



Neutral Citation Number: [2023] EWHC 352 (TCC)

Case No: HT-2022-000273

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 20/02/2023

Before :

Mr Adam Constable KC
sitting as a Deputy Judge of the High Court

Between :

INHEALTH INTELLIGENCE LIMITED
- and -
NHS ENGLAND

Claimant

Defendant

Deok Joo Rhee KC (instructed by Trowers & Hamlins LLP) for the Claimant
Rhodri Williams KC and Jonathan Lewis (instructed by Hempsons LLP) for the Defendant

Hearing dates: 31 January, 1 and 2 February 2023

Approved Judgment

I direct that 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 ADAM CONSTABLE KC SITTING AS A DEPUTY JUDGE OF THE HIGH COURT

This judgment was handed down by the judge remotely by circulation to the parties' representatives by email and release to The National Archives. The date and time for hand-down is deemed to be Monday 20 February 2023 at 10:30am.

Mr Adam Constable KC :

Introduction

1. This claim arises out of the procurement for the award of contracts, divided into lots 1-4, to provide Child Health Information Services ('CHIS') for and on behalf of NHS England and Improvement of East of England, Midlands and NHS Greater Manchester Health and Social Care Partnership. The Claimant, Inhealth Intelligence Limited ('IIL') is a leading provider of CHIS and other services in the United Kingdom with an annual turnover of around £38 million. It employs over 700 staff and has been operating for over 25 years. It is an economic operator within the meaning of regulation 2(1) of the Public Contracts Regulations ('PCR 2015'). The Defendant, NHS England, is the contracting authority for the purposes of the PCR 2015. The procurement was carried out by North of England Commissioning Support ('NECS') on behalf of NHS England.
2. The procurement with which this claim is concerned has been voluntarily paused by NHS England pending the outcome of this trial. This position was reached following an application by IIL for interim relief in respect of which a compromise was reached but in respect of which there remained ancillary matters in dispute considered by Mr Justice Fraser in his judgment of 6th of October 2022 (see [2022] EWHC 2471 (TCC)).
3. In summary, IIL says that it was prevented from participating in the procurement as a whole, that is in relation to all four Lots, alternatively in relation to Lots 1 to 3, by reason of an error in uploading a single document to the designated e-tendering portal ('the Portal') which was operated by a third party provider called Intend Ltd ('Intend'). The error, which was not corrected by the deadline for closure of the tendering process, prevented IIL's bid for each of Lots 1 to 4 being submitted to the procurement process. After the deadline expired, and communication from IIL about the inability to submit its bid, there followed an investigation by NHS England, NECS and Intend. Thereafter, by letter dated 20 July 2022, NHS England communicated its decision that IIL's bid was not submitted by the deadline, and that by virtue of the requirements of the Invitation to Tender ('ITT') the bid was excluded ('the Decision'). As more accurately articulated in the course of submissions, the word 'excluded' in fact meant that the bid was never to be permitted to participate in the procurement in the first place. IIL challenges (1) the design of the portal, which it says was defective in failing to allow validly uploaded bids in respect of Lots 1 to 3 to be submitted; (2) the transparency of the 'error' message in respect of Lot 4; and (3) the lawfulness of the Decision.
4. IIL relied upon the evidence of Philip John Kirby ('Mr PJ Kirby'), its Healthcare Development Manager, and Philip Martin Kirby (no relation), its Managing Director. Only Mr PJ Kirby was called upon to answer questions. NHS England relied upon the evidence of Emma Dinning, Category Manager for NECS, and Lesley Elmes, Public Health Programme Manager at NHS England, both of whom were cross-examined. All three witnesses who gave live evidence undoubtedly assisted truthfully to the best of their recollections.

5. The parties prepared a helpful List of Issues in accordance with paragraph 14.4.1 of the TCC Guide, identifying the main issues of fact and law. I identify in the course of the judgment my answers to the stated issues at the appropriate points. I am also grateful to Ms Rhee KC for IIL, and Mr Williams KC and Mr Lewis for NHS England, for their helpful written and oral submissions.

The Procurement Process and the ITT

6. There is no doubt as to the significance of the procurement process to both IIL and NHS England, and indeed more broadly. Currently NHS England has 12 to 14 separate CHIS contracts covering the four regions to which the procurement relates, which are to be replaced with four separate contracts arising in relation to each of the 4 Lots. The values are also significant (in the range of £30m to £39.5m each), as are their length (6 years with an option to extend for a further 3 years).
7. On 2 February 2022, IIL responded to a Request for Information published by NECS on 17 January 2022, the purpose of which was to allow soft market testing in respect of the service to be the subject of the procurement. The responses were indicative only.
8. On 9 June 2022, a contract notice in respect of the procurement process was published. The closing date was given as 12 July 2022, 12:00 PM. It identified the contract start date as 1 April 2023 and the contract end date as 31 March 2032.
9. On the same day, the ITT was published. The Invitation Letter (Schedule 1) set out, amongst other things, the following:

“The requirement is split into 4 Lots:

- *Lot 1 East of England*
- *Lot 2 Greater Manchester*
- *Lot 3 Midlands East*
- *Lot 4 Midlands West*
- *There is no limit to the number of Lots that can be bid for;*
- *You can bid for one or more Lots;*
- *There are generic questions that apply for every Lot – if bidding for more than 1 Lot then bidders only need to complete the generic questions once;*
- *There are specific questions that apply for each Lot. Bidders need to complete questions relevant to Lot(s) bidding for;*
- *No discounts should be offered if bidding for multiple Lots. Each Lot is standalone;*
- *Period of contract: 6 years with effect from 01 April 2023 with an option to extend for an additional period of 36 months at the discretion of the Contracting Authorities and subject to satisfactory financial and contractual performance;*
- *Closing date and time for Bidder clarification questions: By 12 noon, 28 June 2022;*
- *Closing date and time for return of tender; Before 12 Noon on 12 July 2022; and*

- *Variant bids will not be accepted.*

It is important to note that any late submissions will not be accepted.

The tendering process will be conducted in accordance with the requirements of the Open Procedure, Regulation 27 of the Public Contracts Regulations 2015 (PCR2015) as amended by the Public Procurement (Amendment etc.) (EU Exit) Regulations 2020 No 1319).

Tenders are invited subject to the Terms and Conditions set out within this ITT document.

Please read the ITT and supporting documents very carefully as failure to comply with the requirements contained therein may invalidate your response. Please note that the information and documents contained within this ITT supersede all previous information provided with respect to this service provision.

NECS is utilising an electronic tendering system to manage this procurement and communicate with potential bidders, accordingly there will be no hard copy documents issued, and all communications with the Contracting Authorities and NECS, including your tender submission, will be conducted via the e-Tendering portal.”

10. Schedule 2 provided the following ‘Guidance’:

“The Contracting Authorities will only accept documents for tenders placed on the eTendering portal that are received electronically, unless explicitly stated otherwise in the ITT.

Tenders submitted via the e-Tendering portal must be received in full prior to the closing time and date for receipt of tenders.

Bidders are advised that uploading of large electronic files may take some time and as such bidders must allow sufficient time to fully transmit all files prior to the closing time and date for receipt of tenders.

Immediately prior to submitting a tender electronically, the bidder must check the electronic files making up the tender for viruses, using current virus checking software and must remove all viruses from the files. In addition, the bidder must ensure that all files and documents are not password protected or restricted in anyway.

Corrupt, unreadable and/or password protected files will not be discovered by the Contracting Authorities until after opening of tender submissions and at the start of the evaluation process. If the electronic files containing the tender are corrupt, contain a virus, or are unreadable for any reason, those files cannot be evaluated.

The Contracting Authorities and NECS accept no responsibility for bidders misunderstanding instructions or incorrect use of the e-Tendering portal and shall not be liable or responsible for the loss, damage, destruction, or corruption of any tender, however caused.

Faults in the bidder's system are not the responsibility of the Contracting Authorities and /or NECS and no extension to the closing time or date will be made under those circumstances.”

