although the NDA could, in its discretion, have done so without objection, there was no manifest error in the NDA deciding not to do so. It had already raised one BCR

seeking confirmation that the extract was solely in respect of Oldbury, as it appeared to be. That confirmation was provided.

750. The NDA submits in paragraph 531 of its Closing Submissions that the challenge to the redaction of the BCR is not pleaded by Energy Solutions and "would now be out of time if pursued" and should not be considered. Although I made it clear to the parties during the trial that technical pleading objections were to be discouraged, I have in any event considered the point, even if not pleaded. The case was opened for Energy Solutions by Mr Howell QC who made clear the stance taken in relation to BCRs, and all the points were properly pursued by Mr Hunter QC with the NDA witnesses. All of the relevant material is before the court, regardless of the precise wording of the relevant paragraphs of the many pleadings in the three actions. However, even had the whole BCR been uploaded into AWARD in an un-redacted form, I consider the correct score would still have been the one that was awarded. Certainly, there was no manifest error made by the NDA.

751. Energy Solutions also rely upon the fact that this Requirement was given a score of 5 on every other Node in which it, in identical terms, appeared. However, Mr Peel accepted that the only differences between the contingency parts of each Node were the Risk Register extracts. Accordingly, the fact that such an error by RSS was not made in the other Nodes, or to put it more neutrally, the legitimate concerns that the SMEs had on this Node were not present in those other Nodes, does not matter. In my judgment, there was no manifest error in the way that the NDA evaluated this Node and the score therefore remains unaltered.

752. The answers to the Agreed Issues 38 and 39 are therefore that the score of 3 was lawfully awarded. The sub-issues to Agreed Issue 39 are to be answered as (i) Yes, the risk register was lawfully treated as being relevant to Requirement 5.9(c); (ii) The conclusion that there was a deficiency in the supporting evidence was a lawful one on the basis of the risk register and the edited BCR response supplied to the evaluators, and even if it were not it would have been lawful on the basis of the unedited BCR response; (iii) It was lawful to supply the BCR response to the evaluators in redacted form (rather than supplying it in full or issuing a further BCR) and it would not have made any difference to the conclusion reached in any event; and (iv) this does not arise.

B6 Portfolio/Programme/Project Management ("PPPM") – Node 307

753. This Node concerned the overall strategy, and the creation of what was called a single "portfolio" which encompassed all 12 of the sites, with the programme and project works being performed over the entire contract period. This Node therefore included Sections and Requirements with headings such as Portfolio Management Strategy, Financial Management, Organisational Governance and other items such as Resource Management. Mr Board gave evidence for Energy Solutions on this Node; the NDA evidence was given by Mr Miller (for both Requirements in question) and Ms Thomas.

754. The issues in these proceedings arise under two separate Requirements within this Node and are as follows:

Requirement 5.2(d)

Agreed Issue 40. The issue is whether a score of 2 was lawfully awarded to RSS for its response in relation to programme management, on the basis that the omissions identified by the Defendant constituted "a material omission".

Requirement 5.3(d)

Agreed Issue 41. The issue is whether a score of 4 was lawfully awarded to RSS for its response in relation to project management, on the basis that in the respects identified by the Defendant there were non-material omissions in it.

755. The lead SME for this Node was Ms Livesey. She still works for the NDA and I was told that she attended court, although she was not called to give any evidence and did not provide a witness statement. Energy Solutions relies upon that as demonstrating that she could not or would not support the evidence in fact given in relation to this Node by Mr Miller, a relatively junior and inexperienced SME whom the NDA did call as a witness. Mr Board has worked in relation to Magnox sites since October 1991 with extensive experience of portfolio, programme and project management. Prior to Mr Miller's involvement in the competition in September 2012, which was 11 months after he had joined the NDA, he had not managed any NDA Projects nor any Programmes {Day16Z-CON/105}. It is correct to describe Mr Board's wealth of experience in the nuclear industry as putting him at a considerable advantage, so far as substantive evidence relevant to this Node, over Mr Miller. I have dealt separately in this judgment with the principles governing adverse inferences being drawn from failures to call witnesses.

756. The two Requirements are 5.2(d) and 5.3(d). These are respectively Organisational Structure and Internal Resources; and Project Development, Sanctioning and Management of Budgets. For the first, RSS was given a score of 2 when Energy Solutions maintains it should have been a 5, had the evaluation been done without manifest error. For the second, RSS was given a score of 4 when it is alleged it should also have been a score of 5.

Requirement 5.2(d) Organisational Structure and Internal Resources

757. The SORR stated the following in relation to Requirement 5.2(d) {J/10/83}:

> "5.2 The Bidder must provide its programme management strategy explaining why it has chosen this approach, the expected outputs, including any relevant benefits and examples of how elements of its proposed strategy have been applied in practice. The strategy must include…
>
> (d) The organisational structure (covering senior management and programme management level) which will be deployed for the management of programmes, including any internal resources, specific responsibilities (including R2A2 documents) for key personnel and governance arrangements at both PBO and Magnox SLC and RSRL SLC level that would be applied to programme management and the reasons for using this type of structure and how it will contribute to the successful delivery of the SLCA and the Client Specification."

758. The Requirement was to be scored in accordance with Table 2 in the Node itself {J/10/87}. The relevant parts of the scoring criteria for present purposes are those relating either to description of outputs or to omissions. The response was to be assessed as follows:

1. a score of 5 if the response: *"Describes the anticipated outputs for the relevant Requirement and any relevant benefits, including where applicable how they will contribute to the successful delivery of the SLCA and the Client Specification; Contains no omissions or inconsistencies identified by the Evaluators within this Evaluation Node."*

2. a score of 4 if the response: *"Describes the anticipated outputs for the relevant Requirement and any relevant benefits, including where applicable how they will contribute to the successful delivery of the SLCA and the Client Specification; Contains no material omissions or inconsistencies."*

3. a score of 3 if the response: *"Describes the anticipated outputs for the relevant Requirement and any relevant benefits, but does not describe how they will contribute to the successful delivery of the SLCA and the Client Specification; Contains no material omissions or material inconsistencies."*

4. a score of 2 if the response: *"… does not describe the anticipated outputs and any relevant benefits, for the relevant part of the Requirement, including where applicable how they will contribute to the successful delivery of the SLCA and the Client Specification; It contains material omissions or material inconsistencies."*

5. a score of 1 if the response: *"… does not describe the anticipated outputs or any relevant benefits for the relevant part of the Requirement, including where applicable how they will contribute to the successful delivery of the SLCA and the Client Specification; It contains material omissions or material inconsistencies."*

759. The RSS Tender Submission achieved a score of 2 for Requirement 5.2(d) and this therefore means that, in the view of the SMEs (who are entitled to a margin of appreciation) it did not describe anticipated outputs and any relevant benefits, and/or contained material omissions or material inconsistencies.

760. The Consensus Rationale for this Requirement made the following criticisms of the RSS Tender Submission. Energy Solutions in its Closing Submissions numbered these (1) to (5) and it is convenient to adopt that numbering {U/4/37}:

> "…[1] Organisation gives no further detail beyond the programme manager and the reference in response to the typical project structure at site is no help.
>
> [2] It is unclear how the programme manager [sic] discharges projects up to gate 3.
>
> [3] Focus on project delivery - responsibilities for delivery - not as relevant - the requirement is for the organisational structure deployed for the management of programmes.
>
> [4] It is inferred that the projects remain part of the programmes post phase 3 but not clearly articulated.
>
> [5] Have not clearly articulated the incorporation of the programme board within the management of programmes.
>
> We feel that the above observations are material omissions and undermines the Authority's confidence in the Bidder's approach to deliver the requirement".

761. The NDA number these omissions differently, and identify the omissions as four not five, and in a different order, because the NDA focuses both on evidence for the trial as well as the omissions identified in the Consensus Rationale. The NDA's submissions were that the omissions were as follows:

> "(i) First, the RSS response failed to provide any, or any sufficient, explanation of the role of programme boards in the organisational structure and management of programmes (as opposed to projects);
>
> (ii) Second, the RSS response proposed that programme managers would also act as project manager for all of the projects comprised within their programmes between project gates 1-3 but did not provide any, or any sufficient, detail on what resources and support would be provided to the programme manager for this purpose;
>
> (iii) Third, the RSS response included a statement that responsibility for management of each project would transfer at Gate 3 from the programme manager to the relevant 'site', but did not explain, sufficiently or at all, what this would mean or

> how it would work in practice (in particular as regards what powers would, or would not, be retained at programme level in relation to the projects after gate 4);
>
> (iv) Fourth, the RSS response repeatedly provided information about RSS's approach to the management of *projects*, at the expense of providing detail about the management of *programmes* – which is what requirement 5.2 called for (project management being dealt with within requirement 5.3)."

762. These submissions are difficult to cross-reference precisely against the NDA's own Consensus Rationale. I will therefore deal with the criticisms in fact included within the Consensus Rationale first, and then turn to these four by the NDA and deal with any potential residual issues that may not have been addressed and decided when considering those in the Consensus Rationale. Throughout this exercise, however, it must be borne in mind that the threshold that Energy Solutions must pass, in order to have the score re-considered, is that the NDA were in manifest error, and that the SMEs were entitled to a margin of appreciation in matters of judgement.

763. Mr Miller said both in his witness statement and in cross-examination that the SMEs took the view that "there were multiple material omissions in RSS's response to Requirement 307.5.2(d)": paragraph 141 {C/6/40} and {Day16Z-CON/109}. It was stated in the 11 April 2014 Letter that {U/23/17}, although each of the (five) matters identified amounted to "an omission", it was only cumulatively that they constituted a "material omission". Mr Miller had not been involved in the formulation of the Appendix 8 response included with the April letter {Day16Z-CON/129}. Ms Livesey had been involved in their formulation and was not called to give evidence: Mr Miller had not, and was called to give evidence.

764. In my judgment the correct approach is to consider the supposed omissions both individually and collectively. This is what the Agreed Issue requires, and in any event this is the best way to approach the matter. If an individual omission is a material omission, then application of the criteria would justify the appropriate score and there can be no manifest error. However, the point of principle in terms of what test the SMEs applied is equally valid whether considering these omissions collectively or individually.

765. Energy Solutions maintain that the SMEs applied the wrong test to the criteria, because in order to constitute a "material omission", the SMEs had to consider that their confidence was "fundamentally" undermined, as they had to if any omission was to constitute a "material omission" in accordance with paragraph 1.9(b)(i)(F) {J/10/13}. Reliance is therefore placed upon the absence of the word "fundamentally" when the NDA in the Consensus Rationale described its confidence as being "undermined".

766. Although, on one view, this might be said to be simply an oversight or mistake in entering the expression in to the Consensus Rationale, this is not the case here because the SMEs took the conscious decision to delete the word "fundamentally" on 5 December 2013. The statement originally was that their confidence was

"fundamentally undermined". AWARD shows they deleted the statement that the SMEs' confidence was "fundamentally" undermined on 5 December 2013. This is shown at {T/130/414}. Mr Miller, although stating that he stood by that change (that is, he stood by the deletion of the word "fundamentally"), also said that the change was made by Ms Livesey, probably whilst he was in the room, but he could not remember why it was made {Day16Z-CON/121}. Given he expressly "stood by" the change when he was giving evidence, this can only mean he accepted that the deletion of "fundamentally" was correct. This means that the only evidence of the SMEs before the court was that the NDA's confidence was undermined, but was not fundamentally undermined.

767. In my view, therefore, the SMEs applied the wrong scoring criteria to the content of the submission for this Requirement, the contents of which they had expressly agreed did not "fundamentally" undermine their confidence. As Energy Solutions point out, on the basis of the SMEs' own reasoning, therefore, the correct score should have been at least 3 and the score of 2 was manifestly erroneous. I accept that submission, which is entirely justified given Mr Miller's evidence about this, and the deletion of the word "fundamentally".

768. Turning to the specific omissions, these are useful in analysing what the correct score should in fact have been, to see if applying the correct test there would be any material omissions in any case. These are as follows.

1. Organisation gives no further detail beyond the programme manager

769. The criticism is that there was no further detail about the "*organisation*" beyond the programme manager. This is factually incorrect and hence difficult to accept as justified, given the Tender Response expressly deals with the structure above the programme managers in the Organisational Chart in Figure 307-5 which has at least three, if not five, different layers above that level, going all the way up to Managing Director Magnox {Q/19/6}. There is also text dealing with this at {Q/19/11} and {Q/19/15} which directly refers to that Figure. Programme Managers are shown as being "Accountable to" the Waste and Strategic Programmes Director in Figure 307-15 RSS Organisational Structure {Q/19/23}. The organisation was the Portfolio Management Board (referred to in RSS's Tender Response as the "PMB") and the Waste & Strategic Programme Director (to whom Programme Managers reported, which was shown in Figure 307-15) who was accountable to the Managing Director of Magnox, as well as the Programme Board.

770. Mr Miller said in his evidence that this criticism was about the structure "*below*" or "*beneath*" the programme manager, not above, namely:

> "…what support would be provided to the programme manager to undertake duties of project management".

If that is correct, it would be a curious way of using the term "beyond", but would in any case fall to be considered in the second criticism of the Consensus Rationale, which is that the submission was unclear how the programme manager discharged projects up to "Gate 3". Projects "up to Gate 3" means during the development phase. If that is right, then even Mr Miller did not seek to maintain

that the structure "above" the programme manager was not missing. On the face of the documents, he was correct not to defend that position, because the structure and organisation was clearly set out when the material was read together. This criticism therefore constitutes neither an "omission" nor a "material omission" by RSS and is a manifestly erroneous one.

2. Unclear how Programme managers discharge projects up to Gate 3

771. Mr Miller said that {C/6/42} "there was a lack of clarity as to whether and how Programme Managers would be responsible for all aspects of project delivery before Gate 3".

772. Energy Solutions relies upon RSS's Tender Response which it is said clearly explained responsibility for the projects up to Gate 3. It was {Q/19/15} unambiguously stated that:

> "the Programme Manager is responsible for all aspects of the programme's projects during phases 1-3".

That was repeated elsewhere, such as {Q/19/21}:

> "During Phases 1-3 the relevant Programme Manager is the single point of accountability for the whole project";

and in terms of finance:

> "budgets for project work in phases 1-3 are released to the Programme Manager by the PMB as the project passes the appropriate gate" {Q/19/16}.

This was effectively accepted by Mr Miller who said {Day16Z-CON/146} that "the fact they are responsible, we understood" and {Day16Z-CON/146} that RSS's Tender Response "sets out the fact they are responsible for all aspects".

773. Requirement 307.5.3 was where RSS was to provide a description of "organisational structure (covering senior management and programme management level)". Mr Miller's view that there was the need to specify who might support each Programme Manager for this Requirement is not correct {Day16Z-CON/141}. In any event the Tender Submission at {Q/19/15} identifies the existence and function of the detailed resource loaded schedule, and the Resource Centre is also described in the submission. Given that what would be required would inevitably vary over time, sites and different programmes, the specifics that Mr Miller stated would be required could never be specified in the way he explained {Day16Z-CON/147}, and certainly an RWIND tenderer would not have understood they were required from reading the SORR. Those specifics also do not appear in that way in the SORR and could not have been understood, in my judgment, as being required by an RWIND tenderer. This Node was in any event concerned with organisation structures and not a fully detailed identification of specific resources. I do not consider that there was any omission of this nature in the response at all.

3 and 4. Focus on project delivery and projects after Gate C

774. These can be usefully considered together. The 11 April 2014 Letter stated in Appendix 8 that:

> "…the evaluators considered that the information provided did not properly identify the delineation between programme management and project management levels of control and that this absence of delineation amounted to an omission"{U/23/18}.

It was also said that it had to be inferred that projects remained part of the programmes after Gate C, and that this was not expressly stated.

775. The first criticism in the Consensus Rationale faces some difficulties in being accepted by the court following paragraph 62(6) of the Re-Re-Amended Defence which accepted that such strict delineation was not necessary {A/10/30}. However, it was entirely up to the different bidders to propose such systems or networks of control that they intended to adopt. Given the clear identification in the Tender Response about accountability, particularly in the different Figures such as 307-5 and 307-15, I do not consider that this criticism can be maintained.

776. Mr Miller tried to explain this when he was asked questions about it. He stated {Day16Z-CON/158}:

> "It was not clear to us from this tender response whether the programme managers would have any ability to control, direct, change the projects that sat within their programmes".

It is difficult to see how this lack of clarity was present, even allowing for a margin of appreciation on the part of the SMEs. If a project was "within" a programme controlled or under a programme manager, the rhetorical question arises "why should that programme manager *not* have such control or direction?" I find that it is inherent within the title of programme manager that the person in question would control or direct (other ways of saying manage) the programmes for which that person was responsible. It seems to me that having control of such a project is implicit in the programme manager being in charge of it, which was the whole point and basis of the Tender Submission. Figure 307-5 {Q/19/6} clearly showed that the Site Closure Directors were not accountable to Programme Managers and the response to Requirement 307.5.3(d) {Q/19/20} clearly stated that Project Managers were responsible for the management of their own budgets.