11. Further guidance was included in Schedule 3 (Tender Information) relevant to the manner in which attachments were to be provided into the portal as follows:

- “2.1 *Instructions and guidance information has been designed to ensure that all bidders are given equal and fair consideration. It is important therefore that bidders provide all information asked for in the format and order specified.*
- 2.2 *North of England Commissioning Support (NECS) is utilising an electronic tendering tool (In-tend) (e-Tendering portal) to manage this procurement and communicate with potential bidders in accordance with Regulation 22 of the PCR2015 (SI 2015 No 102). [...]*
- 2.3 *Bids must be submitted using the documentation provided within the ITT pack where applicable. Bidders are requested to input the organisation name within the documents where indicated. A list of those documents which must be submitted and the return date and time to ensure a compliant tender are outlined in ITT Schedule 8 Tender Response Checklist and ITT Schedule 9 Highest Scoring Bidder Validation Checklist. [...]*
- 2.4 *Please note that any attachments submitted in support of a response to a particular question should reference that question number. Any attachments not referenced to the question number or incorrectly referenced may result in information not being considered. [...]*
- 2.5 *Where applicable, supporting attachments/evidence should be completed and submitted via the corresponding named placeholder. If there is a placeholder which has been set as mandatory and the response is ‘not applicable’, if there are no other options to select, bidders must submit a blank word document with the words ‘NOT APPLICABLE’ and upload within the placeholder for this question. Bidders are advised that only single documents can be uploaded to one individual placeholder. As such, where multiple documents are required to be uploaded as supporting information, this should be compressed into a zip file and uploaded to the relevant placeholder. Note: The e-tendering portal In-tend does not accept files with the same name. Please ensure any files uploaded as part of your response /submission have a different file name.”*

...

- 2.7 *On-line Questionnaire Part 1 and On-line Questionnaire Part 2 must be completed and / or submitted within the e-Tendering portal and On-line Questionnaire Part 3 must be completed within the e-Tendering portal. Additional Microsoft Word versions of Questionnaire Part 1 and Questionnaire Part 2 can be completed off-line and uploaded as an attachment for each and every member of a consortium and / or each material sub-contractor who is relied upon to deliver the contract. All mandatory questions MUST be answered otherwise the On-line Questionnaires cannot be submitted. If there is a mandatory question and a mandatory question response is 'not applicable' bidders must enter 'NOT APPLICABLE'' for this response question.'*

12. The Tender Submission Requirements, in paragraph 3, included the following:

- “3.1 *The response documents should include the bidder's name and all documents and supporting evidence submitted with the tender must refer to the organisation that will be signing the contract.*
- 3.2 *The Contracting Authorities may, at their own absolute discretion, extend the closing date and time for the receipt of tenders specified in ITT Schedule 5 Tender Timetable.*
- 3.3 *Any extension granted under point 3.2 will apply to all bidders.*
- 3.4 *Bidders must submit their final tender by the closing time and date as specified in ITT Schedule 5 Tender Timetable. Tenders may be submitted at any time before the closing date and amended as many times as necessary before the deadline. Tenders received before the deadline cannot be opened until after the deadline for receipt of tenders. Bidders are reminded that they will need to re-submit a tender after making any amendments to a tender that had previously been submitted.*
- 3.5 *The Contracting Authorities will not consider any tender response received after the stated deadline and failure to submit a response by the deadline will result in the exclusion of the bidder from participating any further in this procurement.*

...

- 3.10 *Bidders must note in respect of electronically transmitted tenders, that uploading of large electronic files may take some time and as such they must allow sufficient time to fully transmit all files prior to the closing time for return of tenders.*

3.11 *It is the bidders' responsibility to ensure that their tender has been successfully submitted. Tenders which are not submitted in accordance with the instructions detailed above, prior to the stated deadline will not be visible to the Contracting Authorities, and therefore cannot be taken further within the procurement process."*

13. Schedule 4 (Important Notices) at paragraphs 7 and 14 included the following:

"7.1 Bidders acting in contravention of the provisions set out in the ITT or any other information/instruction provided by the Contracting Authorities, will, at the sole discretion of the Contracting Authorities, be excluded from further participation in this procurement."

...

14.1 *The Contracting Authorities reserve the right to reject or exclude a bidder and/or its collaborative members where:*

14.1.1 A tender is completed incorrectly, is materially incomplete, or fails to meet the submission requirements which have been notified to bidders;

14.1.2 The bidder and/or its collaborative members are unable to satisfy the terms of Regulation 57 of the PCR2015(SI 2015 No 102) at any stage during the tender process;

14.1.3 The bidder and/or its collaboration are guilty of material misrepresentation in relation to its application and/or the process;

14.1.4 The bidder and/or its collaborative members contravene any of the Terms and Conditions of the ITT;

*14.1.5 There is a change in identity, control, financial standing, or other factor impacting on the selection and/or evaluation process affecting the bidder and/or its collaborative members;
or*

14.1.6 The bidder and/or its collaborative members submit a variant bid."

14. Schedule 5 set out the Tender Timetable, which included a line item setting out that the tender submission deadline was '*Before 12 noon 12 July 2022*'.

15. Schedule 6 contained the Tender Evaluation Handbook. In summary, bidders were required to complete 3 questionnaires. The relevant questionnaire for the purposes of this dispute is Questionnaire 3 which contained the Tender Specific Questions. Where mandatory attachments were required this was indicated against the relevant question. Lot 4 included Question 121, again relevant to matters as they transpired. Question 121 stated as follows, and as can be seen from the extract, including the requirement for a mandatory attachment with a 6% weighting:

<p>12 1</p>	<p><i>SD04d Lot 4 Midlands West Communication, Reporting and Data Quality – Local/Lot Specific Question</i></p> <p><i>Please describe your plan to ensure that communication is in place between you and the various service stakeholders, throughout the contract period and service delivery, ensuring an accurate and up to date child health record is maintained by the provider and stakeholders and to promote an understanding of the role and function of CHIS.</i></p> <p><i>Please outline how you will:</i></p> <ul style="list-style-type: none"> • <i>Achieve timely performance reporting and other data requests to commissioners and stakeholders and;</i> • <i>Deliver on-going data quality functions to support improvements in data quality in both the CHIS service and primary care providers and embed continuous service improvement throughout the life of the contract</i> <p><i>MANDATORY ATTACHMENTS REQUIRED:</i> <i>Communication/Stakeholder Engagement Plan Word Limit: 2000 Weighting 6%.</i></p>	<p><i>Text Response</i></p>	<p><i>0-4 In accordance with Tender Questions Evaluation Criteria as per the ITT Schedule 6 Tender Evaluation Criteria Handbook</i></p>
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16. In considering the proper construction of the ITT, I apply the well-known principles articulated by the Supreme Court in the domestic court context in the case of *Healthcare at Home Limited v The Common Services Agency* [2014] UKSC 49. Citing from *SIAC Construction Ltd v County Council of the County of Mayo* (Case C-19/00) [2001] ECR I-7725, where there was a disagreement between the parties as to the interpretation of tender documents, the following guidance was given:

‘More specifically, this means that the award criteria must be formulated, in the contract documents or the contract notice, in such a way as to allow all reasonably well-informed and normally diligent tenderers to interpret them in the same way.’

17. I therefore consider the meaning of the ITT, objectively, by reference to the ‘RWIND’ tenderer. I also do so in such a way so as to give effect to and be compatible with the underlying legal framework which, in summary sufficient for present purposes, promotes equality of treatment, transparency and proportionality.

18. As summarised by Ms Rhee, the ITT made clear that the process was that:

- (1) Tender responses were to be submitted via the e-portal;
 - (2) Tenderers were to indicate which of the Lots they were submitting tender responses for, there being no requirement to submit Lots for any or any combination of Lots; and the Lots were to be evaluated separately for both price and quality.
 - (3) In respect of attachments, they were to be uploaded to the correct location or 'placeholder' and all mandatory attachments were to be uploaded before the bids for each of the Lots being tendered for were to be 'submitted' via the portal.
 - (4) The portal 'does not accept files with the same name'.
19. Ms Rhee, in oral argument, sought to rely upon a distinction between the requirement to input text in answer to mandatory questions, which the ITT made clear '*MUST be answered otherwise the On-line Questionnaires cannot be submitted*' (clause 2.7 of Schedule 3), and mandatory attachments, dealt with in clause 2.5 of Schedule 3, which did not explain in similar terms that a failure to fill in a placeholder with an attachment would prevent submission. Whilst there is a semantic difference, in my judgment it was made plain within the ITT that the mandatory placeholders had to be filled as part of the functionality of the e-Portal. This was obvious because the tenderer is instructed within the ITT to upload a blank attachment containing the words 'not applicable' to the placeholder in circumstances where it does not wish to submit an attachment. Moreover, within the system itself, the upload 'button' for mandatory attachments is coloured red until a document is uploaded, at which point it turns green. Far from being a functionality that may be criticised, it is in my judgment a sensible functionality, explained satisfactorily within the ITT, that reduces – not increases – the prospect that a tenderer may inadvertently submit a non-compliant bid by failing to include a mandatory attachment.
20. Ms Rhee also contended that the process required that bid responses were to be 'submitted' (ie by pressing the 'submit' button) only at the point that responses for all the Lots being tendered for had been entered on (in the case of text responses) and uploaded to (in the case of attachments), the portal. Whilst this is true, it is also the case that, as pointed out by Mr Williams, it was possible for a tenderer to complete an application in relation to 1 Lot, submit it, and then withdraw it in order to replace it with a combined bid for one or more Lots. In theory, whilst the portal could work in this way, in practice it seems improbable that any tenderer would operate the portal in this way, not least because the commonality of answers between Lots – even in relation to the Lot specific questions – likely means that most tenderers would progress constructing their answers to the Lots it intends to bid for in parallel rather than sequentially. In any event, the important feature of the portal for the purposes of at least one aspect of Ms Rhee's case is that ultimately, by the deadline of 12 July 2022, noon, a single bid containing all text and mandatory attachments relating to each Lot the tenderer wished to submit a tender for, had to be submitted in one go, with a single press of the 'Submit' button after uploading the contents to the portal. This carries with it the obvious implication that a problem with one Lot may prevent submission of the other Lots, unless of course the tenderer chooses to abandon the problematic Lot and submit the unproblematic ones, which is a course open to the

tenderer, as explained in evidence by Ms Dinning and accepted in evidence by Mr PJ Kirby.

21. In my judgment, in addition to the points identified by Ms Rhee which I have set out at paragraph 18 above, the ITT made the following abundantly clear to the RWIND tenderer:
- (1) Whilst the tenderer could choose how many of the Lots it was entering into, it would be submitting a single bid. This is the obvious implication of the ITT when read as a whole, and it is made clear by the fact (for example) that the various declarations that are required to be given in relation to the absence of collusion etc are made once in relation to the 'Bid' as a whole rather than being made on a Lot specific basis.
 - (2) the deadline was Noon, 12 July 2022;
 - (3) any failure to submit the single bid, containing each Lot tendered for, by the deadline, would result in:
 - a. the exclusion of the bidder from participating any further in the procurement; and
 - b. every part of the bid not being 'visible' to the Contracting Authority, with the effect that no part of the bid could be taken further within the procurement process.
 - (4) whilst an express discretion to extend the deadline existed, as referred to at paragraph 3.2 and 3.3 of Schedule 3, this properly construed applied only prior to the expiry of the deadline, and also could only be exercised by granting the extension to all bidders. It was not therefore a discretion permitting NHS England retrospectively to extend the deadline after just one bidder had failed to meet it.

At this point I note that not only is the consequence of failing to meet the deadline made extremely plain on the face of the ITT, to the extent relevant Mr PJ Kirby was fully aware both of the deadline and also of the consequence of non-compliance:

Q. That was, I take it, so you understood the rules of what you had to do in order to submit your tender?

A. Yes. The rules are literally the same for all procurements: get your submissions in by the deadline, in essence.

....

Q. And also under that: "It is important to note that any late submissions will not be accepted."

A. Yes.

Q. It's fair to say you knew full well what the consequences were of not getting your tender in on time.

A. Yes.

(Transcript page 36)

...

Q. You clearly understood the rather draconian consequences of missing the deadline?

A. Yes.

Q. Would you agree, that didn't give much choice to the contracting authorities: if you missed the deadline you were out?

A. Yes.

(Transcript page 39)

- (5) Although once submitted the Lots were going to be evaluated on a standalone basis, and tenderers might win one and lose another, the fact that they were to form part of a single bid, submitted once within the same portal, meant that an error in one Lot which prevented the bid from being submitted would have consequences for the other Lots, unless the problematic Lot was removed.
- (6) Faults in the bidder's system (be that the electronic system or the broader 'system' within the bidder for ensuring a compliant tender is submitted on time) were not the responsibility of the Contracting Authority and /or NECS and no extension to the closing time or date would be made if caused by fault on the part of the bidder's system;
- (7) 'submitting' the bid meant more than simply uploading the information to the portal. Uploading the information to the portal was merely one of the preparatory elements to the 'submission', rather than something which could be considered of itself a submission. Ms Rhee urged in argument that because the portal was being run by NECS on behalf of NHS England effectively as NHS England's agent, the mere uploading of documents to the portal would itself constitute submission of those documents to NHS England. This is plainly not right. As is made plain on the express wording of the ITT, and clear to the RWIND tenderer, the act of submission of the content uploaded prior to the deadline is necessary for that information to become visible to the Contracting Authority. This is an important functionality for equality and transparency, and that functionality was made clear in section 3.11 of Schedule 3. It also has obvious practical importance for certainty around compliance with the (important) deadline. Indeed, whilst this would be the

case even if subjectively this had not been understood by IIL, Mr PJ Kirby fairly accepted that he understood the difference between uploading information and submitting information:

Q. Right. So you knew that all tenderers, including your company, needed not only to upload to the portal all the documents they wanted to submit, but also to submit them so they would be received by the contracting authority before the deadline?

A. Yes.

(Transcript page 36)

22. In light of this, the answers to Issues 1 and 2 are clear:

Issue 1: Are the Claimant's bid responses as entered and uploaded to the Portal for each of Lots 1 to 4 to be treated as four separate bids or as a single bid for the purposes of the Public Contracts Regulations 2015 ("PCR 2015")?

Answer: A single bid

Issue 2: Did the Invitation to Tender ("ITT"), objectively interpreted by a Reasonably Well Informed and Normally Diligent ("RWIND") tenderer, require bidders to submit a single bid for Lots 1 to 4, or to submit separate bids for each of Lots 1 to 4?

Answer: A single bid

The Legal Principles

23. The starting point is the PCR 2015. Regulation 18(1) PCR sets out the fundamental principles of procurement:

"Contracting authorities shall treat economic operators equally and without discrimination and shall act in a transparent and proportionate manner."

24. Regulation 56(1) states:

'Contracts shall be awarded on the basis of criteria laid down in accordance with regulations 67 to 69, provided that the contracting authority has verified in accordance with regulations 59 to 61 that all of the following conditions are fulfilled:—

(a) the tender complies with the requirements, conditions and criteria set out in the contract notice or the invitation to confirm interest and in the procurement documents, taking into account, where applicable, regulation 45;'

25. Regulation 56(4) states:

"Where information or documentation to be submitted by economic operators is or appears to be incomplete or erroneous or where specific documents are missing, contracting authorities may request the economic operators concerned to submit, supplement, clarify or complete the relevant information or documentation within an appropriate time limit, provided that such requests are made in full compliance with the principles of equal treatment and transparency."

26. IIL relied upon Regulation 56(4) to contend for the existence of a discretion on the part of NHS England to have allowed IIL into the procurement, notwithstanding the admitted 'technical' non-compliance with the ITT. It contended that the discretion exists first and foremost as a matter of law under regulation 56(4) PCR 2015, and that in any event, consistently with regulation 56(4), a discretion can also be reflected in the express terms of the tender documents. In this case, as I have found, no express discretion to extend the deadline after the deadline had been missed by one tenderer existed within the express terms of the tender documents.

27. The case opened by Mr Williams was that, '*on the facts of this case, no discretion existed*'. He also contended that regulation 56(4) was inapplicable to a situation where the bid had not in fact been submitted. Whilst Mr Williams fairly conceded that there may be some cases in which a discretion existed to waive a non-compliance notwithstanding the clear requirements of the ITT and the absence of any contractually stated discretion (by virtue of regulation 18 rather than 56(4)), he contended that this was not such a case.

28. He relied in part on the conclusions of Professor Arrowsmith in the most recent edition of the *Law of Public Utilities Procurement*. At 7-163, the text states as follows:

'The position is the same under the 2014 Public Procurement Directive which, as we have seen, states expressly in Art.56(1) that tenders must comply with stated requirements to be accepted.