777. Even though Mr Board gave a great deal of evidence about this, even without that evidence (which the SMEs would not have had), it seems to me clear on the face of the Tender Submission (which is what the SMEs had before them when they were evaluating the bids) what the extent of the programme managers' responsibility was, and who had responsibility for what, and to whom each reported, and was responsible.

778. The Tender Response made clear that the RSS approach was one based on single points of accountability throughout the programme lifecycle and its projects. The

Programme Manager was to be responsible for all aspects of the programme's projects during project phases 1-3. Following Gate 3, accountability transferred to the Project Manager who reported to the Site Closure Director. I do not see how this could lead to the conclusion that there "might" be a "loss of programme oversight", as stated in the Further Information by the NDA. There could not be such a loss of oversight based upon what was explained in the Tender Submission, in particular the "*Lead and Learn cycle*" but also the statement that "the programme maintains an oversight of all project risks (and opportunities) being managed at the site during project phases 4-5" {Q/19/13}.

779. In my judgment it was manifestly erroneous to consider that there were any omissions on either of these points.

5. The Programme Board

780. This criticism was that:

> "the evaluators were unable to fully understand how the Programme Management Board would work in practice in terms of who was on the board and specifically how/when it governed programme management" {U/23/17}.

781. The exact composition of each Programme Board was to vary over time but the usual or typical constituent members would include a Delivery Director, Commercial Director and PPP Director, and this was stated {Q/19/11}. Appendix (i) at {Q/19/23} identified other members, including the Managing Director of RSRL. There was no requirement to list all the potential specific members. The Programme Board had an advisory role and "challenged" decision making, it did not make those decisions. I accept that it did not appear in Figure 307-5, which was concerned with reporting. I had the benefit of Mr Board's evidence in this respect, but even without that evidence I consider it clear that this was the function of Figure 307-5. Decisions at the "gates" were a matter for the Portfolio Management Board.

782. It could conceivably be, perhaps, that the SMEs genuinely could not, in subjective terms, understand these parts of the Tender Response. However, to me they seem fairly clear. To state that there was an omission (material or not) regarding "who was on the board" when that was not required by the SORR is a manifest error. An RWIND tenderer would not know that the NDA required this information. I do not consider that there were any such omissions.

The omissions relied upon by the NDA in submission

783. I have already, in respect of other Nodes, stated that it is not an encouraging start when the NDA itself has difficulty in articulating the reasons for its own SMEs arriving at the decisions to which they came during evaluation. Here, it is not so much that the decisions given in the Consensus Rationale have been abandoned, rather it is that the way the deficiencies have been explained has evolved (if that is the right term) or been explained in a different fashion. The four relied upon in submissions by the NDA have been explained in the NDA written Closing Submissions in the terms which I have reproduced in paragraph 717 above.

784. These are really expanded and refined reasons, rather than being wholly different. In so far as they can be matched to the list in the Consensus Rationale, the first is broadly equivalent to the fifth and I have dismissed it. The second is a gloss on the second reason in the Consensus Rationale. In so far as the complaint that the Tender Submission "did not provide any, or any sufficient, detail on what resources and support would be provided to the programme manager for this purpose" is new, then it can be seen from reading (in particular) Requirement 307.5.1(e) that there was a process described for identification and allocation of resources, and this would have to be used (in conjunction with the Resource Centre described at {Q/19/9}) to provide detail on what resources would be provided. I consider this new criticism misconceived.

785. The third criticism is a different way of wording the fourth criticism from the Consensus Rationale, and the final one appears to be a "catch-all" approach criticising the content concerning management of programmes. This line of attack by the NDA upon the RSS Tender Submission for this Requirement seemed to me to depart from the proper approach in an exercise such as the one upon which the court is involved.

786. The correct approach, in my judgment, when the court is exercising its supervisory function is firstly for a Claimant to clear the necessary legal hurdle, and only then will the court embark upon the necessary re-marking exercise. That is dealt with in Part IX of this judgment. However, if that hurdle is cleared, the focus must inevitably and primarily turn to the reasons provided by the SMEs to explain what they in fact did at the time, but also the other points relied upon by a Defendant authority in arriving at what the correct score would be, absent the manifest error. If the reasons relied upon are also manifestly erroneous, then there is of course some scope for the authority in any case to provide evidence that is relevant to the alternative score that would or could have been given at the time (which is simply addressing causation, or whether any manifest error was material).

787. However, here – and this catch-all criticism is an example – the NDA based its case primarily upon the evidence of Ms Thomas, who was not even an evaluator on this Node at all. Her views were the basis of a line of questioning put by Mr Giffin QC for the NDA to Mr Board in cross-examination about phases 4 and 5 of the projects and the need for the programme manager to have a well-resourced programme team. The SMEs had not been concerned about the resources available to the Programme Manager during these phases at all during the evaluation; their concerns were with phases 1-3 and also Gate 3. This led to a line of evidence from Mr Board {Day7Z-CON/99} where hypothesis was piled upon hypothesis, based upon the views of someone not involved at the time. The criticism was also widened in submissions to include what was described as "Requirement 307.5.2 generally". Lack of particularity is rarely helpful, and it was not helpful here.

788. Project delivery, and programme management, are not mutually exclusive. One is a component of the other. As Mr Board stated, "it is not either/or" {Day7Z-CON/60}. The NDA's own Programme Controls Procedure defines a Programme {V/110/288} as:

> "…a broad effort encompassing a number of projects and/or functional activities with a common purpose".

As Mr Board pointed out {Day7Z-CON/60}:

> "…how the programmes get delivered....is by actually getting the projects delivered which sit within the programmes".

789. The best evidence that would have been available for any of this would have been that of the lead evaluator, Ms Livesey. No explanation for her absence was provided. The next most senior SME involved in the Node, Mr Edwards, did not give evidence either. The court was therefore left with Mr Miller, a very junior member who had no personal experience of either programme or project management at the NDA, and Ms Thomas who was not involved at the time in evaluating this Node.

790. Even without drawing an adverse inference from the absence of Ms Livesey, I would have concluded that there were manifest errors of assessment, and in particular that the SMEs identified "omissions" where there were none. However, in my judgment the case advanced by Energy Solutions is a strong one and clearly demands an answer, to which no cogent one has been provided, not least by the person best placed to do so, Ms Livesey. An adverse inference can be drawn from the absence of Ms Livesey given the strength of the case brought by Energy Solutions. I consider that Ms Livesey did not give evidence to provide an answer to the criticisms on this Requirement because she had none. The case brought by Energy Solutions in my judgment therefore clearly succeeds. The score for this Requirement that would have been awarded, absent the manifest errors, is 5.

791. The answer to Agreed Issue 40 is therefore that the score of 2 was not lawfully awarded to RSS for its response in relation to programme management. Although no specific Agreed Issue directly addresses this point, the correct score for this Requirement is 5.

Requirement 5.3(d) Project Development, Sanctioning and Management of Budgets

792. RSS was given a score of 4, rather than 5 which is the score Energy Solutions maintain should have been awarded, on the basis that there were non-material omissions in respect of this Requirement. The actual Requirement 5.3(d) stated {J/10/85}:

> "5.3 The Bidder must provide its project management strategy explaining why it has chosen this approach, the expected outputs, including any relevant benefits, and how these will contribute to the successful delivery of the SLCA and the Client Specification and examples of how elements of its proposed strategy have been applied in practice. The strategy must include…
>
> (d) The approach to the project development, project sanctioning and subsequent management of project budgets and how this approach will contribute to ensure the scope of work remains affordable and deliverable."

793. The Consensus Rationale stated the following in respect of this Requirement {U/4/38}:

> "…Not clear who develops business case for a project and other activities due to no project manager in post until gate 3/4. Management of budget only appears to occur following gate 3 - not clear what happens before this point.
>
> These omissions were identified but we felt they were not material."

794. There are therefore two reasons identified. Firstly, lack of clarity regarding development of the business case, and secondly lack of clarity regarding the management of the budget prior to reaching Gate 3.

795. The statement "no project manager in post until gate 3/4" is a little confused, since it ignores entirely the role of the Programme Manager who was clearly identified as the "single point of accountability for the project" and this was restated throughout the submission, for example:

> "…during phases 1-3 the relevant Programme Manager is the single point of accountability for the project…the Project Manager is directly responsible and accountable for all aspects of the project during phases 4-5." {Q/19/21}

Energy Solutions submits that:

> "…no one who read RSS's Tender Response could have missed the point about the single point of accountability for the project up to project gate 3 being with the Programme Manager."

796. So far as management of the budget is concerned, Energy Solutions relies upon passages such as:

> "…budgets for project work in phases 1 - 3 are released to the Programme Manager by the PMB as the project passes the appropriate gate" {Q/19/16}
>
> [and]
>
> "…budgets are authorised and funding is released to the site Project Manager immediately upon Gate 3 sanctioning". {Q/19/20}

797. Mr Miller was cross-examined on this {Day16Z-CON/169} as follows:

> "Q: So once the budget is released by the PMB, at that point the programme manager is responsible for it?
>
> A. I agree, yes, but the question set within the requirement is to tell us about the management of budgets, not who is

> responsible necessarily, although that could be part of it. All we want to know is how will the budget be managed. If it is okay I could give you a slightly different view of this. It would be fine for a programme manager to manage that budget, but they might manage it within the confines of their programme, so they may be able to make changes within a project as long as the programme stays within its budget. It may be that they wish to apply the same controls and trending etc as they were looking to apply post-gate 3. The problem was none of that is articulated, we just know what happens post-gate 3."

798. Energy Solutions submitted that Mr Miller had accepted {Day16Z-CON/169}, that the Programme Manager was responsible for managing the budget during phases 1 to 3. That is not a correct summary of his evidence. His answers, and the questions to them, were from the transcript as follows:

> "Q: During phases 1–3, the relevant Programme Manager is the single point of accountability for the project.
>
> A. I see that, yes.
>
> Q. That ties into the passage we have been to many times, that during phases 1 to 3 the programme manager is accountable for all aspects?
>
> A. It does, yes."

799. Mr Miller's point was about "management" of the budget. Stating that someone is accountable for a budget is not the same as stating that they are the one who will manage the budget. In my judgment Mr Miller is correct on this point; this was an omission but not a material omission. The first reason relied upon by the NDA in the Consensus Rationale is not justified but the second one, relating to the management of the budget and the lack of clarity prior to Gate 3, is. The correct score is therefore 4, regardless of the unjustified first reason.

800. It is not therefore necessary to address the other points advanced by the NDA, or Energy Solutions' responses to them. Energy Solutions submits that *if* there were a lack of clarity (which I have found there was, which amounted to an omission) then it was incumbent upon the NDA to issue a BCR so that Energy Solutions would have had the opportunity to remedy this. I disagree with this submission. The NDA were entitled to issue a BCR, but were not obliged to do so. I do not consider that there is anything either manifestly erroneous, or in breach of the obligations of equal treatment or transparency, in their failing to do so on this occasion. The fact that on other occasions the NDA issued a BCR to CFP, and also it should be remembered did so to RSS as well, cannot be relied upon by Energy Solutions on this Node as meaning the NDA was in breach of any of its obligations by failing to do so here.

801. The answer to Issue 41 is therefore that the score of 4 was lawfully awarded to RSS for this Requirement in relation to project management, as there was a non-material omission in the submission.

B7 Supply Chain Management – Node 306

802. This Node was concerned with how each bidder would manage the supply chain were it to succeed in the competition and be awarded the PBO. One Requirement is in issue regarding the RSS tender, namely 303.5.1(n) "Execute Move to Proposed New Strategy". Evidence was given by Mr Colwill for Energy Solutions, and Ms Dancy for the NDA.

803. The parties have agreed the issue for this Requirement as follows:

> Agreed Issue 42. The issue is whether a score of 3 (rather than 4) was lawfully awarded to RSS for its response concerning the move to a new supply chain strategy, on the basis that it had failed to demonstrate improved performance outcomes.

804. The Supply Chain is a very high area of expenditure by the NDA and obviously, given the costs-plus nature of the model for whichever bidder won the competition, efficient management of the Supply Chain would have a great impact upon overall expenditure by the NDA. The introduction to this Node set out the following, which gives a summary of what the Node was concerned with {Q/18/1}:

> "The objective of Reactor Site Solutions' (RSS) Supply Chain Strategic Plan is to leverage the current supplier base through collaborative working to enhance flexibility, delivery performance and supplier relationships. Our approach also promotes the appropriate use and development of SMEs and socio-economic content, enabling a safe, affordable, cost effective, innovative, and dynamic market. Our proposal introduces the development of the Integrated Closure Partnership Agreement (iCPA) model at Magnox and RSRL along with a number of refinements to Tier 2 supplier arrangements. The iCPA is explained further under Section 306.5.1(g), p12. In summary it consists of highly capable organisations selected mainly through secondary competition from existing framework suppliers to speed up implementation.
>
> There will also be some new areas of competition to bring alignment across Magnox and RSRL or where the scope is not consistent with the primary competitions, ensuring we remain compliant with the Regulations. We envisage this resulting in approximately 15 delivery partnerships to support key programmes and work areas. Suppliers are an integrated part of our solution through a range of contract mechanisms and collaborative arrangements (aligned with BS11000) established within the terms of package orders or new subcontracts…."

805. It should be noted that the term SMEs in the extract above relates to Small and Medium Enterprises, and not Subject Matter Experts as it is used throughout this judgment. This Node was evaluated by a team of SMEs led by Tony Godley and including Ms Dancy and Andrew Davies/Peter Welch. Ms Dancy was called by the NDA to give evidence rather than Mr Godley who was a member of the CCT and

is still employed by the NDA. The NDA did not call either Mr Davies or Mr Welch.

806. The SORR provided in Node 306 for individual scoring of Requirements at the (a), (b), (c) level and so on {J/10/74}. Requirement 303.5.1(n) required a bidder to demonstrate the following:

> "Propose to move from the extant Magnox SLC and RSRL SLC procurement and subcontracting strategies to its proposed new strategy, including a timetable for the change, a recognition of why the change is required in the context of the SLCA, and the demonstration of an ability to adapt the strategy in the light of what is demonstrably good and successful in the extant strategy."{J/10/71}

Scoring was in accordance with Table 2. To score 4 {J/10/75} the bidder had to provide "information which...demonstrates how it will improve performance outcomes for the relevant Requirement" but a bidder would only score 3 if it provided "information which...demonstrates how it will maintain the performance outcomes for the relevant Requirement". As already stated, RSS was given a score of 3 and Energy Solutions maintains it should have been given a score of 4. It can be seen that improvement of performance outcomes would justify a score of 4 (or 5, but this is not contended for), and maintenance of performance outcomes would justify the score awarded in this case, namely 3 (or 2).

807. The Consensus Rationale {U/4/34} was that:

> "RSS do not specify improved performance outcomes elsewhere in their response".

This could be said to be rather unhelpful, as it effectively just amounts to a recitation of the scoring criteria. However, the 11 April 2014 Letter stated {U/23/20}:

> "The score reflects a failure to demonstrate improved outcomes which is a differentiating factor between 3 and 4".

This again could be said simply to be a restatement of the scoring criteria. Ms Dancy said that this was prepared with Mr Godley's assistance {Day17Z-CON/4}. That approach was continued in the NDA's Opening Submissions in paragraph 57 {AA/3/12}.

808. For this Requirement RSS had stated {Q/18/23} the following:

> "**Overall Improved Performance Outcomes, Outputs**: RSS has built on what is good and successful in the extant strategy, as detailed in this node and as summarised in Figure 306-1, Supply Chain Strategic Plan, p1, in order to achieve improved performance in all facets of the Supply Chain".

809. Elsewhere, there were other sections within each element of the Supply Chain Strategic Plan under Requirement 5.1 (other than (e)) where each had a section, entitled "Improved Performance Outcomes". There were 12 of these altogether. In paragraph 167 of her first witness statement {ZA-CON/1/39} Ms Dancy stated that:

> "…when we said in our comments that RSS did not specify improvement outcomes elsewhere in their response, we were in fact referring to the Response to Requirement 5.1(n), not to their response to the Evaluation Node generally".

This on its face suggests that the SMEs had simply ignored, or omitted to consider, the other 12 areas where improved performance outcomes were detailed. Ms Dancy accepted these other 12 areas did provide that information {Day17Z-CON/13}.

810. Ms Dancy accepted {Day17Z-CON/10} that the SMEs should have had regard to the response as a whole. Ms Dancy accepted, that, if they were in doubt, the SMEs had been told they should seek clarification, and in this case no BCR had been raised. The fact that no BCR was issued does not of itself, in my view, constitute a manifest error. What could, potentially, constitute a manifest error would be stating that the improved performance outcomes were not provided in relation to this Requirement alone (which is what Ms Dancy said in her witness statement) and ignoring the fact that there were 12 other areas where they *were* identified, which Energy Solutions submits the SMEs appear simply to have missed or not taken into account.

811. However, element (n) was not simply the sum of the parts represented by the other elements of Requirement 5.1. This Requirement specifically concerned the move from the existing approach or strategy to the new strategy, within a particular timetable. In other words, the effecting of change. This is shown by Figure 306-17 in the RSS response {Q/18/23}, namely a supply chain strategy schedule which is focused on the period between April 2014 and October 2015. Other elements covered matters over the whole lifetime of the contract. In other words, this element was not about the application of strategy over the whole contract, but rather about:

> "…a change management programme which brings about prompt improvements in delivering Supply Chain solutions". {Q/18/22}

The changes identified in Figure 306-17 were to be approached as a project in its own right {Q/18/23}. This is perfectly sensible when one considers the extent of the considerable change that was to be accomplished during this 18 month period. During this period, there would potentially be the ability to achieve timely improvements (and hence savings) in the way the Supply Chain was organised and managed.