The question arises, however, as to whether there are any exceptions to the requirement to reject late tenders. It is suggested that, whilst there is generally no discretion to do accept a late tender, it is arguable that there is a duty to do so, at least prior to the award decision being made, when the tender is late because of the fault of the contracting authority itself. In Scan Office Design SA the Court ruled that it was unlawful for the Commission to

accept the late tender even though the Commission had erroneously sent the specifications to the tenderer's Italian, rather than Belgian, branch. However, the court did not specifically address the argument that this error justified the Commission's action and its conclusion may have been based on the fact that, given ongoing communications between Scan and the Commission, the error caused no prejudice. In cases in which prejudice does exist it would, it is submitted, be acceptable to consider a tender that is late. There is no violation of equal treatment since a tenderer who has been misled, or affected by some other exceptional circumstance, is not in a comparable situation to one who has not. In the domestic High Court case of Leadbitter Richards J, without referring to the Scan case, suggested that there "may be circumstances" where proportionality will "exceptionally" require acceptance of the late submission of the whole or part of a tender "most obviously" when it results from fault on the part of the procuring entity.

It is important to recall here that the contracting authority has a discretion to extend the deadline before its expiry to deal with situations of difficulty, whether of individual tenderers or more general (such as adverse weather) and is even required to extend it in certain cases: this issue was considered at paras 7-133—7-134 above. This makes it less necessary to consider late tenders in practice.'

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

- (4) The starting point is that deadlines are to be respected and only exceptionally should a Contracting Authority permit the submission of late or missing information.
30. Thus, however clear the terms of an ITT, I consider that according to regulation 18 it will always be necessary for a contracting authority to satisfy itself on the facts of a given case that strictly applying the stated rules is the appropriate course in order to satisfy the overall requirements of equality, transparency and proportionality. As stated by Professor Arrowsmith, ‘generally’ it will not be within the bounds of discretion to waive non-compliance with a stated deadline; instead, excluding late tenders will generally be necessary to ensure that regulation 56(1) is complied with. Where, however, the failure of a tenderer to submit a bid is squarely the fault of the contracting authority and it is a fault which has unfairly prejudiced one or more of the various bidders, it seems probable that, absent some other salient feature, fairness would dictate that the prejudice to the tenderer(s) is removed even in circumstances where no explicit discretion appeared to exist on the face of the ITT. Indeed, the facts may be so clear that the only reasonable decision would be to waive the relevant requirement, and in this sense it might be seen as a ‘duty’ to do so, as described by Professor Arrowsmith.
31. In relation to whether 56(4) applies to a tender which has not been submitted at all, in light of my conclusion that a residual discretion may exist irrespective of this section, the wording of 56(4) in fact takes the matter no further. Whilst it seems that there is some force in Mr Williams’ submission that the permissive regulation applies to the situation where the bid has in fact been submitted, it is not necessary for me to decide this and I shall not do so.
32. As pointed out by Mr Williams, there are a number of authorities which address situations in which *submitted* bids were defective in some (often minor) way and issues arose as to what a contracting authority should do when confronted with such a situation. The only authority which addresses the situation where a bidder failed to submit any bid *at all* is *Azam & Co Solicitors v Legal Services Commission*. [2010] EWCA Civ 1194; 2011 Eu. L.R. 131; (2010) 107(37) L.S.G. 17 (10 September 2010). The Court of Appeal upheld a decision which found that the decision to exclude a law firm from a procurement when it missed the deadline was lawful. At paragraph 36, Pill LJ stated:

‘As to proportionality, the judge acknowledged the "harsh economic consequences of the inability to tender" as expressed at paragraph 70. However, he gave "weighty reasons against the grant of an extension". I agree with those reasons. The decision not to permit an extension was not, in the circumstances, disproportionate. I have already read paragraph 70 of the judgment where the reasons are set out. These are put as an objective test, but it is clear, in my judgment, that the relevant considerations were kept in mind by the respondents. I also agree with the approach of David Richards J in Leadbitter and I accept that it reflects the earlier authorities. A deadline is a necessary part of a tendering process. The deadline was plainly stated in readily accessible documents. There is no fault by the respondents; they needed to be conscious of their duty to treat tenderers and potential tenderers equally and to avoid suggestions of favouritism towards a particular party.

The failure to tender arose from a single and very unfortunate failure, though against the background of a failure by Mr Azam and his firm to monitor what would seem to be documents sensible to be monitored by a firm doing this type of work, it was the failure to take action on the receipt of the letter of 23 December. The need for an extension could not be attributed to any fault on the part of the respondents or to any factor outside the control of the appellants.'

33. At paragraphs 51 and 52, Rimer LJ added the following by way of agreement:

'This was, said Mr Nicholls, and I agree, not a case in which the overlooking of the deadline was anyone's fault but Azam's. It was a straightforward and wholly unexceptional case in which a proposing bidder had simply overlooked the deadline. If an extension ought to have been granted in this case, then Mr Nicholls said it would be difficult to see why it should not be granted to anyone who overlooked the deadline and sought an extension, an approach that would effectively emasculate the deadline condition. Moreover, the vice in Azam's case was that it necessarily involved a violation of the principle of equality between tenderers required by the 2006 Regulations. To extend Azam's time to present its bid in the unexceptional circumstance of its case would be to give it an advantage denied to all other tenderers. There might, for example, Mr Nicholls said, be some who had rushed the presentation of their bid in order to meet the deadline but who could have improved it had they had an additional week. Moreover, in an oversubscribed competition such as this one was, in which there would have to be a proportionate scaling down of the awards of "new matter starts" to the successful bidders, the introduction of a late bidder into the system would have the potential to affect those awards in a way which would not otherwise arise.

I would accept Mr Nicholls' submissions as to why on the facts of this case there was nothing disproportionate about the Commission's refusal to change the tender rules to accommodate the unexceptional circumstance that a particular proposing tenderer had, through his own carelessness, missed the deadline. Any different decision by the Commission would, I consider, have been unprincipled and would have involved an unjustified violation of the requirement of equality of treatment imposed by the Regulations'

34. The principles to which Pill LJ referred in the case of *Leadbitter and Co Ltd v Devon County Council* [2010] ELR 61, [2009] EWHC 930 (Ch), stating that it accurately summarised the effect of earlier authorities, can be distilled as follows:

- (1) the exercise of discretionary powers necessarily involves judgement on the part of the contracting authority. The court must respect this area of judgement and will not intervene unless the decision is unjustifiable. This is the proper meaning of a manifest error in this context (paragraph 55);
- (2) exercising a discretion to waive terms which are stated as applying without exception is a departure from the terms of the procurement process and is therefore an exceptional course. This is because a waiver of such terms carries

the very risks of unequal treatment, discrimination and a lack of transparency which the contracting authority is required to avoid (paragraph 56);

- (3) there may be circumstances where proportionality will, exceptionally, require the acceptance of the late submission of the whole or significant portions of a tender, most obviously where it results from fault on the part of the procuring authority (paragraph 68);
- (4) in general, even if there is discretion to accept late submissions, there is no requirement to do so, particularly where it results from a fault on the part of the tenderer (paragraph 68).

35. All these principles were stated in the context of a case in which a substantial part of a submitted bid had been left out; however, they are equally applicable in my view to consideration of a case where, in effect, the whole bid had been left out, in that it was not submitted by the deadline at all. These are the principles which therefore guide me in this case.