812. The Requirement was therefore aimed, not only at improved outcomes over the whole period of the contract, but rather what improved outcomes would result from this specific programme or project. This was explained by Ms Dancy {Day17Z-

CON/14}. The SMEs needed to understand what RSS were going to be delivering under that specific project, namely the one set up for Requirement 5.1(n) {Day17Z-CON/14}. The schedule in Figure 306-17 did not cover all of the aspects (a) to (n) of the Node, and there was no clear link. Ms Dancy dealt with this in her cross-examination {Day17Z-CON/14}.

813. Energy Solutions accepts, as it must, that the context of Requirement 5.1(n) was concerned with transition, but submits that the relevant performance outcomes must mean the performance outcomes derived "from the post transition strategy as a whole". That is correct, but Energy Solutions submits that since the SLCs had not arranged a transition from the existing strategy to a new one before (as Ms Dancy accepted {Day17Z-CON/16}), those were the only improved performance outcomes to which the scoring criteria for this Requirement could have applied. It is said by Energy Solutions that any suggestion that the improved performance outcomes were not demonstrated would also be inconsistent with the SMEs' scoring of the other elements of Requirement 5.1 where they had been specified and demonstrated. However, that rather misses the point, in my judgment, concerning the period of change from the existing strategy to the new one. This Requirement, 5.1(n), was specifically about the change and simply because the other elements of Requirement 5.1 were amply demonstrated does not mean that this was sufficient.

814. In my judgment there was no manifest error in scoring this Requirement and it is not therefore necessary to consider the other reasons advanced by the NDA seeking to justify it. The conclusions drawn by the SMEs were within the margin of appreciation available for matters of judgement.

815. The answer to issue 42 is therefore that the score of 3 was lawfully awarded.

B8 Other Winfrith Issues – Node 408

816. This Node, which was the Delivery of Winfrith Interim End State, has already been dealt with above concerning both Critical Assets and Assumptions to Bound Scope and Cost. This project had a higher weighting than those for the Sample Projects. Dr Clark was the lead SME on this Node and gave evidence for the NDA. Energy Solutions' evidence was given by Mr Matthews and Mr Board. This was selected as one of the projects that would be used to test the bidders' technical scope and methodology because it was a unique project within the decommissioning. The site had hosted various experimental reactors and a reasonable amount of decommissioning had already taken place there. It had never been a power station in the sense that the ten Magnox Power Stations were, and it retained both a Dragon reactor and a prototype steam-generating heavy water reactor or SGHWR. It was 74 hectares in size, but located within a far larger Site of Special Scientific Interest ("SSSI") in Dorset near the coast. It also had the ALES facility and a Treated Radwaste Store known as the TRS.

817. One of the important parts of NDA strategy is "Site Restoration", which is concerned with restoring NDA sites such that they can be released for other uses. Site Restoration is divided into three areas: decommissioning, land quality management, and site end states. The aim is to release sites from being categorised as nuclear ones, for future use.

818. The issues that arise under this Node are, essentially, miscellaneous ones. Those that related to Node 408 but concerned critical assets have been dealt with in Section B1. The ones in this section are as follows.

Requirement 5.1(a)

Issue 43. The issue is whether a score of 1 was lawfully awarded to RSS on the basis of a material inconsistency within its tender response between the strategy for delivery of Winfrith Interim End State and the proposed use of fencing.

Issue 44. Within that issue, specific sub-issues are:

(i) How the Defendant understood what was being proposed in respect of the areas to be fenced;

(ii) Whether there was any obligation on the Defendant to issue a BCR to clarify RSS's proposals.

Requirement 5.3(g)

Issue 45. The issue is whether a score of 3 was lawfully awarded to RSS on the basis that there were non-material omissions and/or inconsistencies in its tender response in relation to the description of internal and external interdependencies and interfaces.

Issue 46. Within that issue, specific sub-issues are:

(i) Whether the Defendant was lawfully entitled to conclude that there were such omissions and/or inconsistencies in relation to –

(a) The NDA;

(b) The supply chain (in relation to the reactor decommissioning partner); and/or

(c) The LLWR (in relation to the management of the TRS drums.)

(ii) Whether the SORR required the significance of any interfaces to be identified;

(iii) Whether, in considering any references that existed in RSS's response to Node 408 to the interfaces said to have been omitted, the Defendant was lawfully entitled to take into account its views of what was or was not said about the significance of such interfaces and to have reduced RSS's score on that basis.

819. It can therefore be seen that the first Requirement, 5.1(a), expressly deals with the intended fencing of the site and how that was evaluated. The second Requirement 5.3(g) is a more technical issue, or bundle of issues, that relate to internal and external interdependencies and interfaces.

Requirement 408.5.1(a) Description of the Proposed IES

820. IES means Interim End State. For this requirement, RSS was given a score of 1, whereas Energy Solutions maintains it ought to have been given a score of 5 and that the score of 1 was manifestly erroneous.

821. Requirement 5.1 stated {J/10/167}:

"Bidders must:

(a) Describe the proposed Winfrith IES and identify any residual issues to be addressed in confirming the IES;

(b) Describe their strategy for delivery of Winfrith IES and the high level objectives of the strategy;

(c) Describe the approach to Regulatory issues...."

822. Paragraph 579 of Energy Solutions' Closing Submissions states "Requirement 5.1(a) was to be scored in accordance with Table K, summarised at paragraph 112 above". However, that is not factually correct. The Evaluation Table to be used for Requirement 5.1(a) was Table N, as shown in the Evaluation Tables, Table 2 in Section 6.1(f) {J/10/174}. That table is entitled "Defining Interim States" and is at {J/10/335}.

823. This Requirement had potential scores available of 1, 3 or 5. The SORR stated in Table N:

[For a Score of 5, Excellent:]

> "The Bidder's response provides information which:
>
> - Addresses all elements of the Requirement;
> - Describes the important constraints, stakeholders and alignment with the Authority's strategic objectives in determining Interim States;
> - Demonstrates an understanding of the current maturity of Interim States determination, describes the residual issues to be addressed and demonstrates how they will be addressed; and
> - Contains no omissions or inconsistencies."
>
> [For a Score of 1, Unacceptable:]
>
> "The Bidder's response provides information which:
>
> - Does not address all elements of the Requirement;
> - Does not recognise important constraints, stakeholders and alignment with the Authority's strategic objectives in determining Interim States;
> - Does not demonstrate an understanding of the current maturity of Interim States determination or describe the residual issues to be addressed; or
> - Addresses all elements of the Requirement but contains material omissions or material inconsistencies."

824. In this case and in summary, the SMEs concluded there was a material inconsistency between what was said by RSS about fencing some of the site (which would by definition deny access to such areas that were fenced), and the stated need to make the site accessible to the public as heathland. The site and its characteristics are therefore important. The heathland area (that is a SSSI) within which the Winfrith site sits, is 285 hectares in size. The public have access to that larger area, with paths for walkers and cyclists. Dr Clark in his written evidence explained in some detail the background to this, including the importance to the NDA of establishing publicly the precedent that a former nuclear site could be safe for the public to use for access whilst there was still residual radioactive material on site {XC-CON/2/17-29}. "Public access" and "residual radioactivity" are not terms that naturally sit together, and the NDA principle was to demonstrate that notwithstanding the site's previous use, public access could be achieved.

825. The Consensus Rationale stated as follows {U/4/52}:

> "In the opinion of the evaluators there is a material inconsistency with the description of the IES here and other aspects described elsewhere. The intention to leave some areas

> of the site fenced (SGHWR and Dragon footprints as described on pages 28 and 29) is not aligned with the NDA objectives for Winfrith and undermines confidence in the delivery of the required outcomes in the Client Specification. The intention is to demonstrate that the site is safe for use as a heathland and therefore only "paper controls" are required e.g. land use controls rather than physical controls (NDA Strategic Objective to ensure proportionate institutional controls). Furthermore having fences in place will raise concerns that remediation work has not been completed to a satisfactory level and that the site is unsafe, fundamentally undermining the confidence in meeting the requirements of the Client Specification. In the strategy section of the submission it is noted that precedent setting is an important aspect of this work: leaving fences in place for this key project would be an unhelpful precedent for the Site Restoration programme".
>
> [emphasis added]

826. The SMEs therefore concluded that RSS had an "intention" to leave the "SGHWR and Dragon footprints" (i.e. the whole reactor footprints) fenced. Energy Solutions submits that this was not a reasonable reading of RSS's Tender Response. This is because the text on which the SMEs relied does not state where any fencing might be, and does not state that it will be around the reactor footprints. It is also submitted by Energy Solutions that the "SMEs' criticism proceeds simply from an unjustifiable and unreasonable reading of Figure 408-25" {Q/24/28}. The inclusion of this graphic no doubt caused problems for RSS on this Requirement. I reproduce that Figure as Appendix 2. It shows two red areas, one marked "Dragon" and the other "SGHWR". The red outlines on that diagram are along the footprints of the reactors. The title underneath states "Winfrith at IES, (Red = IES Site boundary– Green = Site fence beyond IES Site boundary)".

827. Energy Solutions submits that the description of the red lines in this key to the Figure did not suggest that they showed the location of any proposed fencing. By contrast, the red lines on Figure 408-18 were said in the key to that Figure to show existing fencing {Q/24/21}. Secondly, it is said that the description of the red lines in the key to Figure 408-25, namely that they indicate the IES site boundary, is plainly wrong. The site to be put into the IES included the licensed area and the unlicensed part within the site boundary, which is a far larger area. This is shown in the start conditions on Fig 408-18 {Q/24/21}, as Dr Clark accepted, since RSS did not propose to shrink the site {Day10Z-CON/43}. Energy Solutions therefore say that the caption, or key, beneath Figure 408-25 was "obviously a mistake". That mistake was however, obviously one made by RSS, it was not a mistake made by the NDA. Dr Clark said {Day10Z-CON/41} that it had not occurred to the SMEs at the time that the caption was a mistake. This therefore constitutes criticism by Energy Solutions of Dr Clark for not realising that the RSS tender team had made a mistake and captioned its own Figure incorrectly. Thirdly, the reactor footprints were not shown fenced on Figure 408-26, which is on the same page and shows the "Alternative End Conditions for Winfrith", in which (as Dr Clark accepted {Day10Z-CON/39}) the only difference in the End Conditions is

the continued presence of Intuec and some roads, which do not affect this issue. Dr Clark said that he did not think that the SMEs had paid "anywhere near as much attention to [the] second figure".

828. In the 11 April 2014 Letter {U/23/7}, the NDA stated:

> "[that it was] the evaluators' opinion that following the achievement of the IES there should be no continuing need to fence the specific areas proposed (the SGHWR and Dragon reactor footprints)".

At one point this Requirement had been given a score of 3 – even with the misapprehension about fencing being contrary to strategy – but this was reduced by the SMEs after Dr Clark and Mr Rankin had a discussion between themselves.

829. There are a number of separate issues that arise and it is useful to consider them in chronological order. Firstly, Figure 408-25 was not a helpful Figure – in fact it was positively incorrect. The green line was incorrect.

830. Mr Matthews, who prepared most (but not the entirety) of the RSS Tender Submissions, could not really explain the green line on Figure 408-25 and he frankly accepted it was a mistake. This was made clear both in his written evidence and also his cross examination {Day6Z-CON/62}:

> "……When I left the project, there was no green line, I'm afraid to say, and the – my intention had been something that looked below, and I was quite surprised why the evaluators never looked at figure 408-26 because the only differences between that end condition was to do with Inutec and our proposal to leave a few roads on the site. So the green line is a mistake, I'm afraid to say. I can't explain any other way."

831. Rather than turn this onto the SMEs, as Energy Solutions would have me approach it, and blame them for not realising that Figure 408-26 was correct and hence Figure 408-25 was obviously a mistake, I consider the correct approach is to consider Figure 408-25 as presented in the Tender Submission. That figure could, in my view, sensibly be interpreted as it was labelled, with the green line representing what it said it did, namely "site fence". Further, the red area could equally be interpreted as representing a fence. I do not therefore consider that the SMEs can be criticised for approaching it as though it constituted fencing, or looking at that figure and interpreting it as they did.

832. However, I accept the criticism made of the SMEs for considering that fencing per se was contrary to the NDA strategy. This is for two reasons. Firstly, the text at {Q/24/27} is:

> "We will fence in some areas to minimise human access and ensure conservation for protected species. It will have the added benefit of restricting public access from areas where intrusion and exposure to buried materials should be prevented."

It also stated that:

> "The proposed IES is for the site to become heathland, with no remaining facilities, other than the Scottish Southern Electric compound. This is shown in *Figure 408-25, Winfrith at IES, p29*."

A small area shaded grey on the graphic is the Scottish Southern Electric compound.

833. Mr Matthews explained in his evidence that the requirement was that the site be "suitable for public access". Just because an area is fenced does not mean that it is not so suitable. There was no problem with the SSE compound remaining. Further, areas of SSSIs are often fenced off for a variety of reasons, without this necessarily rendering them not accessible to the public. Mr Matthews used the example of protected species. Humans are often, in some areas, rather damaging to certain protected species. Fencing areas for the latter does not of itself contradict the NDA strategy in my view. Where such fences are, and whether such areas were, or were not, the same as the reactor footprints themselves, does not seem to me to matter in any respect. The SMEs seemed to have come to the conclusion for the RSS Tender Submission that *any* fences were contrary to the NDA Strategy. Such a conclusion is manifestly erroneous in my judgment.

834. I accept Energy Solutions' submission that:

> "…the mistake about the extent of the fencing envisaged fundamentally undermines the stated reasoning. The SMEs thought that RSS proposed to fence off the whole reactor footprints (and/or apparently the green area) and formed the view that that was not consistent with the overall goal of general public accessibility, setting out concerns about perception and so forth. But that was not RSS's proposal at all. Rather RSS proposed – as a concept – some fencing principally for conservation purposes (with no specific proposal as to the location). That was a manifestly different proposal to the one the SMEs erroneously thought the response advanced."

This was actually made clear in the text. It was never intended to leave the reactor footprints fenced off. In its response to Requirement 408.5.3(a), under the heading "408.5.3(a)(ii) Conditions During Main Phase of Delivery – Element 3", RSS in the text quoted above expressly used the following phrases "we will fence in some areas"; "ensure conservation for protected species"; "added benefit"; {Q/24/27}. The fact that it uses the phrase "restricting public access" does not mean that it is contrary to the NDA strategy. As Dr Clark accepted {Day10Z-CON/29}, it was "important", when considering whether any fencing proposed was inconsistent with making the IES suitable for use as public access heathland, to consider "the purpose of that fencing and the extent of that fencing". If it was to ensure conservation for protected species, which is what the text expressly said, I do not consider that it would be contrary to the NDA strategy, regardless of where those fences were to be located.

835. The other areas explored with Mr Matthews in his cross-examination concerning potential access to areas that might be contaminated do not seem to me to be relevant to the evaluation of this Node. Mr Matthews, who had previously been Head of Decommissioning at Dounreay and is vastly experienced, dealt with all Mr Giffin QC's points admirably, but this area of exploration was rather off the point given the SMEs' views as expressed in the Consensus Rationale. There was a difference between what the (incorrectly labelled) figure stated or seemed to show, and the text. Clarification could have been sought by means of a BCR, but the NDA point out that this allegation is not pleaded and Energy Solutions are out of time to raise it. Although this is an area where, on the facts, a BCR could usefully have been raised, in all the circumstances the failure to issue one is not manifestly erroneous nor does it comprise a breach of obligation by the NDA.

836. However, a compelling reason for concluding that the presence of fencing in the RSS Tender Submission should not have been viewed in this way by Dr Clark and his SMEs is their approach to the CFP Tender Response on this Node.

837. CFP's Tender Response to Node 408 was belatedly disclosed by the NDA during the trial itself. The failure to produce it before that appears to have rested on some quibble about relevance. I do not see how it could credibly be suggested that such a document was not relevant to this issue, but it is not necessary to consider the matter in any detail because, finally, it was produced in time to be dealt with. Important documents do occasionally emerge in this way and the CFP Tender Response to this Node is, in my judgment, important. This shows that the CFP bid was awarded a score of 5, yet like the RSS Tender Response it also envisaged agreeing management arrangements and institutional controls to allow public access to the site whilst it was still licensed. In CFP's express view such controls could also include fencing or restricted access, and fencing is specifically referred to. In different places this was identified and these were brought to the attention of the court during Closing Submissions. They are the third bullet point in left hand column, second and third bullet points in right hand column {ZC-CON/4/2}; Table 19 last bullet point under Regulator engagement {ZC-CON/4/24}; Table 21 last bullet point under Stakeholder {ZC-CON/4/25}; and the reference to demonstrating "proper control of the heathland to ensure access is restricted"{ZC-CON/4/28}. CFP's Volume 5 also included reference to {XE-CON/7/27} "The Fernald site is an accessible area to employees and the public with only very small, fenced off, restricted areas." In CFP's view {XE-CON/7/35}, "engineered barriers, such as fencing, gates and locks are also important institutional controls". Thus the institutional controls at the Fernald Site included controls such as infrastructure "for the protection against human exposure to contaminants, such as fences and signs" {XE-CON/7/38} and "fences and postings" {XE-CON/7/39}.

838. It is not therefore necessary to consider the evolution of this particular aspect of the Tender Submission throughout the dialogue process. In order to treat the bidders equally, the NDA SMEs should have adopted the same approach to fencing/partially restricted areas whether dealing with the submissions of RSS or CFP. They did not do so, and this was a clear breach of the obligation of equal treatment. The difference in treatment so far as fences are concerned is stark. There is no rational explanation for why references to fencing by CFP were considered in

one way by the SMEs, yet the very use of such controls by RSS was seen as clearly justifying the award of a score of 1.

839. I agree with Energy Solutions that had the competition rules been lawfully applied, regardless of the mistaken view about the extent of the fencing proposed, with RSS being treated in the same way as CFP was treated in this respect, RSS would have been given a score of 5.

840. The answers to the issues are therefore as follows:

Agreed Issue 43: The score of 1 was not lawfully awarded. Had the contents of the bid been considered correctly against the scoring criteria in the SORR, the score would have been one of 5.

Agreed Issue 44:

(i) The SMEs misunderstood RSS's proposals for any fencing, and in my judgment gave too much attention to Figure 408-25 and insufficient or any attention to the text; and

(ii) in the circumstances, the failure by the NDA to issue a BCR to clarify what RSS proposed is not a breach of obligation.

Requirement 408.5.3(g) Interdependencies and Interfaces

841. Requirement 5.3(g) required {J/10/170}:

> "A description of the most important internal and external interdependencies and interfaces between delivery of Winfrith IES and the other strategies and approaches required to deliver the outcomes required by the Client Specification to demonstrate how:
>
> (i) The interface management arrangements will be optimised across the Magnox SLC and the RSRL SLC; and
>
> (ii) The Bidder will potential opportunities from working with other Authority SLCs and subsidiaries."

There is a word missing in the final entry, probably "the Bidder will [secure or maximise]…" or "the Bidder will [obtain]…" or something similar. Earlier draft versions of the SORR, for example the one dated 20 September 2013 {J/9a/1}, did not have Node 408 in Section 3 so it is not possible to consider earlier versions to see which word was missing.

842. The Requirement was to be evaluated in accordance with Table G {J/10/322}. The criteria for a score of both 5 and 3 were similar, and both included "Identifies key internal and external interdependencies and interfaces" as the second bullet point. However, for a score of 5 there were to be no omissions or inconsistencies; for a score of 3, there were to be no material omissions or material inconsistencies. "A failure to identify a key internal and external interdependency or interface that is essential to delivery of the Bidder's proposed programme of work" would lead to a

score of 1. The required table of interdependencies and interfaces was included in the RSS Tender Submission as Figure 408-34 in a page and a half {Q/24/37} and {Q/24/38}.

843. RSS was awarded a score of 3. The consensus rationale stated {U/4/54}:

> "The submission provides the required table. Interfaces and interdependencies are identified, however, there are a number of omissions and inconsistencies:
>
> NDA is not identified, which is key given the precedent setting nature of the work (as identified by the Bidder)
>
> Supply Chain is included, but the description of the functional activities makes no reference to the major procurement activity that will be required in procuring the reactor decommissioning partner.
>
> There is no mention of the interface arrangements required to manage the TRS drums.
>
> There is discussion in the text regarding optimisation with other SLCs – including working with LLWR and sharing decommissioning experience with Dounreay."

844. There were therefore three omissions. There were also some unspecified inconsistencies. Energy Solutions submits that due to the score of 3 being awarded, the SMEs must have concluded that the key internal and external independencies and interfaces had been identified. The submission is:

> "Table G {J/10/322} provided no basis for reducing the score because of any "*omission*" of any internal or external interfaces that were not ones that were "*key*". Accordingly there was no lawful basis for the reduction in RSS's score."

I do not find that submission entirely logical. A score of 3 means that there were omissions or inconsistences but these were not material. There is not much to be gained from considering whether "key internal and external interdependencies and interfaces" could be present (which they plainly had to be for a score of 3) at the same time as some non-material omissions or inconsistencies. That is how the SORR set out the scoring criteria.

845. It is not necessary to look further than the first and third omission. Whether the omission of the NDA itself was genuinely "key" or not, the SMEs must have been of the view that this was not a material omission. The NDA was plainly omitted. Either this was material (in which case RSS should have scored 1) or it was not material; given RSS was awarded 3, the conclusion of the SMEs must have been that it was not material. It cannot be disputed that the NDA was not identified in Figure 408-34 as one of the ten Internal, or eight External, entries. The table at Figure 408-34 did not include NDA as an interdependency/interface, although it did include an NDA subsidiary, namely RWMD. However, RWMD only has a

limited role in relation to waste packaging and Mr Mathews sensibly acknowledged that RWMD and NDA were different interfaces, and were not the same {Day6Z-CON/103}. The text itself suggested that the NDA plainly was an interface. The second sentence of the paragraph under Requirement 408.5.3(g)(ii) in the right hand column expressly states {Q/24/36}:

> "Interfaces with the rest of the Authority are driven by learning from experience and are addressed in Figure 408-34".

The NDA should have been included; at the very least, it was not manifestly erroneous for the SMEs to have concluded that it was an omission.

846. There was also no mention of the interface arrangements required to manage the TRS drums. TRS means waste from the Treated Radwaste Store. The table did refer to the Low Level Waste Repository (LLWR) but did not identify any interface or interdependency in relation to the LLWR's acceptance of the drums from the TRS.

847. Either of these points alone would, in my judgment, have justified the score of 3. Given those findings, there can be no basis for arguing the SMEs were manifestly erroneous in their evaluation of this Requirement. If these two omissions justify the score given, which in my judgment they do, then whether there was a manifest error or not in the other specified omission (concerning the Supply Chain) and the unspecified inconsistencies does not matter. Energy Solutions would have to have succeeded on all of these points to demonstrate that any manifest error was material such that the score would fall to be reconsidered.

848. The answers to Issues 45 and 46 are therefore that the score of 3 was lawfully awarded to RSS on the basis that there were non-material omissions and/or inconsistencies in its tender response in relation to the description of internal and external interdependencies and interfaces. The NDA was lawfully entitled to conclude that there were such omissions and/or inconsistencies in relation both to the omissions regarding the NDA and the management of the TRS drums.

C. CFP Threshold Issues

C1 Principles

849. The term "threshold" refers to some of the scoring criteria for particular Requirements, in relation to which the evaluation resulted in either "Pass/Fail" or, for some, "above threshold" or "below threshold". The consequences of a bid being evaluated as "fail" or "below threshold", was to be, potentially, exclusion from the competition altogether. On eight separate grounds, Energy Solutions maintain that had the CFP bid been marked without manifest error, the threshold Requirements would not have been satisfied and hence CFP should have been excluded from the competition. This would have left RSS as the winning bidder, regardless of the potential re-marking of its own tender as a result of Agreed Issues 1 to 46.

850. Although the question of threshold failure had been dealt with generally in the parties' written submissions, in view both of its importance and also the way it had

been addressed in those submissions, I invited further more detailed written submissions. These preceded a further hearing for oral submissions, on the following specific points:

1. As a matter of construction of the SORR, was it mandatory that a failure by either bidder to achieve threshold would lead to exclusion from the competition?

2. If the answer to that is "No", what principles would or should apply to the decision whether or not to exclude the bidder in question, and what discretion would the NDA have in this respect?

The hearing took place on 23 March 2016 with written submissions having been lodged at the beginning of that week.

851. The thresholds in the SORR were part of the Level 3 criteria. One part of the ITSFT {P/2/23} stated:

> "The Level 3 Criteria are to be evaluated by either threshold only or threshold/ranking criteria. The threshold only approach allows the Authority to mandate a high quality level which must be satisfied for Bidder's Tender Responses to be considered and evaluated against this standard only. If a Bidder fails to achieve a threshold, its Tender Response risks being deemed non-compliant in the Authority's opinion and the Bidder may be excluded from the Competition."
>
> [emphasis added]

852. However, although the highlighted passage uses "may", suggesting discretion, in the SORR the word "must" is used. In Paragraph 5.2(b) of the ITSFT {P/2/21}:

> "Tender Responses will be evaluated against the criteria and weightings set out in Appendix 7 (Evaluation Framework) and in further detail in Appendix 11 (Statement of Response Requirements) and Appendix 14 (Commercial (Contractual Terms) Evaluation)."

Part 6 of the ITSFT ("Statement of Response Requirements (including evaluation methodologies") provided {P/2/26} that:

> "6.1 The Statement of Response Requirements contained at Appendix 11 (Statement of Response Requirements) sets out the Authority's requirements relating to all strategy, programme, technical and cost elements relevant to the submission of the Bidders' Tender Responses excluding those elements addressed by Appendix 14 (Commercial (Contractual Terms) Evaluation).

> 6.2 Each element of the Statement of Response Requirements documents the Authority's requirements and describes the information that the Bidders are required to submit.
>
> 6.3 The Statement of Response Requirements also contains the relevant evaluation methodologies for each Evaluation Node contained within it. These have been developed specifically to reflect the factors which the Authority considers to be of critical importance to the identification of the most economically advantageous tender for the Competition."

853. The SORR also provided at 1.7(a) {J/10/11} that:

> "The Authority will evaluate the Bidders' responses to the Evaluation Nodes in accordance with the relevant weightings and evaluation methodologies set out in section 6 of each Evaluation Node and the Evaluation Node Framework."

Section 6 in each relevant Node followed a similar format and stated (for example) in section 6.1 of the SORR relating to Nominated Staff (Node 303) {J/10/48}:

> "(b) ..To pass the threshold for this Evaluation Node, a Bidder's response must achieve a "Threshold" as set out in Table 1 below:
>
> Table 1: Threshold Matrix
>
> Threshold: The Bidder's response must achieve....
>
> Below Threshold: The Bidder's response achieves....
>
> (c) If a Bidder's response to this Evaluation Node is deemed to be "Below Threshold" (determined in accordance with Table 1), then the Bidder's Tender Response will be deemed non-compliant and will be excluded from the competition."
>
> [emphasis added]

854. For simple "Pass/Fail" Requirements, Table 1 specified that "a fail" rendered the response below threshold.

855. Energy Solutions supplementary submissions were that the answer to the first question posed for further submissions was "Yes" – that disqualification was mandatory – and the second question simply did not arise. No submissions were made by Energy Solutions in the alternative to cover the situation where the answer to the first question could be "No".

856. The NDA also submitted that the answer to the first question was "Yes", but that this was subject to certain qualifications. Further, in respect of Requirement 303.5.4 Nominated Staff Appointment, which was subject to a Nominated Staff Bulletin of 18 July 2013, it was said by the NDA that because this was a general response requirement, "any failure to comply with it gave rise to a discretion

whether to disqualify". The question of discretion above was therefore effectively considered by the NDA so far as that Node alone was concerned, but in the context of qualifications to the first answer.

857. The NDA written supplementary submissions also went somewhat further than the questions that had been posed, and made detailed submissions on the Nodes the subject of the alleged threshold failures by CFP. Mr Howell QC for Energy Solutions objected to this and justifiably made the point that the Claimant had restricted itself to answering the questions only, whereas the NDA had not. However, I found those further submissions from the NDA (even if un-invited) helpful, and so I gave Energy Solutions the opportunity to make their own further written submissions on the same points, after the hearing of the supplementary submissions, if so advised. Having considered the matter, Energy Solutions decided not to do so.

858. It is therefore the effectively agreed position of both parties that the first question should be answered "Yes", the only difference between them being the presence of qualifications to that affirmative answer.

859. Energy Solutions' submissions were as follows. The premise for the questions was a conclusion that a bidder has failed to achieve a "threshold" specified in the SORR. There were certain safeguards before such a conclusion could lawfully have been reached by the NDA. These were both substantive and procedural. Firstly, if the threshold criterion was capable of being understood in more than one way by a RWIND bidder then the NDA could not lawfully find that the threshold had been failed, if it would be passed applying any of those interpretations. Secondly, if the bidder submitted a response containing an obvious error, then the NDA would have had to provide a bidder with the opportunity to correct that before failing the bidder, provided that that did not lead to what was in reality a new tender. This would be as a matter of discretion on the part of the NDA which had to be exercised equally and fairly. If the bidder submitted a response which was unclear in any respect or might be susceptible to clarification, then the NDA would have had to provide a bidder with the opportunity to clarify its bid (through the BCR procedure) before failing the bidder, applying its own rule of "*if in doubt clarify*". Finally, the NDA would have to give the benefit of any doubt to the bidder, applying its rule of "*if in doubt score up*". As a matter of construction, Energy Solutions submitted that any failure to achieve a relevant threshold should have led to a bidder's exclusion from the competition.

860. The NDA on the other hand, included six qualifications to its answer "yes". These were as follows (in summary):

1. Competition rules leading to mandatory disqualification must be construed strictly and narrowly;

2. It was legitimate for the NDA to "lean against disqualification, and to take such steps as are properly open to it to avoid having to disqualify a bidder";

3. The court should be slow to interfere with a decision by the NDA as to whether a response had failed to achieve threshold;

4. It is neither mandatory nor permissible for a bidder to be disqualified if its response was one that a RWIND tenderer could have understood to be in accordance with what the SORR was seeking;

5. The NDA had a discretion to waive matters which went to form rather than substance of the tender response;

6. The SORR itself by its terms made it a matter of discretion whether to disqualify a bid for failure to comply with general response requirements.

861. Of those qualifications, those numbered (1) and (2) relate to a decision whether to disqualify, which would only arise after the evaluation had resulted in a particular score, or a decision on a Pass/Fail basis, that would lead to disqualification being considered. Mr Howell QC submitted, with some force, that in reality the NDA were asking not for the competition rules leading to disqualification to be applied strictly and narrowly, but rather to the contrary and for those rules to be applied loosely and widely.

862. Qualification (3) relates to the evaluation of the tender by the SMEs; the principle for that being the court will only interfere if there had been a manifest error. By definition the evaluation first has to be performed *before* it could be considered that a bidder had failed to meet any threshold requirement. The qualification at (4) can also be considered as having to be considered at the evaluation stage. A tenderer is entitled to have its bid evaluated on the basis of the terms of the SORR as they would be understood by an RWIND tenderer. (6) is correct, on the terms of paragraph 6.1(a) of each of the relevant sections of the SORR, but that does not assist as all save one of the Nodes in question in this section are not general response requirements. The exception is possibly the Nominated Staff Bulletin of 18 July which was not part of the SORR, and Requirement 303.5.4 Nominated Staff Appointment, and to which I return in Confidential Appendix 3.

863. Qualification (2) is also rather confused and somewhat circular. If a bidder is entitled to take "such steps as are properly open to it" that does not assist in terms of deciding what those "proper" steps are. Mr Giffin QC orally submitted that it was a properly relevant consideration to keep a bidder within the competition. In my judgment this is simply a different way of saying the same thing – the NDA's case is that it was permissible to attempt to keep a bidder within the competition, even though that bidder may have failed to comply with a Requirement which was stated to be a threshold Requirement. The concept of "leaning against disqualification" is one that is rather difficult to apply, yet remaining within the rules of the competition if those very rules state disqualification will or must occur. The SORR was a NDA document (arrived at following dialogue with the bidders) and constituted the rules of the competition. No party forced the NDA to include disqualification provisions within the SORR.

864. The problem that arose, and which I find was realised by the NDA only during evaluation itself, was that strict application of the SORR could lead to bidders being disqualified, in particular CFP. There were only four bidders.

865. Dr Clark told me in his oral evidence {Day11-NC/92} – {Day11-NC/95} that during evaluation he and the other SMEs became aware of the severity of the

consequences of disqualifying a bidder for failures to achieve threshold and that this was a concern. He said his personal view was that some of the threshold requirements took on "a lot more of an importance than perhaps they were intended when they were drafted". He said that:

> "…all of a sudden requirements that, when they were written, perhaps weren't intended to be – have such a strong effect, you suddenly looked at them and thought 'These requirements have a really big effect and it is a really serious one'".

That leads me to conclude that insufficient consideration was given by the NDA to the effect of the inclusion of threshold provisions in the SORR. It also begs the question of why matters were included as being subject to threshold if they were not intended to "have such a strong effect". If they were not intended, as Dr Clark put it eloquently, to "have such a strong effect" it is difficult to understand why they were stated to be so important that a failure to satisfy them would lead to disqualification of a bidder from the whole competition. This evidence led to my asking Dr Clark whether there was a reluctance by the SMEs to reach a finding during evaluation that would lead to any of the bidders failing on a threshold requirement. He stated as follows {Day11-NC/94}:

> "A: I think, yes, probably there was tied with that and there was the guidance around marking up if in doubt and things like that. So that kind of provided some of the context for that kind of thinking……I think we all felt that it would be very regrettable if it had happened."