The Facts

36. The team within IIL responsible for the bid commenced work shortly after the publication of the tender information on the portal. Mr PJ Kirby was responsible for uploading the documents provided to him by the bid team, and ultimately for ensuring that the bid was submitted by the deadline. A number of activity logs, which are automatically generated by the InTend system and are, as rightly accepted by Ms Rhee, to be taken as accurate, have been provided. One of these (provided under cover of Linda Brady's email of 14 July 2022 ('the Blue and White Log')), demonstrates all the IIL activity on the portal throughout the 35 day period from the opening of the tender to 13 July 2022. This shows that during June and early July, the portal was, as might be expected, being regularly visited for the purposes of viewing documentation. On 7 July, the process of completing questionnaires online was commenced, and whilst the content of that process is not available on the log, the timing of processing and saving is seen. There is no activity on the portal on 8, 9 or 10 July, but at 8.34am on 11 July, the day before the tender deadline, activity resumes and the last activity that day took place at 23.02. The following day, activity recommenced at 08.32am.
37. The question of what precisely went wrong in the short period prior to the attempted submission of IIL's bid was the subject of detailed exploration with Mr PJ Kirby, both in a lengthy examination in chief and cross-examination.
38. However, as a starting point I set out how Mr PJ Kirby described what he thought had happened in the most contemporaneous explanation available. This was contained in a message sent through the portal shortly after the deadline expired. At 2.27pm, Mr PJ Kirby wrote:

'About 11.40am (20 minutes before deadline), our bid was complete and ready to be submitted, ie all answers and associated mandatory attachments for all lots were all uploaded. Upon pressing 'Submit Return', the portal stated

that there was an issue with Document 10 SPD Questionnaire Part 1 and 2. I believe that portal suggested that there was an issue with said attachment and that I remove the current attachment, then upload again, which I did. I am sorry, I did not take a screenshot at that particular error message. I then pressed 'Submit Return' once again, the portal then stated that there was a problem with SV02d, again I did not or take a screenshot of the exact error, due to the deadline closing. I removed attachment SV02d, then re-uploaded the same document. I attempted again to submit the tender, the portal stated that there was another issue with SD04d (mandatory attachment), which I removed and then reuploaded. However SD04d did not appear in the portal as being successfully uploaded, see pages 6 & 7 of the screenshots as the button remained red. When I attempted again to upload SD04d, the portal then stated "The file you are trying to upload already exists. Please try again", see page 6 of the screenshots. I attempted to submit the return, but the portal then stated "All mandatory tender documentation placeholders must be filled before submitting this return", see page 7 of the screenshots. At 11.54am (6 minutes before deadline), I sent a message to the Commissioners (and procurement) via the portal to seek your assistance about this issue and also to notify you that I had this problem because our bid was complete and ready to be submitted. There was no time to call the portal helpdesk. I cannot recall how many more times I tried to upload SD04d (after sending the message at 11.54am), I think it was around 3-4 times. About 11.57am, I thought it would be wise to take screenshots of the portal to evidence that: a. our bid was ready for submission, ie all questionnaires had been answered and all mandatory attachments had been uploaded (with the exception of SD04d) and b. to evidence the error message associated with attachment SD04d that prevented me from submitting our bid before the 12pm deadline. I assume that the portal had an audit log of this too?'

39. In his witness statement, Mr PJ Kirby described effectively the same events as set out above for Document 10 and SV02d (which the witness statement corrected to SV01d), and in particular that this second document was successfully removed and re-uploaded. In different terms to the contemporaneous account, the witness statement explains then that a different error message showed, relating to SD04d (the Lot 4 Engagement and Comms plan, a mandatory document). Mr PJ Kirby explained that it said '*The file you are trying to upload already exists. Please try again*' upon pressing the 'Submit Return' button after removing and re-uploading SV01d, and it is in this context that Mr PJ Kirby states, '*At the time I did not understand what this error message meant*'. It is this statement that underpins IIL's pleaded breach that the error message was not clear, such that the system failed to comply with the PCR 2015.
40. In his written evidence, he goes on to explain that the placeholder for SD04d was highlighted red and stated '*Upload Document*'. He goes on to explain that he did not understand at the time that (as he has now assumed) SD04d had been uploaded to an incorrect placeholder, and so he removed and re-uploaded SD04d, and that this did not work. Mr PJ Kirby's evidence continued that when he removed the SD04d document from its placeholder, and tried simply to submit the tender, he was met with the message: '*All mandatory Tender document Placeholders must be filled before submitted this return*'.

He concluded that he was therefore prevented by the Portal from submitting IIL's bids for any of Lots 1, 2, 3 or 4. At the end of his witness statement, he ventured an explanation at paragraph 73:

'Upon reviewing the 20 July 2022 letter and the audit log in combination I identified that the attachments in support of Lots 1 – 3 had been uploaded correctly, but that for Lot 4 the attachment 'SD04d' had been uploaded but 'SV01d' had not been. From this I suddenly realised that I must have uploaded attachment 'SD04d' into the placeholder for question 'SV01d'. It was only at this point that I realised what the error message meant: that a file had been uploaded to the wrong place for one of the Lots.'

41. Mr PJ Kirby was taken through the relevant audit logs in examination in chief, and cross-examination. Mr PJ Kirby was entirely fair in accepting, when put to him, that he did not actually have a very clear recollection of what happened in those frantic 20 minutes (Transcript page 26). Little additional clarity was provided to what may have happened, but Mr PJ Kirby maintained that the explanation he gave at paragraph 73 was still his best assumption of what had happened.
42. It is, however, extremely clear to me from analysing the logs that the description of events provided both just hours after they took place, and as somewhat modified in his witness evidence, cannot be correct. I emphasise that I do not consider for one moment that Mr PJ Kirby was not trying properly to assist, but it is frankly unsurprising that Mr PJ Kirby's own recollection of precisely what happened is not necessarily accurate in relation to what must have been an extremely stressful time and during which he was not thinking clearly.
43. From the logs, it is possible to ascertain a more accurate, although still not wholly clear, picture of events. I am grateful to both parties' legal teams for producing and agreeing (at least in general terms, and with some caveats) at my request a schedule which identifies the times upon which each relevant document was either loaded or possibly removed from the system and the documentary evidence relied upon. The starting point is, in my view, the various logs, which are consistent with each other even though they show slightly different levels of detail. In addition to the Blue and White Log (referred to above) I refer principally to what I shall call 'the Audit View Log' which (unlike other logs) contains in column 3 an indication of the precise document uploaded, although unfortunately it does not identify the name of any document when it identifies that a document has been 'removed'.
44. Having considered all the information with care, the following, in my judgment, is what on balance of probabilities, happened in the short period before midday on 12 July 2022:
 - (1) Subject to the later need to remove and upload a document, the 'last' document required to have been uploaded was uploaded at 11.40.00. As shown in the Audit View log, this was document WF01d – Lot 4 Midlands West Staffing Plan.docx.

- (2) Thereafter, as shown in the Blue and White Log, between 11.41 and 11.43, Mr PJ Kirby viewed the various Return Documents, presumably checking their completeness prior to pressing Submit.
- (3) At 11.49, Mr PJ Kirby pressed the 'Submit' button, as recorded as 'Website Return Started' in the Blue and White Log. He did not do this at 11.43, as Mr PJ Kirby had said in his witness evidence or 11.40 as he recorded in his contemporaneous message, but at 11.49, some 11 minutes before the deadline expired.
- (4) As Mr PJ Kirby explained, he then saw an error message asking him to remove and re-upload ITT Document 10, SPD Questionnaire Part 1 and 2 NHSE823_Inhealth.pdf ('Document 10'). This error message was specific, comprehensible and successfully acted upon; indeed Mr PJ Kirby does not suggest otherwise. This conclusion is also supported by the Audit View Log. Although it does not specifically identify it, the 'Document Removed' at 11.50.20 was obviously Document 10, and it was (re-)uploaded at 11.50.40. Thus, it took something less than a minute to read, understand and act on the message correctly. I therefore conclude that the message was easily understood, was in no way problematic and could not of itself be considered any type of inherent flaw in the software. The Blue and White Log shows that the Submit button was immediately pressed following the upload (at 11.50).
- (5) This generated another message. Mr PJ Kirby's evidence is that it was similar to the previous one, and related to SV01d. I accept this is the case; in other words it was another specific and easily understood message relating to a particular identified document and was capable of being actioned successfully in a short period of time.
- (6) The Audit View Log shows 'Document Removed' at 11.50.56. It is not clear from the face of the Audit View log which document was removed, but because of the other evidence in the case I accept that it was probably either SV01d or SD04d. It is clear from whichever log is examined, however, that there was no other successful upload to the portal from this moment on. Therefore, where Mr PJ Kirby has described, either in his contemporaneous message or in his witness evidence, that further uploads took place, he is certainly mistaken.
- (7) From the screenshots which Mr PJ Kirby took at the time, it can be seen that the placeholder button for SD04d was, very shortly before midday, coloured red, making it clear that a document was still required to be uploaded into this placeholder. I find it highly improbable that the button was red when the initial attempt to Submit happened at 11.49, as it would have been obvious that the bid was not yet in a position to be submitted if a red button was still showing. It therefore must have turned red at the same time as the document was removed at 11.50.56. This means that the document which was removed was whatever the document was that sat in the placeholder for Lot 4 Engagement and Comms plan.