866. I do not accept that the NDA was permitted to "lean against disqualification" and increase the score that would otherwise be given, if evaluation without such an increase would lead to a score "below threshold" or to one of failure for a "Pass/Fail". Further, I do not accept that the SMEs were entitled to apply the scoring criteria differently to how those criteria were set down in the SORR, simply because they feared that to apply the criteria correctly would result in a disqualification, and so to "lean against disqualification" in that way either. The NDA had an obligation to apply the rules of the competition contained in the SORR transparently and in accordance with the obligations upon it under the Regulations, which include that of equal treatment. "Leaning" one way or the other to influence the evaluation in respect of any particular bidder is or would be, in my judgment, an obvious example of unequal treatment. It is also, obviously in my judgment, a failure to apply the rules of the competition as set down in the SORR.

867. A further difference between the parties is the supposed "qualification" at (5), namely whether the NDA had a discretion to waive matters going to form rather than substance of the Tender Submission.

868. One of the threshold Requirements was considered in great detail on this point because it could, on one view, have led to surprising results. Requirement 401.5.1 required presentation of certain information as a graphic within the A0 format. There was considerable discussion of this Requirement during submissions generally, because the CFP graphic contained what became known as the "Cyclist Graphic" (and less prosaically Exhibit Z-CON/C1). The CFP graphic arguably

failed to include an entry for supply chain in the "spend profile". This was expressly made a threshold requirement in the SORR {J/10/127}. This point starkly illustrates the difference between the parties. Energy Solutions submits the SORR should be applied strictly and have CFP disqualified; the NDA argue that this would be a failure of form not substance and to disqualify would be disproportionate. My detailed findings on this particular Requirement are contained in section C4.

869. As a matter of construction, the presence of the phrase "may be excluded" in the ITSFT does not affect the operation of the SORR itself, which for these purposes makes it clear in mandatory language – using the word "must" - that a bidder must achieve threshold and were it not to do so, it would be excluded. There is no provision within the SORR itself for some further consideration by the NDA as to whether a failure was one of form rather than substance, with disqualification following only if the failure to achieve threshold was the latter but not the former. However, failures of form rather than content fall to be considered under the principle of proportionality which is considered further in this section. I do not accept that the NDA had the discretion claimed in its qualification (5) in respect of any of the Requirements being challenged by Energy Solutions. The reason that the issues concerned with the Cyclist Graphic go to content rather than form are identified in section C4 in Confidential Appendix 3.

870. In any event, even if the NDA did have such a discretion, this would not affect all of the areas challenged by Energy Solutions, as the NDA has expressly conceded that a number of them go to substance and not to form. Further – and this is a practical, rather than legal point – the NDA SMEs did not see themselves as either having or exercising such a discretion, even if they had one. The SMEs saw themselves as applying the "if in doubt, score up" approach. That was not something that applied specifically to threshold Requirements; the NDA witnesses told me that it was a rule that applied to the evaluation generally, and it was included within the training slides used to train the SMEs before the evaluation started. It was a way of arriving at a particular score, and it was only once that score was finalised that it would be known if a bidder had failed to achieve threshold or not. This is not the same as reaching a below threshold evaluation (or a fail) and then deciding whether to exercise a discretion to avoid disqualification, and hence increasing the score for that reason.

871. The answer to the complaint of disproportionality by the NDA is a simple one. It was the NDA that mandated in the SORR that certain failures would lead to disqualification. Cases such as ***C-87/94 European Commission v Belgium*** [1996] ECR I-02043 at [70] and [74] {AB/5/47} and ***T-40/01 Scan Office Design SA v European Commission*** [2002] ECR II-5046 at [76], [80], [94] {AB/9/22},{AB/9/23},{AB/9/26} make it clear that there is no discretion upon the NDA to disregard such a failure. The latter case in particular, which concerned the specification of office furniture, states in paragraph [76]:

> "However, even if the contracting authority has a certain margin of discretion in the context of a negotiated procedure, it is always bound to ensure observance of the terms and conditions of the tender specifications, which they have freely chosen to make mandatory."

872. The phrase "freely chosen to make mandatory" is exactly suited to the instant case. The SORR comprises the NDA's own rules. Further, ***Commission v Ireland*** {AB/23/1} make it clear that the rules cannot be changed after the competition has started and the tenders submitted; the rationale for this is that this may favour certain tenderers. In the current case, the NDA itself had specified the consequences that would ensue if a response to the relevant Requirement were to be assessed as below threshold. Any supposed "disproportionality" could only arise as a result of the direct application of the rules; therefore the rules of the competition set out in the SORR must within themselves (for there to be such potential disproportionality) have specified as a potential threshold failure something that may not have been that important. This is inherently unlikely – they were stated as being "factors…..of critical importance".

873. In its supplementary submissions on this topic, the NDA submitted that the right approach was "to strive so far as possible to interpret such provisions so that failure only follows where the bid is so deficient that it really is not fit to be accepted as a response to the relevant Requirement." The overriding principle of proportionality is relied upon by the NDA in this respect. However, to introduce the test of something "so deficient it is not fit for purpose" urged upon me by the NDA would be, in my judgment, to rewrite the SORR itself. That was not the way the competition was designed, and that is not the way the rules of the competition were drafted. Certain failures by any bidder were stated, in express terms within the SORR, as having particular scoring consequences. These failures were not stated as consisting only of "lack of fitness as a response".

874. The NDA also submitted the following: "Put another way, the requirements and criteria in the SORR ought not to be interpreted in such a way that they become a kind of obstacle course in which a bidder may find an otherwise perfectly good tender disqualified because of some minor blemish or through overlooking some point of detail." It can be seen, when sections C2 to C6 in the Confidential Appendix are considered, that the matters in question are not "minor blemishes". Also, given the subject matter of the whole competition and the fact that nuclear facilities and radioactive waste play a central part in that, it might be thought that "points of detail" could prove to be rather important during the duration of the contract. Bidders engaged in such activities could reasonably be expected to have a grasp of detail. Whether points in the tender are, or are not, of particular importance is something that had to be addressed when the scoring matrices in the SORR were being decided upon and drafted, not after the bids have been submitted in an effort to avoid application of the rules of the competition.

875. In the case of ***J Leadbitter & Co Ltd v Devon County Council [2009] EWHC 930 (Ch)*** {AB/88/1} David Richards J (as he then was) considered an application for an injunction by the Claimant tenderer seeking to force the Council to consider its tender, which had been rejected. The subject matter of the competition was a framework contract for construction projects, and although there was a consortium of public bodies involved, the Council was acting on behalf both of itself and other members of the consortium. The deadline for tenders to be submitted was 12 noon on 16 January 2009, and these were to be submitted electronically through a portal. The deadline was extended by three hours because of a power failure affecting one of the tenderers. The Claimant submitted its tender at 12.05, but case studies that

were supposed to be submitted as part of the tender were omitted from the Claimant's tender by mistake. The Claimant realised this at 14.45, the Council help desk received a call shortly before 15.00, and the case studies were submitted by 15.26 by email. The Council rejected the tender on the grounds that a complete tender, including the case studies, had not been submitted by the deadline. The deadline as extended had been 15.00 hours.

876. In the proceedings, in which the tenderer sought an injunction, alternatively damages for loss of a chance, the court held that the principle of proportionality applied to the procurement, but the rejection of the tender did not breach it. The tenderer relied upon the fact that the Council had relaxed the rules for two other tenderers. One was the subject of the power failure, and it was this that had led to the extension of three hours to the deadline. The other tenderer had been concerned that the case studies had not been uploaded, and been allowed to lodge these in sealed hard copy before the deadline expired. That tenderer's offices were in Exeter so this was possible, but in the event the hard copies were not opened because the upload had, in fact, included the case studies. The Judge held that the factual circumstances concerning these two other tenderers were objectively different to the Claimant's, and so the Council's behaviour towards them did not amount to discriminatory treatment of the other tenderers. The Judge also held, in paragraphs [55] and [56], that the principle of proportionality also applies to procurement competitions. Within those paragraphs, the Judge considered the judgment of ***Tideland Signal Ltd v European Commission*** Case T-211/02 [2002] ECR II-3781, as well as the speech of Lord Hoffman in ***CR Smith Glaziers (Dunfermline)*** [2003] 1 WLR 656 [2003] 1 All ER 801 [2003] UKHL 7. In that latter case, which concerned the taxable treatment of a compulsory insurance payment, Lord Hoffman explained the European law principle of proportionality, which has three sub-principles which he explained at [2003] 1 WLR 663F. In the ***Tideland Signal*** case, the Commission had rejected a tender for the supply of navigation equipment. The tenderer in that case had made an error concerning the period for which the tender was valid, and that error was obvious to any reader of the tender. The Commission did have an express power contained in the invitation to tender to seek a prompt clarification, but rather than exercise this, it rejected the tender as non-compliant with the tender terms.

877. The court in ***Tideland*** held that because this was done without first seeking clarification this was "clearly disproportionate and thus vitiated by a manifest error in assessment" in paragraph [43]. The action in that case was a failure to exercise an express power under the invitation to tender, and not a failure to waive express terms. This difference was noted by David Richards J in paragraph [56] of ***Leadbitter.*** This distinguished ***Tideland*** from the instant one, which is to the contrary. Here, the express terms of the competition, contained in the SORR, state that certain failures will result in disqualification. The NDA cannot rely upon a discretion within the terms of the SORR because there is none.

878. Further, in paragraph [56] of ***Leadbitter*** the Judge expressly set out the cautionary aspects of using the principle of proportionality to depart from the rules in such a competition, and emphasised that being permitted to do so would be an exceptional course. I agree with that, and nothing in this case strikes me as exceptional.

879. The principle of proportionality may have originated as a general EU law principle, but it also applies to domestic law too. The principle can be explained in summary as requiring a proper relationship between the action taken, and the objective to be achieved. It is the opposite of the principle of "zero tolerance". The principle of proportionality is woven into both the substantive and adjectival law. It is central, for example, within this jurisdiction to the procedural reform contained in the Woolf reforms of 1999 and more recent procedural reforms. However, in a procurement competition, the objectives to be achieved are compliance with the legal obligations of transparency and equal treatment, and compliance with the rules of the competition. The action under consideration in this case would be disqualification in certain circumstances. In my judgment there is a proportionate relationship between that action and the objectives to be achieved.

880. The principle of proportionality generally does not assist the NDA for a number of reasons. In my judgment, it would not have been disproportionate to have disqualified a bidder from the competition for failure to satisfy a threshold Requirement. Firstly, these were stated as being of "critical importance" by the NDA in the SORR itself. Indeed, some – such as Requirement 306.5.1(j) – were stated as being "High Priority" Requirements. It was for that reason that they were made threshold Requirements. Disqualifying a bidder for failing such a Requirement could not be said to be disproportionate.

881. Secondly, CFP's alleged failings on the threshold Requirements were not sufficiently minor that the NDA would have been entitled to ignore them, or waive their non-compliance, on the grounds that they had no impact upon either the content of the tender submission, or the degree of confidence on the part of the SMEs that the tender submission was compliant with the rules in the SORR. Disqualifying a bid in those circumstances could not be said to be a disproportionate result. They were potentially (depending upon my findings in sections C2 to C6) failures in the specific content of the CFP submission.

882. Thirdly, even if I am wrong about that, and even it were permissible for the NDA to waive such failures, on those Requirements where there was a score to be awarded (rather than a simple Pass/Fail) CFP should not have been given a score by the NDA as though the Requirement had been passed, if it had not. This is because where a Requirement was given a score, that mark (when adjusted for weighting) was to count towards the overall percentage outcome of the competition. In my judgment, CFP was not entitled to be marked as though, say, a particular Requirement merited a 3, or a 5, when in reality and in accordance with the SORR, the bid only merited a 1. The proper course would have been to mark that Requirement correctly (in this example a score of 1) yet waive the "below threshold" consequences. That would also be the transparent course. I consider this a compelling point that affects six of the Requirements challenged by Energy Solutions which attracted a score that would count towards the total. Increasing the score artificially to one above Threshold, to avoid having to face the consequences of a below Threshold score, cannot properly be described as a waiver at all, in my judgment. It is a disguise.

883. Fourthly, in the ***Leadbitter*** case, paragraph [60] of the judgment shows that reliance was placed by both parties on Professor Arrowsmith in ***The Law of Public and Utilities Procurement*** *(2nd edition 2005)* which was then the current edition. In

her views in paragraph 7.94 of that edition, Professor Arrowsmith's conclusions were to the effect that "breaches of formalities" would not create "any significant inequity between tenderers" and that the general principle should be that procuring entities have a right to waive non-compliance or to allow corrections. However, she drew a distinction with what she termed "fundamental formalities" set out by the procuring entity, in respect of which, as well as "for fundamental requirements of the specifications and conditions", strict compliance was probably required as a result of the equal treatment principle.

884. The more recent 3rd edition (2014) of Professor Arrowsmith's book in paragraph 7-157 debates the notion of "fundamental requirement" and suggests that a requirement, whether substantive or procedural, would be considered fundamental if the need to comply with it might have deterred other tenderers, or where waiving the requirement would give rise to a significant risk of unequal treatment. She also suggests that there should be a presumption that contracting authorities have a right to waive non-compliance (as well as to allow corrections) in the case of "non-conformity with merely procedural requirements", with the presumption capable of rebuttal when there is evidence of impact on the authority or a significant advantage to the tenderer; where the need to comply with the requirement might have deterred other tenderers; or where significant risks of abuse exist. With respect to Professor Arrowsmith, in my judgment that appears to go too far. I do not accept that there is such a presumption. Even if there were, that presumption could be rebutted where (as here) the rules themselves state that disqualification is mandatory. The express rules should always take precedence over such a presumption, even if there were one.

885. Further, the test is not, nor in my judgment should it be, that waiver of a requirement is permissible unless it gives rise to a significant risk of unequal treatment. ***Leadbitter*** demonstrates this, in my view. In that case the 26 minute period after the deadline had passed before the case studies were lodged could not, in reality, have given that tenderer the ability to perform more work on the tender than those who had lodged their tenders within the time limit. There was therefore no (or very limited) risk of abuse or collusion. Further, there would have been negligible impact upon the Council by reason of the very slight delay in lodging the case studies.

886. A further passage in the 3rd edition at paragraph 7-283 characterises ***Tideland*** as being a case concerned with an issue of conformity rather than the merits of the tender. I agree with that characterisation, which is a different way of differentiating form and substance. That does not apply to the issues before the court concerning the CFP tender in this case, which almost all concern substance. The only exception to this is one element of the challenge to Requirement 401.5.1.

887. Additionally, I do not see how the application of the principle of proportionality could, in any circumstances, permit the NDA to avoid complying with the clear obligation of transparency that is upon the NDA. Proportionality does not outweigh transparency. However, that would be the consequences of enabling the NDA to rely upon this principle here for at least two of the Requirements in issue, namely 306.5.1(j) and 401.5.1(b)(ix), were I to accept the NDA's case.

888. It is wholly contrary to its obligation of transparency for the NDA to have become concerned about a failure on a threshold requirement, sought to avoid that consequence (whether or not at the time justifying this to itself as exercising the principle of proportionality), and accordingly to have marked the CFP bid on that Requirement *higher* than it merited to avoid that consequence. Quite apart from the obvious effect upon the overall result of the entire competition, the unsuccessful tenderers would never know that such a process had taken place. That cannot be right, and in my judgment cannot be consistent with any of the principles of law which apply to procurement competitions such as this one.

889. Finally, I consider that the principle of proportionality, exceptional as its application must be, will more usually apply to circumstances entirely or substantially outside the control of the tenderer in question, preventing compliance with a rule of the competition – the power failure in ***Leadbitter*** is a good example. Matters within the control of the tenderer, particularly those that go to what must have been a tenderer's decision as to substantive content of the tender submission, will rarely in my judgment be sufficiently exceptional to justify application of the principle to excuse non-compliance. ***Tideland*** can be explained as not going to substantive content.

890. It is submitted by the NDA in its supplementary closing submissions that excluding a tenderer for failures that are "venal or trivial" or for failures that had "no real impact" would be disproportionate. This may be using different words to present Professor Arrowsmith's views. In my judgment the correct approach is to characterise the failure, firstly, as one of either form or content. If form, then there is a second step. If the failure relates to content, in my judgment, the second step would not fall to be considered at all. That second step would be then to consider the scope and extent of the failure. If merely trivial, then the authority could potentially waive the failure, as long as doing so would not breach the obligations of transparency and equal treatment. Further, such waiver should only be permissible in the most exceptional of cases. It is also important to differentiate between cases where the rules of the competition entitle the authority to waive non-compliance, and those that do not. Those authorities engaged in competitions where the rules specifically do not permit this will rarely be entitled to act contrary to those rules, although of course the rules will differ in case to case.

891. It should be remembered that paragraph 6.3 of Part 6 of the ITSFT {P/2/26} states that the issues under consideration here were in Requirements which were expressly stated to be "factors…. of critical importance" to the NDA. In other words, the NDA had chosen to make these Requirements threshold ones specifically because they were considered to be so highly important. It is difficult, in that context, to introduce consideration into the evaluation that, upon reflection by the SMEs and the CCT, they were not so important after all.

892. I do not accept that the subject matter of the challenges to the scoring of the CFP Threshold Requirements could be correctly described as falling into the category of failure that entitled the NDA to waive disqualification. Quite apart from the fact that they relate to content and not form in my judgment (a point accepted by the NDA in any event for all save one of them), consideration of the subject matter makes it clear that none of them could be said to have "no real impact". Requirements 306.5.1(j), 303.5.3, 3035.4, 410.5.1(c), 410.5.3(a) and 410.5.3(d) all

had scores attached to them. The scores of the latter three counted towards an aggregate for that separate part of the bid too. Of the others, although 116.5.3, 117.5.3 and 118.5.3 were Pass/Fail Requirements, the subject matter was the references necessary so that the NDA could ensure the Cost and Technical Nodes were aligned for work scope. In a technically complex tender such as this one, failure to align these two different areas would undoubtedly have an impact. The purpose of those Requirements was to ensure that the two separate component parts of the bid – the cost, and the technical aspects of the work – sat together consistently. The only one that could arguably fall into the "trivial or no real impact" category could be Requirement 401.5.1(b), which was also a Pass/Fail, and which did not contribute to the percentage outcome. However, upon analysis, it can be seen that the content (as well as the form) was what was being assessed in that Requirement. The only necessary element that could be said to go to form was that a graphic was needed, and it had to be in A0 form. However, both those elements were satisfied by CFP.

893. Accordingly, therefore, it is not necessary to consider that submission by the NDA further because it seeks to mis-characterise the nature of the objections to the content and evaluation of the CFP Threshold Requirements.

894. The following is also submitted by the NDA in its supplementary closing submissions (paragraphs 16 and 17):

> "16. Put simply, it is apparent from the objective background and evidence that (as one would expect) NDA wanted the lengthy and expensive dialogue process for this important contract to result in the submission of four tenders which were all capable of acceptance. That would maximise the chances of bringing about as economically advantageous a solution as possible, and would mean that time spent on dialogue with each bidder would not have been wasted.
>
> 17. As the Judge noted during the trial and closing submissions, application of the threshold requirements so as to fail tenders could potentially have led to a situation in which all the bidders were disqualified, <u>which would have represented a commercial disaster</u>. But the point can be looked at more positively as well - for each and every bidder, it was desirable that they should achieve threshold, so that their offer (and especially their commercial offer) would be in the mix and capable of acceptance."
>
> [emphasis added]

895. I do not accept those factors identified as justifying failing to disqualify a bidder who failed a threshold requirement. There are some observations that must be made of these submissions. If the NDA had wanted all of the tenders to be capable of acceptance, it is highly surprising that the competition contained so many (or any) Requirements where the consequences of failure were expressed, in the NDA's own rules, as leading to mandatory disqualification. Additionally, it is possible that all the tenderers could have submitted bids that contained deficiencies

such that they all might have failed threshold Requirements and been disqualified. That was an observation I made during the trial. This would have been embarrassing for all concerned, but given this was a £4 billion contract for 14 years, re-running the competition if all the bidders failed would not necessarily have been a commercial disaster. The alternative would be conducting an unlawful evaluation leading to a potential challenge, claims for damages and even greater embarrassment and financial loss depending upon the outcome. The final point has already been made above; with the scores of so many threshold Requirements counting towards the overall percentage total, the solution to the position in which the NDA found itself could not be artificial or unwarranted increase of a score. The features identified in the submissions by the NDA reproduced in the preceding paragraph do not justify either manifestly erroneously giving a Requirement a higher score than it merited, or unequal treatment of bidders or a failure to act transparently.

896. In my judgment, there is on the challenges brought by Energy Solutions on this bid, so far as content is concerned, no further step of consideration available to the NDA, *after* any bidder had failed a threshold Requirement, to ask itself "was that threshold Requirement really that important?", to arrive at the conclusion that it was not, and then use that conclusion to justify increasing the score to a higher one than the content merited (or to justify failing to disqualify that bidder). This would be unlawful, in my judgment, for three reasons at least. Firstly, it would be a failure to apply the terms of the SORR in respect of that particular bidder. Secondly, it would be scoring the Requirement in question manifestly erroneously. Thirdly, and equally importantly, that increased score (for those requirements that had a score associated with them) would then comprise a component of the bidder's overall total score towards the eventual total. The artificially inflated score would count towards that bidder's overall percentage in the competition, thus potentially distorting the whole result of the competition.

897. I therefore accept Energy Solutions submissions on the questions posed for supplementary submissions. The parties are agreed that the answer to the first question is "Yes" and the second question does not arise. In terms of the six qualifications proposed by the NDA, my findings are as follows. Competition rules leading to mandatory disqualification must be construed in accordance with the normal principles of construction. Construing them "strictly and narrowly" as the NDA would have me do would in any event not assist the NDA. If a disqualification rule were to be construed strictly, it would make disqualification more likely not less, if the relevant score was below threshold.

898. It was not legitimate for the NDA to "lean against disqualification" if that means applying the scoring criteria set down in the SORR differently because the effect of applying such criteria fairly and equally would have led to disqualification of a bidder. The court is slow to interfere with a decision by the NDA as to evaluation, which would lead to the score or Pass/Fail being awarded – manifest error is required for reconsideration of the score, and in matters of judgment there is a margin of appreciation available. However, there is no separate stage of "reluctance to interfere" if there is a manifest error such that the score is reconsidered, and the lower score would constitute or lead to a failure to achieve threshold.

899. It is neither mandatory nor permissible for a bidder to be disqualified if its response was one that a RWIND tenderer could have understood to be in accordance with what the SORR was seeking. This factor however needs to be considered at the evaluation stage, as the SMEs should have evaluated the response in accordance with one that a RWIND tenderer could have understood to be in accordance with the SORR. Disqualification would only fall to be considered after that process had occurred, if the score that resulted after that evaluation was one either of below threshold, or failure.

900. The only matter challenged here which could be said to go to form rather than substance or content of the tender response is the A0 element of the graphic {ZB-CON/15/1} for Requirement 401.5.1. The other issues within the CFP Threshold challenges go to substance or content in any event.

901. Finally, although the SORR itself by its terms made it a matter of discretion whether to disqualify a bid for failure to comply with general response requirements, only one of the areas of challenge could be said potentially to relate to general response requirements. The others, on the terms of the SORR, include no such element of specific discretion and the NDA have expressly accepted that express statements in particular Nodes prevail over the general statement for general response requirements, namely Requirement 303.5.3 (paragraph 9 of the NDA Supplemental Closing Submissions).

902. With those findings in mind, it is necessary to consider each of the eight challenges by Energy Solutions concerning alleged threshold failures and the marking of CFP's bid, so that each can be considered individually. Due to the issues of confidentiality, the analysis of Issues 47 to 72 is contained in Confidential Appendix 3.

C2 to C6 and D.

903. Application of these principles to the CFP Threshold Issues, and consideration of the CFP Non-Threshold Evaluation Issues, are contained in Confidential Appendix 3.

XI The NDA's application to dismiss the claim

904. On 21 July 2016 the NDA issued an application seeking an order that the Claims be dismissed, and/or be struck out, and/or that the trial on liability be declared a mistrial and of no effect. The information relied upon to support the application was the evidence served by Energy Solutions following my order of 14 July 2016, namely that of Ms Roe {D/6/1}, Mr Stuttaford {D/18/1}, Mr Joyce {D/20/1}, and the further evidence of Mr Bowes, Mr Board, Ms Wilson, Mr Davies, and Mr Colwill, all relating to the litigation win bonus arrangements.

905. Skeleton arguments were served by both parties on the morning of 25 July 2016 and a hearing took place that day and the next, which included cross-examining all of the eight witnesses identified in the preceding paragraph. I have dealt in Part V of this judgment with the circumstances in which that order of 14 July 2016 came to be made by me, and I have dealt in Part VI of this judgment with my view of the five witnesses who had given evidence already at the trial in November 2015, including the circumstances in which they came to agree (or in Mr Davies' case, be given) payment of a bonus dependent upon the outcome of the litigation. I will deal with the other three witnesses in the order in which they were called.

Ms Sally Roe

906. Ms Roe is the partner at Freshfields with conduct of the case and a highly experienced solicitor. Energy Solutions have waived privilege in certain communications with Freshfields on this issue. In an email of 26 September 2014 at 3.25pm, Freshfields recorded their view about payments to witnesses in the context of paying Mr Matthews, who was a consultant and not an employee. This advice was given by Ms Roe's assistant Kate Gough, assisted by Emma Procter, to Ms Roe, and was then given to Mark England of Energy Solutions in a meeting the same afternoon. The advice reviewed the law of England and Wales concerning this subject, and Energy Solutions was told that a witness must not be paid contingent on the evidence he or she gives, or "for giving evidence". However, compensation could be paid for the time spent "provided that the rate is reasonable and represents the witness's loss of earnings for the time spent." Emails back to Freshfields on the same day at 17.25 and 18.08 show that both Mark England and Simon Stuttaford were aware of the advice, and an agreement was reached with Mr Matthews at his standard hourly rate for his loss of earnings. This was the same rate he was paid for working on the bid. That agreement is unobjectionable and the NDA take no point in respect of it.

907. Freshfields were not instructed to advise Energy Solutions on the redundancy programme but knew it was occurring. They were obviously involved in the litigation throughout the process. They notified Burges Salmon on 1 December 2015 of the intended disposal of Energy Solutions by its US parent, and again notified Burges Salmon of completion of that transaction on 11 April 2016. The next relevant part of Ms Roe's involvement came in April 2016 when a draft of the proposed consultancy agreement with IJRB Ltd was sent to Freshfields by way of background, as Freshfields were to prepare delegations for Mr Bowes and Mr Board for the next phase of the litigation. The commercial terms were not reviewed at that time by Ms Roe. On 4 July 2016, a copy of the final version of that

agreement was sent to one of Ms Roe's assistants, Tom Hutchison. That day, it was briefly reviewed by Ms Roe (Ms Gough being away) and she noticed, in passing, a reference to "bonus payments", which led her to review clause 4.2 itself. This clause was the one that contained the operative provisions relevant to this issue, namely the contingent payments of £100,000 and the 0.5% of damages recovered. She was immediately very concerned, but did not realise that the £100,000 was already in place from the earlier Supplementary Agreement, and thought it was a purely prospective future arrangement. She did, however, immediately instruct Mr Hutchison to follow this up and investigate the point, which he did initially with Mr Bowes, and although Mr Board was on holiday, also with Mr Board a couple of days later. Counsel were then consulted on 11 and 12 July 2016 which led to the letter dated 12 July 2016 being sent out later that day both to Burges Salmon and the court.

908. The following points are relevant. In my judgment, Freshfields acted as promptly as could be expected, and with urgency, once Ms Roe noticed the reference to such arrangements in the document she had been sent. No criticism can be attached either to Ms Roe, or to any of her team, for not realising the existence of these arrangements earlier than they did. Also, Mr Bowes, when asked by Freshfields, and then Mr Board too, were entirely open and helpful in explaining not only about the document they were asked about (the Percentage Fee Agreement) but also the Supplementary Agreements too. They therefore brought the full picture to the attention of Freshfields and in my judgment there was no attempt at secrecy. I should also state that Ms Roe acted in accordance with the highest professional standards, and brought the matter promptly to the attention of the court so that the handing down could be postponed and the matter thoroughly investigated.

Simon Stuttaford

909. The same, with regret, cannot be said for Mr Stuttaford; indeed, rather to the contrary. He is a solicitor having qualified in 1995. He had been at Burges Salmon (who coincidentally acted in this litigation for the NDA) before he joined Energy Solutions in 2011. Also coincidentally, Burges Salmon acted for Energy Solutions in the redundancy programme, but Mr Stuttaford told me that the continuing role of Burges Salmon as HR advisers to Energy Solutions was specifically considered by him following receipt of the acknowledgement of service in the First Claim {A/3/1}, and it was decided that as long as something "sat wholly outside of the claim…. [such as] routine employment matters" it was appropriate to continue to use that firm.

910. However, Mr Stuttaford accepted that he was aware at the time in 2015 of the principle contained in the Solicitors' Code of Conduct published by the Solicitors Regulation Authority that banned payment to witnesses generally (which is in Rule 5.8). He also accepted that he drafted the Supplementary Agreements. He actually signed Mr Board's Supplementary Agreement {D/19/85}. He also accepted that he had signed the Disclosure Statement in the litigation on 30 April 2016 {G/11/15}, less than three weeks before this. Rather worryingly, he said that he did not consider drafts of the Supplemental Agreements would be disclosable – a point which is plainly and obviously wrong – but even on his own view of "documents", and given the duty of continuing disclosure, I fail to see how in any circumstances, any solicitor could sensibly fail to disclose the executed Board Supplementary

Agreement. Not only is this failure to disclose extremely concerning in itself, in my judgment the failure to disclose is a free-standing and separate issue to the formation of such contractual arrangements themselves. These are two separate issues, and Mr Stuttaford is central to each of them.

911. Had Mr Stuttaford, as the in-house Counsel of Energy Solutions, acted as he ought to have done, such agreements (even if thought up by non-lawyers as an appropriate solution to a problem) would not have been contemplated at all, let alone drafted by a qualified solicitor and, in the case of Mr Board's agreement, signed by a solicitor on behalf of the company. In my judgment, Mr Stuttaford is to be criticised for these lapses in application of proper professional standards.

912. However, Mr Hapgood QC in his skeleton argument endeavoured to put the case for the NDA on this issue not only as high as he possibly could, but in my judgment far higher than on the facts of this case it could merit. He used the phrase "inherently corrupt", stated that such arrangements "must be regarded objectively as corrupt ones" and also referred to them as "corrupt arrangements". He described them as "secret arrangements which were known to be improper". However, he did not put the case in these terms to the witnesses which, were the NDA intending to advance such arguments, should have been done. At the end of the cross-examination of Mr Stuttaford, I did put to Mr Stuttaford the point about corruption, as a matter of basic fairness and because, of all the witnesses, in my judgment he could have been expected to know more about the propriety of such agreements than anyone else involved. I also did not know at that stage that the point was not going to be put to any of the other witnesses who were being recalled, and who had given evidence in November 2015. Mr Stuttaford's answer was as follows {Day23Z-CON/29/13}:

> "The Judge: ….would you please give me your answer to a point that's being put to me by the NDA, which is that they are corrupt agreements?
>
> A. The supplemental agreements, you are talking about the supplemental agreements?
>
> The Judge: Yes.
>
> A. Well, I categorically reject that. It was not a thought that even came into my mind, that that was why these agreements were being put together. It was not explained to me in any way like that by Tim Joyce, in my discussions with Tim Joyce, and to a certain extent with Ian Bowes. So I categorically reject that. It was not even a thought that came into my mind."

I fully accept that evidence.

Timothy Joyce

913. He is the Executive Vice President Finance of the Claimant. He is a chartered accountant, having qualified in 1984. He is a Main Board director. Energy Solutions was the incumbent for the Magnox sites at the time of the competition,

and the Claimant therefore decided that what is known as a Chinese wall would be put in place between those personnel working on the RSS bid, and those running the Magnox sites at the time. He therefore became the responsible director running the Magnox programme from February 2013, and hence was not involved in the bid. He was not involved in the decision to issue proceedings against the NDA but supported it. He did not know how the amounts payable in the Supplemental Agreements would be dealt with in the litigation either as part of the quantum claim, or as costs, and I find that he could not be expected to know. He did not think about them in the context of disclosure and I find that he could not be expected to do that either; Mr Stuttaford, in my judgment, had that responsibility. He oversaw the redundancy programme and the restructuring. He saw the agreements to pay litigation win bonuses as part of dealing with the small group of people necessary to be dealt with as a distinct group. The Settlement Agreements were in a common form for all employees, and the Supplemental Agreements each depended upon the personal circumstances of the individuals in question. Shortly after the bid had been lost, some personnel including Mr Colwill had raised the question of bonuses if the litigation was successful. This was understandable in my judgment – they would have received such a bonus had the bid been successful, and the whole rationale of the procurement challenge was that the RSS bid *should* have been successful. However, although this was rejected by Energy Solutions at that time, once the redundancy programme was adopted it had to be reconsidered and was. Also, Mr Board and Mr Bowes were rightly concerned about the effect on their futures of the confidentiality undertakings. In my judgment Mr Joyce took a business decision at a high level, ignorant of the public policy considerations relevant in this jurisdiction to such agreements. He instructed Mr Stuttaford to draft the agreements and this was done.

914. There was one particular point relied upon by the NDA that was made both to him and Mr Stuttaford, and also in submissions, namely that full Board approval should have been obtained for these agreements, and that a decision must have been taken deliberately not to tell the full Board. I find that there is nothing in this point. There is no evidence to suggest that any of the figures in the Supplemental Agreements were large enough to merit this. I doubt that a company of the size of Energy Solutions would require main Board approval for agreements in value between £15,500 and £100,000.

Legal principles

915. English law is hostile to agreements to pay witnesses dependent upon the outcome of litigation, and it is easy to see why. The temptation to a witness to give untruthful evidence because of the prospect of monetary reward for doing so means that such agreements are contrary to public policy.