- (8) This being the case, it may be that Mr Kirby made an error in removing a document from the SD04d placeholder having been given a clear message which, on his own evidence, related to a different document, SV01d. However, it is equally likely to me that he simply looked on the screen for document SV01d, and removed it. He may not have noticed that it was (most probably, in my determination) wrongly in the placeholder for Lot 4 Engagement and Comms plan. This therefore emptied the SD04d placeholder and the button turned red.
- (9) Upon trying to refill the placeholder, Mr PJ Kirby was met with the message, *'The file you are trying to upload already exists. Please try again'*. This is because it is most likely that, having removed SV01d, Mr PJ Kirby mistakenly attempted to (re-)upload SD04d because he was looking at the placeholder description. However, this is a document which, if I am right, had never in fact been removed from the system. I reject his suggestion in Mr PJ Kirby's witness statement that he successfully re-uploaded SV01d and it was following this that he got a further message about SD04d, because the logs are inconsistent with such an account. I also reject the suggestion that the message occurred when the 'Submit' button was pressed – it would have occurred when he was attempting to upload the document, prior to pressing submit.
- (10) This analysis is supported by Mr PJ Kirby's screenshots, which show (albeit on a page without date and time, but which I take to be properly part of the sequence of screenshots as Mr PJ Kirby described) SD04d was in the system shortly before noon (although in light of what later occurred, likely in my judgment to have been in a corrupted or incomplete form). Indeed, whilst Mr PJ Kirby was obviously in a panic, when taking the screenshots he would have necessarily seen the existence within the portal of the very document that he was trying to upload (again) and the meaning of the error message was – at least objectively - obvious. This therefore evidences a prior error, in that document SD04d had most probably been uploaded into the portal and into the wrong location, and probably SV01d likewise.
- (11) Because it is not possible in any log to see unsuccessful upload attempts, it is not possible to see how many times or for how long Mr PJ Kirby attempted in vain to upload a document which already existed within the portal. However, he accepts that a point soon came when he spoke with his boss and concentrated not on trying to solve the issue, but on taking screen shots of the system to establish what the situation was.
- (12) Ultimately, the expiry of the deadline passed at noon on 12 July 2022, and IIL had plainly not in my judgment submitted its tender to NHS England as required by the ITT prior to its expiry.
- (13) Whilst I will deal with the investigations which followed within NHS England and NECS below, I conclude that the best evidence of the state of what was, or was not, within the portal as at 11.59 (and, indeed, save for the last 'Document Removed' at 11.49), is the communications provided by InTend upon enquiry. I have no reason to doubt their accuracy:

- (a) at 9.46 GMT, Molly Schofield, a support analyst at InTend provided an email with all the attachments which had been recovered from the system. The email read:

Please note we did have an issue trying to recover the file "Appendix_SD04d_MW_Engagement_&_Comms_Plan_Lot4_InHealth.pdf" as it appears there was an issue during upload for this document, for example the suppliers connection to the internet dropping for a moment during upload or the file being corrupt so were unable to recover this document.

The attachment then showed a screenshot of the General and Lot 4 folders. The General Folder showed Document 10. The Lot 4 Folder was missing SV01d and SD04d.

- (b) the email from Linda Brady of 19 July 2022 at 11:06 GMT stated:

'Please find attached the audit I did showing the documents uploaded/removed and also the list of attachments confirmed by Intend which is cross matched with the audit. I have also attached a list of all of the placeholders for the project. Below is the details of the documents which were either not uploaded or the wrong documents uploaded.

Missing mandatory attachments Lot 4

- *AppendixSD04d_MW_Engagement_&_Comms_Plan_Lot4_Inhealth.pdf*
- *Appendix WF01 – Proposed Midlands West SHIS Organisational Chart – Inhealth.pdf*

Wrong mandatory attachments Generic

- *ITT Document 1 Declaration NHS876*
- *ITT Document 2 Form of Tender Non Collusion NHS876*
- *ITT Document 3 Conflict of Interest NHS876*
- *ITT Document 4 Confirmation of Questionnaire Declarations NHSE876.'*

The spreadsheet attached showed SD04d as not being included within the 'Intend Support List 18/7/22', highlighted red with a 'No'. The spreadsheet also showed SV01d as blank orange (because although it was not recovered, it was not a mandatory document).

45. In light of this, it is clear to me as a matter of fact that:
- (1) The initial error messages requiring specific documents to be removed and uploaded were easily understood and capable of being easily dealt with, as

with Document 10. I do not regard their existence as any sort of defect within the InTend portal (indeed, no part of the pleaded case by IIL alleges this; it is at most context).

- (2) Had the prior error of mislocation of files not existed, it is more than likely that Mr PJ Kirby would have dealt as simply and successfully with document SV01d as he had done with Document 10;
- (3) As it happened, by mistake (potentially partly contributed to by a prior mislocation error), Mr PJ Kirby tried to upload a document to the portal which already existed on the portal.
- (4) The ITT was clear that no two files with the same name could be uploaded.
- (5) The error message explaining this was extremely clear. It is plain that the reason Mr PJ Kirby did not work out what the issue was was because he was in a panic. This itself was caused by the fact all this was happening at 11.50, with 10 minutes to go until the portal closed. In my view, it is unlikely that Mr PJ Kirby spent more than a couple of minutes trying to think through and resolve the problem before, effectively, giving up, calling his boss and, no doubt as requested, concentrating on evidencing the state of affairs through screenshots.
- (6) I am left in absolutely no doubt that if the submission process had been started even 20 minutes earlier, Mr PJ Kirby – who was clearly experienced in e-tendering portals, and indeed the InTend portal – would have worked out that a simple human error lay behind the problem and it was not (and I so find) a problem with the software or the portal. It is clear to me that it would have been extremely straightforward for Mr PJ Kirby either (1) to find SD04d – indeed, it can be seen on the screenshot – and remove it and re-upload it to the placeholder; (2) change the SD04d filename (e.g. add ‘v2’ into the filename) and upload it into the e-Portal; or (3) even upload a blank document into the placeholder. Any of these would have taken no more than a minute or so and could have allowed the bid in respect of all 4 Lots to proceed into the procurement. He could also have removed Lot 4 from the uploaded material and submitted just Lots 1-3. However, given his panic caused by the time pressure rather than any objective difficulty in understanding the problem, he did none of these things.
- (7) In my judgment, whilst I accept that subjectively Mr PJ Kirby did not understand the error message in the frantic and panicked state he was in at around 11.52am on 12 July 2022, it is clear that neither the software package nor NHS England were responsible for this. Whilst I have considerable personal sympathy for Mr PJ Kirby, I am left in no doubt that responsibility for the failure to submit the bid lies squarely with IIL. I should add that, as Mr PJ Kirby fairly pointed out, he was only able to upload documents when provided to him by the wider team, and it may well be unfair on him that the focus has necessarily, for the purposes of this litigation, been on the last minutes of the overall process.

46. At this point, I set out the answer to Issue 3. This states:

Did the Claimant enter/ upload to the Portal:

1. (i) all the documents required for Lots 1 to 3;
2. (ii) all the mandatory documents required in respect of Lot 4; and
3. (iii) all the text responses required for Lots 1 to 4

before the deadline for the Procurement (at midday on 12 July 2022), such that – but for the error in uploading one document to the wrong placeholder for Lot 4 – the Portal would have allowed the Claimant’s bid responses for each of Lots 1 to 4 into the Procurement?

47. In respect of this issue, my answer is that:

- (1) all the documents required for Lots 1 to 3 had been uploaded;
- (2) all the mandatory documents for Lot 4 had been uploaded, save that in my judgment it is probable that:
 - (a) Documents SV01d and SD04d were in the wrong places at 11.49, and SV01d had been removed by 11.59;
 - (b) Document SD04d was in a corrupted or non-retrievable form, and would have required to be removed and re-uploaded successfully at some point prior to submission in order for it to be visible to NHS England.
- (3) I accept that it is more likely than not that all the text boxes were complete;
- (4) I do not, however, agree with the premise of the ‘but for’ assumption inherent in the wording of the Issue. On the basis of my findings of fact, the ‘but for’ assumption would more appropriately be articulated, in my judgment, as follows: *‘but for human error in uploading documents to incorrect placeholders, and an inability to deal properly with clear error messages driven principally by the failure on the part of the Claimant to have commenced the submission process with enough time in hand prior to the deadline, the Portal would have allowed the Claimant’s bid responses for each of Lots 1 to 4 into the Procurement.’*

48. Following the failure to have successfully completed the bid in time, Mr PJ Kirby submitted the message quoted at paragraph 38. above. As explained by Ms Dinning in evidence, NECS and NHS England became aware shortly after that there was a potential issue with one of the bidders failing to submit a bid by the deadline. There followed what was rightly accepted by Ms Rhee as a period of investigation by NECS and by NHS England, which concluded with the Decision on 20 July 2022. A number of the email exchanges were put to either Ms Dinning (of NECS) or Ms Elmes (of NHS England). It is not necessary to set out in full the chronology of those exchanges, but in my view both witnesses were extremely clear, and I find, that they wanted, as far as possible, to get to the bottom of what happened prior to making any decision in

relation to the bid. In circumstances where it seems to me that Mr PJ Kirby's own contemporaneous recollection of events is wrong when compared against the audit logs, and when the Claimant's own explanation of events in submissions clarified only in closing the case, any criticism of NECS and/or NHS England to have come to a clear or unequivocal understanding of the precise circumstances of what led to the failure of the bid to be submitted is, in my judgment, unjustified.