916. The concept of illegality, and the role of public policy, has very recently been the subject of a decision by the Supreme Court consisting of nine Justices of the Supreme Court, namely ***Patel v Mirza*** **[2016] UKSC 42** which became available on 20 July 2016. Neither party before me cited this case, although my attention was drawn to it by Energy Solutions when I asked Mr Howell QC whether the Supplemental Agreements were void, or voidable. No submissions were made about it but I was simply told I should read it. This sets out the doctrine of illegality and enforceability in circumstances where a claimant brought an action in

unjust enrichment, seeking the return of £620,000 advanced by Mr Patel to Mr Mirza for an illegal purpose, namely betting on the price of bank shares with insider knowledge. What is called insider trading is a criminal offence. There were different views amongst the different members of the Supreme Court concerning reasoning, but the claim in restitution succeeded as the Supreme Court unanimously dismissed Mr Mirza's appeal. That case makes clear that a detailed consideration is needed when considering the doctrine of illegality and paragraphs [107], [121], [133], [137] [143], [163], [197-199], [210], [250] and [253] of the decision set out the approach, at least so far as restitution is concerned. Obviously that equitable remedy is designed with the purpose of putting the parties back into their pre-existing positions. The correct characterisation of the nature of the Supplemental Agreements in terms of illegality would have an impact upon enforceability of (for example) one of the witnesses in seeking payment of the litigation win bonus. That issue is academic here, and any views I could express are not made after full (or indeed any) argument on this point. Suffice it to say, for present purposes, that payments to a witness contingent upon the outcome of litigation such as these are contrary to public policy and also contrary to the SRA Rules. They should not have been entered into. However, the fact that they were does not of itself entitle the NDA to succeed on this application.

917. Mr Hapgood QC readily accepted that there was no authority specifically on the point upon which he sought to rely. However, his primary submission was that this conduct was so far at the extreme end of the scale that dismissal of the claim, and/or striking out of the claims, was necessary as the trial "had been corrupted", the evidence was tainted, there was a significant risk that a fair trial was impossible, and was generally conduct by both witnesses and Claimant that was so reprehensible that the Claimant had lost its right to have its claims heard. Essentially, the right to access to the courts had been lost. In the alternative, he submitted that the trial before me was so compromised it was necessary to have the case reheard by another judge at a retrial. Exploring the final element of the consequences of that alternative case for a mistrial before me, and a retrial, it was expressly submitted that none of the five witnesses involved could give any admissible evidence at a retrial and should not be permitted to be called. In technical terms, leading counsel for the NDA (of whom there were two) agreed they had become incompetent as witnesses.

918. The short answer to the application is that the existence of such agreements goes to the weight I should give to the evidence of each witness. Neither the existence of the agreements, nor the failure to disclose (which has now been remedied) justify granting the NDA the order sought on the application.

919. The NDA are of course permitted to cross-examine each witness about these agreements. This did occur, and the witnesses were recalled for that purpose. Any relevant points could be put to each of them. In this context, it should be noted that in an email from my clerk to the parties dated 15 July 2016 at 09.42 (the day after I had made the Order of 14 July 2016, but before the application was issued) the parties were told the following:

> "insofar as any submissions are to be made concerning the impact of these developments upon the findings of the draft judgment, the most sensible course is for those submissions to

> be made by reference to the draft judgment itself (as corrected for typographical errors) already in the possession of both parties."

The NDA declined to do this. Rather than point to any specific finding, a blanket approach to the consequences of these agreements was adopted. I find that such a blanket approach would not only be wrong in principle, but would lead to a disproportionate result. It would mean that there would be no proper analysis of legal principle applied to the facts of this particular procurement competition such that Energy Solutions' claims could be properly assessed by the court.

920. However, out of deference to the careful legal submissions made by the NDA, I will deal with the approach of the NDA on this issue, in case I am wrong that the existence of such agreements goes to the weight to be given to the evidence of each witness.

921. The three cases from the United States are of no assistance. In ***The State of New York v Solvent Chemical Co Inc 166 FRD 284 (1999)*** District Judge Curtin held in an environmental lawsuit that actions, which he found were the equivalent of making cash payments to a witness Mr Beu as a means of making him sympathetic and securing his testimony, were indefensible and included in a general definition of "subornation of perjury". However, in that case in a deposition Mr Beu had been asked whether he had "any business relationships with" the party after 1992. He stated that he had not, and none of the attorneys who knew about the relationship to "purchase his cooperation" made any attempt to clarify this answer. He actually had such relationships. He therefore gave, on any analysis, perjured testimony.

922. In ***United States of America v Cynergy Corp*** a case unreported in the 2nd Federal Supplement of 2008 but with Westlaw Reference 2008 WL 7679914, a retrial was ordered when the jury in the first trial returned a verdict after Cynergy misled that jury by contrasting the plaintiff's paid expert witness testimony with its own, which was said to be from unpaid current and former employees including Mr Batdorf. Mr Batdorf was in fact being paid by Cynergy under an undisclosed signed consulting agreement. Again, the facts of that case are somewhat far from this one, and also involve consideration of a verdict returned by a jury after it had been directly misled.

923. The final case relied upon is ***Thomas v City of New York 293 FRD 498 (2013)*** in which Mr Thomas brought an action for false arrest and excessive force against the police. He also entered into an undisclosed agreement with a witness that he would pay her 20% of any damages recovered. This agreement was not mentioned by the witness when she was asked about any financial interest in the case. The District Judge vacated the jury's verdict in Mr Thomas' favour and ordered a retrial.

924. These cases are a world away, in my judgment, from the facts of the instant one. They involve juries who have returned verdicts based on fraud or perjury. They are not in this jurisdiction. Reliance on them by the NDA is misplaced. Given they concern the Federal law of the United States (as they were Federal cases) Mr Howell QC was reluctant to make submissions about them.

925. Guidance to this court is found in the following cases from this jurisdiction. In ***Alpha Rocks Solicitors v Alade [2015] EWCA Civ 685*** the Court of Appeal held that where an application is made to strike out a claim under CPR Part 3.4(2), the power to strike out should only be used in exceptional circumstances where it was just and proportionate to do so, and only where a claimant was guilty of misconduct so serious that it would be an affront to the court to permit him to continue. This was the case even if a claim had been fraudulently exaggerated. The emphasis should be on a fair trial. In that case the conduct was a claim for solicitors' fees brought on the basis of fabricated documents and a knowingly inaccurate bill of costs. It was held "the remedy should be proportionate to the abuse" and the appeal against the striking out of the claim was allowed. Even there, where the conduct went to the very heart of the substantive claim, it was not struck out.

926. In ***Arrow Nominees Inc v Blackledge [2001] BCC 591*** the Court of Appeal considered a case where the controller of a petitioner had forged documents, this had been discovered, he had then apologised and sought to explain his conduct, and then subsequently further falsification was discovered. This information that came to light put the case into the category of involving a "campaign of forgery" (at 634F) which meant his previous explanation of "impulsive moment of madness" was not the truth, and that there was a sophisticated process of forgery. There was also a serious risk other original documents had been destroyed. Notwithstanding this, the judge at first instance refused to strike out the petition. The respondents' appeal against this succeeded, and Chadwick LJ held (paragraphs [53] to [55] at 640) the following:

> "53. […] In my view the judge ought to have reached the conclusion that, once the allegations in respect of which there was a substantial risk that Nigel Tobias' fraudulent conduct had made a fair trial impossible were put on one side and left out of account, there was no case for relief which remained to be tried.
>
> 54. It would be open to this court to allow the appeal against the judge's refusal to strike out the petition on that ground alone. But, for my part, I would allow that appeal on a second, and additional, ground. I adopt, as a general principle, the observations ofMillett J in *Logicrose Ltd v Southend United Football Club Ltd (The Times,S March 1988)* that the object of the rules as to discovery is to secure the fair trial of the action in accordance with the due process of the court; and that, accordingly, a party is not to be deprived of his right to a proper trial as a penalty for disobedience of those rules - even if such disobedience amounts to contempt for or defiance of the court - if that object is ultimately secured, by (for example) the late production of a document which has been withheld. But where a litigant's conduct puts the fairness of the trial in jeopardy, where it is such that any judgment in favour of the litigant would have to be regarded as unsafe, or where it amounts to such an abuse of the process of the court as to render further

> proceedings unsatisfactory and to prevent the court from doing justice, the court is entitled - indeed, I would hold bound - to refuse to allow that litigant to take further part in the proceedings and (where appropriate) to determine the proceedings against him. The reason, as it seems to me, is that it is no part of the court's function to proceed to trial if to do so would give rise to a substantial risk of injustice. The function of the court is to do justice between the parties; not to allow its process to be used as a means of achieving injustice. A litigant who has demonstrated that he is determined to pursue proceedings with the object of preventing a fair trial has forfeited his right to take part in a trial. His object is inimical to the process which he purports to invoke.
>
> 55. Further, in this context, a fair trial is a trial which is conducted without an undue expenditure of time and money; and with a proper regard to the demands of other litigants upon the finite resources of the court."

927. In ***Dadourian Group International Inc v Simms and Dadourian [2009] EWCA Civ 169*** the Court of Appeal considered an application to strike out an appeal under CPR Part 52.9. Arden LJ giving the judgment of the whole court explained further the dicta of Chadwick LJ in ***Arrow Nominees*** and in [233] stated that "any restrictions on access to the court must, among other things, be proportionate". It was held that the dicta in ***Arrow Nominees*** was consistent with that. She stated:

> "We consider that this paragraph is not to be read as meaning that a litigant who has demonstrated that he is determined to pursue proceedings with the object of preventing a fair trial is to be taken to have forfeited his right to take part in a trial in every case. Chadwick LJ is careful to emphasise that the litigant's conduct had put the fairness of the trial in jeopardy and that the court's power to strike out the proceedings was not a penalty for disobedience with the rules. This interpretation of [54] of the judgment of Chadwick LJ is consistent also with art 6 of the European Convention on Human Rights."

928. In my judgment, these cases show that conduct at the very extreme end of the scale – for example forging documents, mounting a campaign of dishonesty -- are necessary before access to the courts will be denied by striking out a claim such that it is never adjudicated upon. The Supplemental Agreements, and the Percentage Recovery Agreements, do not in my judgment involve any hint of dishonest or fraudulent conduct. They are nowhere near the top of the scale of reprehensible or fraudulent conduct, and in my judgment are not on the scale of dishonesty at all.

929. The NDA also rely upon the decision in ***Factortame Ltd (No.8) v Secretary of State for Transport (No.8) [2003] QB 381*** wherein the Court of Appeal considered the situation of recovery by a professional firm of accountants of its fees on a percentage of recovery basis. That case is wholly distinguishable. Firstly, that case concerned an agreement in support of litigation, and express legal provisions such

as the Courts and Legal Services Act 1990 provide powerful indication of the limits of public policy in that respect. Secondly, experts are expected, indeed required, to be independent, as set out in the CPR itself in CPR 35.3 due to the over-riding duty to the court, and the well-known authority ***The Ikarian Reefer [1993] 2 LLR 68, 8***. Thirdly, permission is required from the Court to call expert evidence in the first place. No such permission is required for witnesses of fact. Fourthly, the case is no authority at all for justifying what the court is being asked to do by the NDA on this application. Finally, the passage to which my attention was expressly drawn by Mr Hapgood QC is not part of the ratio in any event and is per curiam on the test of apparent bias on the part of an expert.

930. Comfort that my approach – namely the presence of these agreements goes to weight – is correct can be drawn from Gloster J (as she then was) in ***Berezovsky v Abramovich [2012] EWHC 2463 (Comm)***. In that case, it transpired that even though Mr Berezovsky told the court none of his witnesses were being paid to give evidence, in fact they were. None of the agreements were disclosed. These were treated by the Judge as going to weight [103] to [111]. Mr Howell submitted that given the "array of legal talent" in that trial, the point might have been expected to be raised either by Mr Sumption QC (as he then was) for Mr Abramovich or even by Gloster J (as she then was) herself, if the NDA's position on this application were correct.

931. Mr Hapgood QC marshalled a list of 13 factors that he said took this case into such an exceptional category that dismissing it entirely, or striking it out whether as an abuse or process or otherwise, was justified – indeed the only course available. It is unnecessary to set out all of those factors but I reject the submission that all, or any, of them make this such a case. Further, although the failure to disclose the agreements was a separate failure, I do not consider that this would justify such a draconian course of action. These faults on the part of the Claimant can be dealt with suitably by costs orders in due course.

932. I reject Mr Hapgood QC's submission that the Supplementary Agreements are "inherently corrupt". Firstly, the point was not put. Secondly, it is not a correct characterisation of the nature of these agreements when consideration is made of the relevant facts. The central point in the litigation is that had the NDA acted lawfully, RSS would have won the procurement competition. Each of these witnesses would have been entitled to a bonus at the time as a result of RSS winning the competition, had that occurred. Accordingly, on one view of their employment rights, one consequential effect of success in the trial would have been possible lawful entitlement to a bonus. The fact that the Supplemental Agreements had different amounts to those bonuses does not, in my judgment, matter. They had already worked on the bid submission itself, gaining bonuses for submitting that bid, even though that work was within their employment responsibilities and could arguably be said to be covered by their salaries. Assisting with the case, preparing their statements, and giving evidence, was work additional to their normal employment responsibilities, and given the subject matter of this case, must have involved work out of normal working hours and at weekends. Mr Bowes and Mr Board had given undertakings which directly impacted their freedom of employment in a highly specialist field until the case was over, or June 2017. This is a lengthy period. Mr Hapgood QC made much of

the fact that this sort of work could, indeed should, have been covered by their existing salaries but these witnesses worked in an environment where success was often rewarded with payment of a bonus. It was part of the company culture.

933. The speech of Lord Clarke in ***Summer v Fairclough Homes Ltd [2012] UKSC 26***, is of considerable assistance. This case concerned surveillance evidence clearly demonstrating that an employee in a personal injury action against his employer had grossly and fraudulently exaggerated the effect of his injuries, claiming significant disability and inability to work. He could in fact not only work normally, but even play football. The Supreme Court dismissed the appeal by the employer who sought to strike out the award of damages for the injuries he had actually suffered. The employer argued this was justified as the fraudulent case he had advanced was an abuse of process. Lord Clarke in [41] to [44] makes it clear that there is jurisdiction to do this, both within the court's inherent jurisdiction and the CPR, but this power would only be exercised where "it must be a very rare case" and he agreed with the Court of Appeal who had said this was "a largely theoretical possibility". In my judgment, the existence of the Supplemental Agreements does not come close to making this such a very rare case.

934. It would be wholly disproportionate for this application to succeed, even on its alternative approach of a retrial. The points on the Supplemental Agreements have all been put to the witnesses. I have taken account of these points when assessing the weight which I should attach to the evidence of the five witnesses in question. This was a lengthy trial and even without the supplementary submissions necessary in March 2016, the trial started in November 2015 and ended in January 2016. There are only finite resources available to the courts. Undergoing the whole trial process again – for what is, if I am correct about admissibility, the purpose of questioning witnesses on the Supplementary Agreement before another judge – would not only increase cost to the parties, it would also deprive or delay other litigants. In my judgment, it would be contrary to the overriding objective in the CPR. The same evidence would be led at the subsequent trial, as I do not consider that there is a new category of inadmissibility of evidence created by the execution of such agreements. The NDA accepts there is no authority to support their express submission that each of the five witnesses has become incompetent. That submission is, in my judgment, entirely wrong in law.

935. Mr Giffin QC submitted that because these facts came to light after the draft judgment had been distributed, it is too late to deal with the issue within this trial. That submission too is, with respect, wrong in law also. The Supreme Court in ***Re L (Children) [2013] UKSC 8*** confirmed that there is power for a judge to change his or her mind up until the order is drawn up and perfected and that there is no principle that this power can only be exercised in exceptional circumstances. The Court of Appeal in ***Edenred (UK Group) Ltd v Her Majesty's Treasury [2015] EWCA Civ 326*** in the judgment of Etherton LJ the Chancellor (as he then was) stated in paragraph [49] that there was:

> "…greater latitude to a judge to alter the judgment while it remains in draft as distinct from after it has been formally handed down although inevitably each case will turn on its own particular facts".

Even if the same submission is made by way of accepting I have the power, but seeking to dissuade me from reconsidering my draft judgment, I reject it. Reconsidering the draft judgment after recalling the witnesses to be asked about these agreements is the obvious and in my judgment correct course of action to adopt. I also reject the overarching submissions made by the NDA that the fairness of the trial process has been hopelessly compromised, or that there was a significant risk that it has been.

936. Given there is no fraud, the approach set out by the Court of Appeal in ***Royal Bank of Scotland v Highland Financial Partners LP [2013] EWCA Civ 328*** does not arise. However, even if it did, [106] of the judgment of Aikens LJ makes clear the fraud must be material. For the reasons I will now explain, materiality does not assist the NDA either due to the subject matter of the issues.

Materiality

937. This case involved the evaluation by the NDA of both the RSS and the CFP tenders against the rules of the competition contained in the SORR. It could, potentially, be advanced without any evidence at all from witnesses for Energy Solutions. Indeed, one part of the case upon which Energy Solutions succeeded was particularly suited to such an approach, namely the CFP Threshold Issues which are the subject matter of Part X Sections C1 to C6. There is nothing to suggest that even if the NDA was correct, and even if each of the five witnesses who entered into the Supplemental Agreements did become incompetent to give any evidence, or that their evidence were totally untruthful, that this would have any effect. The answers to the failures by the NDA to disqualify CFP on the two Threshold Requirements that I have found CFP should have failed, namely Nodes 306 and 401, would not change.