49. The material facts, as I find them, following the failed bid submission can be summarised as follows:

(1) On 12 July 2022, Linda Brady of NECS first contacted In-Tend by email at 1.08pm GMT stating:

'In order for us to complete a full audit check please can you confirm if you had any downtime issues on the portal, especially between 11.30 and 12 noon.'

(2) Molly Schofield, of In-Tend, confirmed shortly after that there had been no downtime recorded, and that she had also checked with the other members of support and that they were unaware of any reports of suppliers experiencing issues accessing or submitting a return on the portal.

(3) In-Tend then provided its views on the screenshots which had been provided by Mr PJ Kirby, which I have already referred to. Ms Schofield correctly indicated how the issue could have been simply dealt with.

(4) On 13 July, IIL submitted a letter through the portal, which was forwarded through to Ms Elmes, amongst others. In response to the letter, Ms Elmes explained, and I accept, that she wanted to make sure that all bidders had been treated fairly and that as such it was important to establish that the error was not something which NHS England or NECS could have prevented. This sentiment was captured at the time by Cathy Harris, a colleague at NHS England, the same day in her email which asked:

'Do you have the evidence from InTend Support to show the issues / timeline with the late / error submission yet? I don't think anyone is in a position to respond to this letter without the evidence to show who was in the right or wrong or what the actual issues were.'

(5) As explained at paragraphs 21 and 22 of Ms Elmes statement, by around 15 July 2022, it became clear to Ms Elmes that the error was IIL's. Following this, a series of exchanges took place in which various members of the NHS England team sought information about what had been uploaded, what could be retrieved and/or what was 'visible', as well as what the mechanical process would have to be in order to submit the bid. Various members of the team explored possibilities including whether the bid might be accepted in relation to Lots 1-3. On any view, there was a competent and fair-minded investigation seeking to establish as well as was possible what had happened prior to reaching any final conclusion. As set out in paragraph 25 of Ms Elmes' statement, which I accept:

'We were looking to make sure that we hadn't missed anything. However, at this point, we were concluding that our only option was not to permit InHealth to participate in the procurement due to unsubmitted bid. I recall that all NHSE colleagues involved wanted to make sure that we followed the ITT to avoid putting ourselves at further risk of challenge by the decision that we made. I was also conscious that any decision that we made could also impact on other bidders.'

- (6) On 19 July 2022, Stephanie Cox (NECS) emailed Ms Elmes with further information, which I have quoted at paragraph 44.(13) above, which explained that In-Tend could not recover SD04d as it appeared that there had been an issue when uploading it. On the same day, Ms Elmes was informed that NECS had identified that some of the generic mandatory documents which had been uploaded were incorrect. A draft of what was to be the Decision was circulated across the wider team on 19th, and was finalised and sent on 20 July 2022.

- (7) The Decision stated:

"Your letter [of 12th July 2022] suggests that there were problems with the portal. We have therefore contacted the e-tendering provider.

We have been informed that there were no issues with the portal on the morning of 12 July. We understand that another bidder was able to submit their tender right up to the deadline without any problems. We understand that the screenshots you have provided suggest that you were trying to upload a document with the same name in multiple places. This was not permitted.

We note that you have also made reference to a previous instance where your bid was allowed to be submitted when it was not uploaded prior to the deadline. We understand that this was 3 years ago, and that the wording of the ITT has changed since then to address the issues that previously arose.

On this basis it would appear that this situation has arisen due to non-compliance with the requirements rather than a problem with the portal therefore your bid remains excluded."

- (8) IIL responded on 21 July 2022. In that letter, IIL admitted to what it termed an 'administrative error' in uploading an attachment to the wrong placeholder. As is clear from my findings above, I do not consider that this is a complete account of IIL's errors which caused the ultimate failure to submit the bid on 12 July. NHS England responded on 26 July 2022, maintaining the Decision.

50. At this point, I answer Issue 4. This states:

Did the Defendant access/request access to and obtain the Claimant's bid responses and uploaded documents as entered into and uploaded to the Portal for each of Lots 1 to 4 before making the Exclusion Decision on 20 July 2022 and confirming that decision on 26 July 2022?

51. My answer is:

NHS England, and/or NECS on its behalf, asked sufficient questions as to the state of what IIL had successfully uploaded and submitted, and indeed the reasons why, in advance of its decision making to come to a sound and fair decision. It is not relevant whether it in fact obtained access to the documents themselves for the purposes of fairly determining whether IIL's bid ought to have been allowed into the procurement process notwithstanding its failure to have submitted a bid.

The Allegations of Breach

The Functionality of the InTend System

52. IIL's pleaded case alleges (at paragraph 50) that in circumstances where (i) there was no requirement to bid for any number of Lots (ii) bids were to be treated as standalone bids and (iii) bids were to be separately evaluated, it was incumbent on NHS England to ensure that the tendering process adopted allowed validly completed and uploaded bids to any of the Lots to be submitted into the Procurement. Paragraphs 51 and 52 articulate effectively the same point in different ways. Paragraph 52 states:

'52.1 The design of the Portal and/or the Exclusion Decision penalises bidders for a single error made in its response to one Lot by precluding the submission of its bids for any other Lots. This is contrary to the contrary requirement of proportionality.

52.2 There was no clear explanation in the ITT that an error in respect of one Lot would preclude the submission of any or all bids – contrary to the preclude any – contrary requirement of proportionality.

52.3 The design of the Portal and/or the Exclusion Decision operates to preclude the consideration of the Claimant's validly uploaded bid responses for Lots validly uploaded bid responses for Lots 1, 2 and 3, contrary to the requirement of equal treatment.

52.4 The design of the Portal and/or the Exclusion Decision discriminates against bidders who have chosen to bid for more than one Lot against by operating to treat an error made in uploading one Lot as a reason for refusing to allow bids for all other Lots into the Procurement.

52.5 The design of the Portal and/or the Exclusion Decision constitutes a breach of an implied contract. In particular, as documents requested in support of Lots 1, 2 and 3 were "uploaded to the e-Tendering portal" (as required under Stage 1 of the evaluation process: see para 33 above). [sic]'

53. These allegations are unfounded. There is nothing improper with a contracting authority generally, or NHS England specifically in this case, choosing to use an ‘off-the-shelf’ product rather than a bespoke-designed product, as long as its functionality is suitable and clearly explained within the ITT. As set out above, the way in which the system worked was suitable, it was clearly explained and, as it happens, completely understood by those within IIL who were operating the system. Indeed, both the software and the wording of the ITT had been improved in relation to inability to upload files with duplicate names following a tender in 2019 when IIL faced a problem with such an issue, again at the last minute. Critically, nothing within the InTend system used in the context of a multi-lot/single bid process offends of itself against the principles of equal treatment, transparency or proportionality. Each tenderer had to navigate the e-portal in the same way, and faced the same consequences if it failed to do so such that it was unable to submit its bid by the deadline. The consequences of failing to follow the instructions within the ITT will usually always be significant, and, when it comes to compliance with a deadline, the failure may be minor. The problem here was not the design of the e-portal, but human error in the use of the portal in the circumstances where IIL left it to the last moment to process its submission. Moreover, it was always open to the user to remove a problematic lot, if it existed at all, and simply submit those which it had been able to upload successfully.
54. It is, of course, important in this context that other tenderers may have taken the more cautious and sensible decision to spend less time in completing the content of their submissions in order to start the technical uploading and submission process in good time so as to avoid the sort of issues IIL contended with at the last moment. It would be unfair, and in breach of the requirement to apply the rules equally and transparently, to allow one tenderer what amounts to more time to complete the substance of their tender by waiving the clearly stated consequence of, thereby, missing the deadline.
55. As a failure to comply with PCR 2015 in its own right (or a breach of an implied contract), IIL’s allegation in respect of the design of the e-portal used in the procurement fails.
56. Thus, in relation to Issue 5:

Was the design of the Portal defective in so far as it did not allow the Claimant's bid responses in respect of Lots 1 to 3 to be submitted into the Procurement, as a result of the Claimant uploading a single document into the wrong location / placeholder in respect of Lot 4?

The answer is ‘No’. I would also note, as set out above, the description of the assumed error is also inaccurate.

The Error Message

57. IIL alleges, at paragraph 55 of its Particulars of Claim, that it was incumbent on NHS England to ensure that the Portal’s design was transparent in nature. In particular, it is said that :

- “(1) *In circumstances where (i) any error in the uploading of documents was only made apparent when ‘submitting’ the entirety of a bidder’s response to all Lots and (ii) any error in uploading a single document would preclude the submission of bids for any of the Lots, it was all the more incumbent for the Defendant to ensure that any error message displayed was sufficiently clear to enable bidders to be able swiftly to identify and correct the error;*”
- (2) *In the premises, the error message received that “The file you are trying to upload already exists. Please try again” was lacking in transparency such as would permit a reasonably well informed tenderer, such as the Claimant, to proceed to the submission of its bids. In particular, it led the Claimant to believe that that the solution lay in removing the attached file from the correct placeholder and “trying again”.*

58. For the reasons I have set out above, this allegation fails. The first and second error messages (relation to Document 10 and Sv01d) were perfectly clear – and indeed, no pleaded complaint is made in relation to these. The message “*The file you are trying to upload already exists. Please try again*” was also perfectly clear: it meant that a file with the same name already existed (SD04d) on the system, and this was indeed the case, albeit probably in corrupted form. This could have been seen swiftly by scrolling up, and it is indeed captured on one of Mr PJ Kirby’s screenshots taken shortly before the deadline. Had Mr PJ Kirby not been in a panic, caused by the fact that IIL had left submission to the last moment, it would have been obvious what the solution was, and it would have been swiftly remedied. The problem was not with the clarity of the message but with preceding human error(s) and the fact that this was being dealt with at the very last moment. Whilst plainly unfortunate, this is not the fault of the system or NHS England.
59. Thus, in relation to Issue 6:

Was the error message “The file you are trying to upload already exists. Please try again” in respect of the document the Claimant sought to upload in respect of Lot 4 transparent to a RWIND tenderer in all the circumstances?

The answer is that the error message was clear and transparent to a RWIND tenderer in the relevant circumstances.

The Decision

60. IIL contends that the Decision was unlawful and in breach of the PCR 2015 for reasons it sets out at paragraphs 56 to 58 of the Particulars of Claim.
61. Paragraph 56 sets out the facts as alleged by IIL as to what had been uploaded to the portal by the deadline, which facts effectively form Issue 4 considered above. IIL then contends that because (it says) the substance of its bid had been uploaded by the deadline, the consequence of allowing its bid into the procurement process would not confer upon it any substantive advantage over other tenderers and that it is not seeking the advantage of ‘extra time’. For the reasons I have already given, I do not accept the

factual premise underlying Issue 4 (in that, as at the deadline, I consider that SD04d, a mandatory document, had not been uploaded in a retrievable form). However, even if it is assumed that everything was uploaded successfully by the deadline, this does not amount to submission of the bid, and, moreover, it is also incorrect that the effect of allowing the bid to be submitted after the deadline does not confer upon IIL an advantage. As I have identified above, other tenderers will have taken the decision to allow good time before the deadline to ensure the technical requirements of uploading and submission are carried out properly. In doing so, they would have deprived themselves of some time to work on the substance of their bid. IIL, however, was working on the substance of the bid right up to very shortly before the clearly stated deadline, and in so doing left themselves insufficient time to deal with the mechanics of the submission process successfully.

62. Paragraph 57 of the Particulars of Claims states that through the design of the Portal, including the sufficiency of the ‘error message’, and the Decision, NHS England acted:

- (1) in a manner which was manifestly flawed and irrational;*
- (2) so as to take into account irrelevant considerations, including:*
 - a. the fact that another bidder was able successfully to upload its tender submission without encountering an error message or other issues*
 - b. that inclusion of [IIL’s] bids could represent a breach of the PCR 2015. In particular, bidders would not thereby be treated differently or discriminated against because the [IIL’s] bids would be unaltered from the form it was when uploaded to the Portal.*
- (3) by failing to take into account relevant considerations, including the considerations at paragraph 56 above, and*
 - a. the fact that [the Decision] will reduce competition make it less likely that [NHS England] will identify the Most Economically Advantageous Tender.*
 - b. the fact that the [IIL] previously encountered a similar issue in previously uploading a document in time in similar procurement carried out on behalf [NHS England] where the [IIL’s] bid was not excluded.’*

63. In my judgment, the Decision was not manifestly flawed, or irrational, whether in relation to Lots 1 to 4, or Lots 1 to 3. IIL had failed to comply with the clearly stated deadline for reasons which were, unfortunately, its fault, as I have set out above. Neither the InTend system, nor NHS England, whether through NECS or otherwise, were to blame for IIL failing to submit a compliant bid by the deadline. The consequences for failing to submit a compliant bid by the deadline were clearly spelt out, and were in fact clearly understood by IIL. Caused by a series of minor human errors and having left the submission process to the last moment, there was nothing exceptional about IIL’s inability to submit the bid in accordance with the requirements of the ITT, and nothing happened to justify waiving the clear rules. There was a very significant risk, as those within NHS England concluded having properly investigated the events, that if it decided to waive the rules, that decision would itself constitute a failure to comply with the requirements of equality and transparency. The determination made by NHS England to apply the deadline strictly in circumstances where it was, rightly, satisfied that the failure to comply was down to matters for which IIL were entirely responsible, was well within such discretion as NHS England had. The situation was not comparable to 2019, when NHS England

accepted that the system caused or contributed to the problem IIL faced because of a lack of clarity within the ITT and in the non-specific error message. That problem was remedied, and as I have found, NHS England were entirely justified in concluding that the error lay with IIL.

64. In the circumstances, IIL's claim fails.

65. For completeness, Issues 7 to 11 are therefore answered as follows:

Issue 7 : Did the Defendant have a discretion pursuant to the terms of the ITT or otherwise as a matter of law to allow into the Procurement and evaluate the Claimant's bid responses (in respect of (i) Lots 1 to 3 or (ii) Lots 1 to 4) the text of which had been entered into the Portal and in respect of which documents had been uploaded to the Portal (but which had not been accepted having been submitted) before the deadline?

Answer: NHS England did have a residual discretion as matter of law.

Issue 8: As a result of the design of the Portal and/or the Exclusion Decision, did the Defendant breach the PCR 2015, retained EU Law, and / or any enforceable obligation in the field of public procurement and / or implied contract, including with respect to:

i. proportionality;

ii. equal treatment; and

iii. discrimination

by refusing or otherwise failing to evaluate the Claimant's bid responses (in respect of (i) Lots 1 to 3 or (ii) Lots 1 to 4) as had been entered into and uploaded to the Portal (but which were not accepted as having been submitted) before the deadline?

Answer: No.

Issue 9: As a result of the design of the Portal and / or the Exclusion Decision, did the Defendant act in this regard in a manner which was manifestly erroneous and/or in breach of the PCR 2015 including by taking into account irrelevant considerations/failing to take into account relevant considerations and/or otherwise acting irrationally in refusing or otherwise failing to evaluate the Claimant's bid responses (in respect of (i) Lots 1 to 3 or (ii) Lots 1 to 4) as had been entered into and uploaded to the Portal (but which were not accepted as having been submitted) before the deadline?

Answer : No.

Issue 10: Is the Claimant's complaint regarding the design of the Portal time barred pursuant to reg 92 of the Regulations?

In light of my findings, this does not arise.

Issue 11: In the event liability is established in favour of the Claimant in respect of any one or all of the issues identified in paragraphs 1 – 10 above, to what remedy is the Claimant entitled?

In light of my findings, this does not arise.