938. There are other areas on the RSS Tender evaluation which fall into the same category. That concerning critical assets, has an effect upon Part X Section B1 of this judgment and Nodes 411, 412, 414, 408, 405 and 410. The summary of my findings on these Nodes was that Mr Grey failed to apply industry standards, and the tests set out in his own published material, to the categorisation of critical assets. He manifestly applied the wrong test. Again, there is no need for extensive, or even any, evidence from the five witnesses the subject of these Supplemental Agreements for that case to succeed a second time. In terms of equal treatment (or lack of it), in Node 411 the NDA had marked RSS down for failing to identify either the AETP or the saline groundwater pumping system as critical assets. However, CFP did not identity these very same systems as critical assets either, yet the CFP bid was not marked down. Findings such as these would remain wholly unchanged regardless of the evidence by Energy Solutions.

939. In the time available, which both parties agreed was sufficient, I have revisited my findings in the draft judgment on each and every Requirement in issue for both the RSS and CFP bids to consider whether those findings would have been different, even were I to have concluded (which I have not) that any of the five witnesses should have had their evidence discounted to a significant degree, or even entirely. I have concluded that those findings would be, in those hypothetical circumstances, exactly the same. I consider that this was more than the NDA was entitled to expect, given their failure to accept the invitation expressly made by the court on

15 July 2016 to make submissions based on specific findings in the draft judgment. There is no reason why that could not have been done by the NDA in the alternative to the blanket approach adopted on the application. That blanket approach sought what could be described as a technical knockout of the whole claim (or to be accurate, all three claims). It could be described as opportunistic. However, even having gone through that exercise, in my judgment any subsequent trial would reach the same conclusions as I have done.

940. It follows from this that the correct course is to dismiss the NDA's application and hand down the judgment on liability.

XII Summary of findings

941. I include at Appendix 4 a list of the corrected scores both for the RSS and CFP tenders in respect of all the different requirements. This collates the answers to all of Issues 5 to 72.

942. So far as Agreed Issues 3 and 4 are concerned, the answers are as follows:

Agreed Issue 3:

(i) The effect of the answers on the CFP Threshold Issues is that CFP ought to have been disqualified if the NDA had properly applied the terms of the SORR to CFP's Tender Submissions for Requirements 306.5.1(j) and 401.5.1(b)(ix). The effect of my findings on the RSS Threshold Issues is that there was no reason why the NDA ought to have disqualified RSS.

(ii) The final scores can only be decided once the appropriate weighting has been applied to the different Requirements to result in an overall score for each of RSS and CFP, and the parties are agreed that exercise is to be performed by them jointly such than an agreed percentage score can be arrived at after applying the findings in this judgment.

(iii) Although any conclusion arrived at by applying and comparing the percentage scores can only be reached once that agreed exercise is done by the parties, based upon my findings about disqualification of CFP in Agreed Issue 3(i) the Transition Agreement ought to have been awarded to RSS.

Agreed Issue 4: It was agreed by the parties at the conclusion of the trial that further submissions would be required on the question of whether any unlawfulness (whether individually or cumulatively) constituted a sufficiently serious breach to give rise to a liability in damages (assuming that to be a requirement of such liability) to deal with the second of the so-called *Francovich* conditions dealt with in paragraph 13 of this judgment. That is to deal with a contingent situation concerning the extant appeal to the Supreme Court.

XIII Conclusion

943. The NDA stated the following in paragraph 18 of its Written Opening:

> "This was by most standards a very detailed and sophisticated procurement exercise, which took nearly 2 years (including a 4 month evaluation period) and for which a budget of £6 million was allocated."

When the different number of Requirements within each Level 3 Evaluation Node are considered, in total for all the bidders the SMEs between them evaluated over 2,100 separate Requirements. Given the context, it was particularly important that the competition was conducted in proper compliance with the relevant legal obligations, which are designed to ensure fair competition and transparency. There is an obvious public policy benefit in important public contracts being awarded to the most economically advantageous tenders. It was important that evaluation of the tender responses was done in accordance with the rules of the competition and the SORR, and in accordance with the obligations of transparency and equal treatment which were upon the NDA. As I have found in the body of this judgment, this did not occur and my findings are that the NDA fell short in a number of respects.

944. The NDA urged upon me in submissions the point that the SMEs were "all doing their best". I have recorded my views on the different witnesses who appeared in the trial in Part VI of this judgment. Whatever the reason or reasons behind the failures that occurred in this competition – and excessive workload on a few individuals may have been one explanation for at least some of the problems – there is, in my judgment, no escaping the fact that applying the correct legal test to the evaluation exercise leads to the scores having to be reconsidered, with some of them changing. There were many manifest errors by the NDA SMEs in the evaluation of the RSS tender with the result that the RSS score is, as a result of this judgment, to be increased. On some Requirements, RSS was treated quite differently and less advantageously than CFP. Indeed, the NDA had conceded in any event that the RSS tender score had to be increased as a result of Requirement 5.9(c) for both Nodes 110 and 112 in Agreed Issue 37.

945. CFP should also have been disqualified from the competition, by application of the very rules contained within the SORR that the NDA itself drew up that governed the competition. The SMEs themselves realised during the evaluation process the draconian effects of the NDA's own rules upon the CFP bid, so far as the Threshold Requirements were concerned. They sought guidance from the Core Competition Team and a way was found to avoid disqualification of CFP. In my judgment the NDA sought to avoid the consequence of disqualification by "fudging" the evaluation of those Requirements to avoid reaching a situation where CFP would be given a "Fail" or "Below Threshold" score. By the word "fudging", I mean choosing an outcome, and manipulating the evaluation to reach that outcome. This was by choosing a score high enough to avoid that undesirable outcome, rather than arriving at a score by properly considering the content of the tender against the scoring criteria. If that were to be the approach during the evaluation – some sort of institutional reluctance by the NDA to score a Requirement correctly, if that were to result in a score "Below Threshold" or a

"Fail" – one wonders why the NDA imposed such terms within the SORR in the first place. The NDA was the architect of its own misfortune in that respect.

946. Further, in four instances (which is a small number of cases) the CFP score should be reduced because the score awarded by the SMEs was manifestly erroneous.

947. It is notable in my judgment that seven of the Nodes appear both in the Energy Solutions' challenge to the RSS score, and also the challenge to the CFP score. They are Nodes numbered 112, 303, 306, 307, 405, 410 and 411.

948. The consequences of this change of score upon the percentage result of the tender has been agreed by the parties. After the appropriate weighting is applied to the new scores, the results of the procurement competition as adjusted (and without taking account of the disqualification of CFP that I have found should have occurred) become 91.48% for RSS and 85.56% for CFP. Accordingly, the most economically advantageous tender was that of RSS. The consequences of these findings mean that these proceedings between these parties will continue to the next stage, namely directions and resolution of the quantum of damages.

Neutral Citation Number: [2016] EWHC 1988 (TCC)

Case No: HT-2014-000053, HT-2015-000094, HT-2015-000163

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
TECHNOLOGY AND CONSTRUCTION COURT

The Rolls Building
Fetter Lane, EC4A 1NL

Date: 29/07/2016

Before :

THE HONOURABLE MR JUSTICE FRASER

- -

Between :

ENERGY SOLUTIONS EU LIMITED	**Claimant**
- and -	
NUCLEAR DECOMMISSIONING AUTHORITY	**Defendant**

- -
- -

APPENDIX 1
GLOSSARY

- -

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

.....

MR JUSTICE FRASER

Mr Justice Fraser :

Appendix 1

Glossary

AETP – Active Effluent Treatment Plant

ALES – Active Liquid Effluent System

AMEC – AMEC Nuclear holdings Ltd

ASW – Agency Supplied Workers

BAE – BAE Systems plc

BCRs – Bidder Clarification Requests

Bechtel – Bechtel Management Company Ltd

BNFL – British Nuclear Fuels Ltd

BNG – British Nuclear Group

CCT – Core Competition Team

CFP – Cavendish Fluor Partnership

CPB – Competition Programme Board

CPP – Collaborative Procurement Programme

CSW – Contractor Supplied Workers

CWBS – Contractor Work Breakdown Structure

CXPP – Chapel Cross Processing Plant

D&D – Deplant and Demolition

DECC – Department of Energy & Climate Change

Energy Solutions – Energy*Solutions* EU Limited

EPR – European Pressurized Reactor or Evolutionary Power Reactor

FED – Fuel Element Debris

GLEEP – Graphite Low Energy Experimental Pile

HLW – High Level Waste

HSSSEQ – Health, Safety, Safeguards, and Environment and Quality

IAEA – International Atomic Energy Agency

iCPA – Integrated Closure Partnership Agreement

IES – Interim End State

IESR – IES Regulatory

ILW – Intermediate Level Waste

INS – International Nuclear Services

ISF – Interim Storage Facility

ISO – International Organization for Standardization

ITPD – Invitation to Participate in Dialogue

ITSFT – Invitation to Submit Final Tenders

IWM – Integrated Waste Management

KMS – Knowledge management System

LLWR – Low Level Waste Repository

M&O – Management and Operations

MAETP – Mobile Active Effluent Treatment Plant

Magnox – Magnox Ltd

MCP-10 – Management and Control Procedure 10

MDTs – Monitoring Delay Tanks

MEAT – Most Economically Advantageous Tender

MODP – Magnox Optimised Decommissioning Plan

MOP – Magnox Operational Plan

MPA – Major Projects Authority

NDA – Nuclear Decommissioning Authority

OEM – Original Equipment Manufacturer

OJEU Notice – Notice in the Official Journal of the European Union, published under the number 2012/S 136-227570 dated 18 July 2012

ONR – Office for Nuclear Regulation

PBA – Parent Body Agreement

PBO – Parent Body Organisation

PCM – Programme Control Manager

PID – Probability Impact Diagram

PIN – Prior Information Notice

PMB – Portfolio Management Board

PPPM and PPP – Portfolio/Programme/Project Management

PQQ – Pre-Qualification Questionnaire

PwC – PricewaterhouseCoopers LLP

PWTP – Pond Water Treatment Plant

RSRL – Research Sites Restoration Ltd

RSS – Reactor Site Solutions

SCM – Supply Chain Management

SE – Supporting Evidence

SGHWR – Steam-Generating Heavy Water Reactor

SLCA – Site Licence Company Agreement

SLCs – Site Licence Companies

SMEs – Subject Matter Experts

SORR – Statement of Response Requirements

SPFs – Sand Pressure Filters

SRO – Senior Responsible Owner

SSA – Shared Service Alliance Dr

SSSI – Site of Special Scientific Interest

T&E – Technical and Engineering

TAPs – Treasury Approval Points

TLAs – Three-letter abbreviations

TRS – Treated Radioactive Waste Store

UHP – Ultra-High Pressure

UKAEA – United Kingdom Atomic Energy Authority

WBS – Work Breakdown Scope

Neutral Citation Number: [2016] EWHC 1988 (TCC)

Case No: HT-2014-000053, HT-2015-000094, HT-2015-000163

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
TECHNOLOGY AND CONSTRUCTION COURT

The Rolls Building
Fetter Lane, EC4A 1NL

Date: 29/07/2016

Before :

THE HONOURABLE MR JUSTICE FRASER

- -

Between :

ENERGY SOLUTIONS EU LIMITED	**Claimant**
- and -	
NUCLEAR DECOMMISSIONING AUTHORITY	**Defendant**

- -
- -

APPENDIX 2
WINFRITH GRAPHIC

- -

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

.....

MR JUSTICE FRASER

Mr Justice Fraser:

Winfrith Graphic

Figure 408-25, Winfrith at IES, (Red = IES Site boundary–Green = Site fence beyond IES Site boundary)

{Q/24/28}

Neutral Citation Number: [2016] EWHC 1988 (TCC)

Case No: HT-2014-000053, HT-2015-000094, HT-2015-000163

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
TECHNOLOGY AND CONSTRUCTION COURT

The Rolls Building
Fetter Lane, EC4A 1NL

Date: 29/07/2016

Before :

THE HONOURABLE MR JUSTICE FRASER

- -

Between :

ENERGY SOLUTIONS EU LIMITED	**Claimant**
- AND -	
NUCLEAR DECOMMISSIONING AUTHORITY	**Defendant**

- -
- -

APPENDIX 4
CORRECTED SCORES TABLE

- -

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

.....

MR JUSTICE FRASER

Mr Justice Fraser :

Appendix 4

Corrected Scores

Node 411 Dungeness (Sample Project 2) Preparing Dungeness Reactor Complex for Interim State *Requirement 411.5.3(c) identification of critical assets* [Agreed Issues 8-10]	
Score awarded at time: 1	Corrected score: 5
Node 412 Sizewell A (Sample Project 3) Preparing the Fuel Storage Ponds at Sizewell A *Requirement 412.5.3(c) identification of critical assets* [Agreed Issues 11-13]	
Score awarded at time: 1	Corrected score: 5
Node 414 Sizewell A (Sample Project 5) The Management of Active Effluent at the Sizewell A Site *Requirement 414.5.3(c) identification of critical assets* [Agreed Issues 14-16]	
Score awarded at time: 1	Corrected score: 5
Node 408 Delivery of Winfrith Interim End State *Requirement 408.5.3(c) identification of critical assets* [Agreed Issues 17-18]	
Score awarded at time: 1	*Corrected score: 5*
Node 405 Spent Fuel and Nuclear Materials Management *Requirement 405.5.3(j) management of critical assets* [Agreed Issue 19]	
Score awarded at time: 1	Corrected score: 5

<table>
<tr><td colspan="2">Node 410 (Sample Project 1) Preparing Chapelcross CXPP and B141 for Interim State

Requirement 410.5.3(c) identification of critical assets

[Agreed Issue 20]</td></tr>
<tr><td>Score awarded at time: 3</td><td>Score left unchanged</td></tr>
<tr><td colspan="2">Node 405 Spent Fuel and Nuclear Materials Management

Requirement 405.5.3(k)

[Agreed Issues 21-23]</td></tr>
<tr><td>Score awarded at time: 3</td><td>Corrected score: 5</td></tr>
<tr><td colspan="2">Node 410 (Sample Project 1) Preparing Chapelcross CXPP and B141 for Interim State

Requirement 410.5.3(i)

[Agreed Issue 24]</td></tr>
<tr><td>Score awarded at time: 1</td><td>Corrected score: 5</td></tr>
<tr><td colspan="2">Node 408 Delivery of Winfrith Interim End State (“IES”)

Requirement 408.5.3(i) Assumptions to bound scope and cost

[Agreed Issue 25]</td></tr>
<tr><td>Score awarded at time: 3</td><td>Corrected score: 5</td></tr>
<tr><td colspan="2">Node 409 Common Support Functions and Services

Requirement 409.5.1(a) Strategy for Delivery (competencies)

[Agreed Issues 26-27]</td></tr>
<tr><td>Score awarded at time: 3</td><td>Corrected score: 5</td></tr>
<tr><td colspan="2">Requirement 409.5.1(d) “Challenges, Risks, Mitigations [sic] and Impacts”

[Agreed Issues 28-29]</td></tr>
</table>

Score awarded at time: 3	*Corrected score: 5*
Requirement 409.5.3(e) "Remaining Fit for Purpose Through Learning From experience" [Agreed Issue 30]	
Score awarded at time: 3	Score left unchanged
Node 303 – Nominated Staff Appointment *Requirement 303.5.2 Approach to Nominated Staff Development of the Management Team* [Agreed Issues 32-33]	
Score awarded at time: 4	Corrected score: 5
Requirement 303.5.3 Nominated Staff talent identification and succession planning [Agreed Issues 34-36]	
Score awarded at time: 3	Corrected score: 5
Nodes 110 and 112 *Requirement 110.5.9(c) and 112.5.9(c) Cost Contingency* [Agreed Issue 37 – conceded by NDA]	
Scores awarded at time: 1	Corrected score: 5
Node 113 *Requirement 113.5.9(c) Cost Contingency* [Agreed Issues 38-39]	
Score awarded at time: 3	Score left unchanged
Node 307 Portfolio/Programme/Project Management ("PPPM") *Requirement 307.5.2(d) Organisational Structure and Internal Resources* [Agreed Issue 40]	

Score awarded at time: 2	Corrected score: 5
Requirement 307.5.3(d) Development, Sanctioning and Management of Budgets [Agreed Issue 41]	
Score awarded at time: 4	Score left unchanged
Node 306 Supply Chain Management *Requirement 306.5.1(n) Execute Move to Proposed New Strategy* [Agreed Issue 42]	
Score awarded at time: 3	Score left unchanged
Node 408 Other Winfrith Issues *Requirement 408.5.1(a) Description of the Proposed IES* [Agreed Issues 43-44]	
Score awarded: 1	Corrected score: 5
Requirement 408.5.3(g) Interdependencies and Interfaces [Agreed Issues 45-46]	
Score at the time: 3	Score left unchanged