Neutral Citation Number: [2025] EWCA Civ 127

Case No: CA-2024-000926

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE BUSINESS AND PROPERTY COURT OF ENGLAND AND WALES (KBD)
TECHNOLOGY AND CONSTRUCTION COURT
Mr Justice Freedman
[2024] EWHC 766 (TCC)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 14/02/2025

Before:

LORD JUSTICE COULSON
LORD JUSTICE FRASER
and
LORD JUSTICE ZACAROLI

- -

Between:

Working on Wellbeing Ltd Trading as Optima Health	**Appellant**
- and -	
(1) Secretary of State for Work and Pensions **(2) Department for Work and Pensions**	**Respondents**

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Valentina Sloane KC (instructed by **Eversheds Sutherland (International) LLP**) for the **Appellant**
Azeem Suterwalla and Alfred Artley (instructed by **Government Legal Department**) for the **Respondent**

Hearing Dates: 10 and 11 December 2024

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Approved Judgment

This judgment was handed down remotely at 10.30am on 14 Feberuary by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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LORD JUSTICE COULSON:

1. Introduction

1. This is an appeal in a public procurement dispute. There are broadly three issues. The first is whether the Invitation to Tender ("ItT") prepared by the respondents (whom I shall call "DWP") contained a mandatory exclusion provision which meant that, if any of the tendered line items exceeded the existing Framework Maximum Prices, the whole tender would be excluded from consideration. The second is whether DWP were entitled or even obliged to seek clarification of the errors in the bid provided by the appellant (whom I shall call "Optima"), where those errors had no effect on the scoring and an impact of just 0.02% on the evaluation of the price. The third raises questions of detail about requests for clarification during a tender process, and in particular the limits on what a tenderer can permissibly do when answering such a request.

2. These issues matter very much on the facts of this case because, if the tender provided by Optima had not been excluded from consideration then, as DWP well knew, it would have been comfortably the winning bid, because it was by far the highest-scoring on quality. It also matters because the power/duty to seek clarification is an issue which is the subject of some high level statements of principle in the European cases, but rather less practical guidance for contracting authorities and economic operators.

3. I should like at the outset to pay tribute to the judge at first instance, Freedman J ("the judge"), who heard the case over three days in March 2024 and, conscious of the urgency of the dispute[1], was able to hand down a judgment in draft on 27 March 2024. His final judgment dated 5 April 2024 ([2024] EWHC 766 (TCC)) was the product of considerable industry and acumen. In those circumstances, I am conscious that, since I take a different view to the judge on a number of the critical issues, I should explain the reasons for my conclusions with particular clarity.

2. The Factual Background

4. Optima is an economic operator for the purposes of the Public Contracts Regulations 2015, as amended ("the PCR 2015"). It is a leading occupational health provider. The two respondents are both contracting authorities for the purposes of the PCR 2015, although DWP took the lead throughout this particular procurement.

5. Optima is a party to the RM6182 Framework Agreement with the respondents. Under Schedule 7 of that Framework Agreement, DWP could award call-off contracts either via a direct award or a further competition. The Framework Agreement included a schedule setting out the maximum prices that Optima (and the other service providers who signed up to the Framework Agreement) could charge for each individual service item in any call-off contract that might be awarded under the Framework. Those were called the "Framework Maximum Prices". They are described in paragraph 1.1.1. of Framework Schedule 3 as "the basis of the charges (and are maximums that the Supplier may charge) under each call-off contract".

[1] DWP agreed to wait until after the judgment at first instance before agreeing the call-off contract with the successful bidder. That contract has now been entered into.

6. Six bidders, who were each signed up to the Framework Agreement, were invited to tender for a call-off contract for occupational health and employee assistance programmes ("OHEAP"). Five of those – including Optima - expressed an interest in tendering for the call-off contract. The Invitation to Tender ("ItT") included:

   (a) Attachment 1, entitled 'About the Procurement';

   (b) Attachment 2, entitled 'How to Bid including Evaluation Criteria'. This included a questionnaire;

   (c) A document entitled 'Instructions for Completing Q5-Pricing Schedule';

   (d) The Pricing Schedule itself.

7. For the Pricing Schedule (which was an excel spreadsheet), bidders needed to provide a price for each line item specified by DWP. There were 133 line items, and a total of 190 prices that needed to be filled in (because some of the line items provided for different options as to service delivery). The evaluation criteria were weighted: 70% for quality and 30% for price[2]. The volumes were indicative only, in order "to provide a basis for financial comparison and evaluation" (paragraph 1.1 of the Instructions for completing the Pricing Schedule).

8. I address particular parts of the ItT when dealing with Issue 1/Ground 1 of this appeal, in Section 5.1 below. At present it is sufficient to say that there were a number of parts of the ItT which explained in clear terms that no unit price in the Pricing Schedule was to exceed the Framework Maximum Prices. Paragraph 2.2 of Attachment 1 said that "any bids for any service line submitted to the Framework by invited bidders in excess of this [the Framework Maximum Prices] will be discounted." Moreover, this was always understood and agreed by Optima: in answer to questionnaire 1, they had stated that they "agree, without caveats, or limitations, that in the event we are successful, the terms and conditions [of the RM6182 Framework Agreement] will govern the provision of this contract". That therefore included the Framework Maximum Prices.

9. The procurement exercise was very prolonged. There were numerous exchanges between the bidders and DWP and a whole series of revised pricing schedules for the bidders to complete. The detail of those different pricing schedules, and the bidders' responses, are set out in detail by the judge at [23]-[48] of the judgment, which I gratefully adopt and do not repeat. However, other than noting the lack of clarity evidenced by the various documents produced by DWP, and the fact that, by the time the eventual evaluation took place in May 2023, almost a year had passed, so that there was a natural desire for urgency on their part, I consider that the unhappy history of the procurement is of peripheral relevance to the issues under appeal.

10. Ultimately, there was a Revised Pricing Schedule issued by DWP on 13 March 2023. Paragraph 1.4 of the Instructions of the Revised Pricing Schedule contained these words:

[2] See [9] of the judgment below.

> "All unit prices quoted must **not** be greater than your prices from the CCSL Occupational Health Services Framework, RM 6182, lot 1 fully managed service".

In common with the other four bidders, Optima submitted its Revised Pricing Schedule on 24 March 2023.

11. Optima's tender was evaluated using a system of quadruple-checking by DWP.[3] It was discovered that Optima had exceeded their Framework Maximum Prices in relation to 3 (out of the total of 133) service delivery lines. It appears from the evidence that DWP always knew that there was "a potential high possibility" of a bidder missing an item in their Pricing Schedule which was not in line with the Framework: see [31] of the judgment below, citing an internal DWP email of 10 January 2023. The details of the three particular items were recorded by the judge at [49]:

> "(i) For OH58 (Occupational Health Physician – face to face offsite), Optima had bid £105 whereas its Framework Maximum Price for this service line was £40. Optima states that in the Revised Pricing Submission, DWP changed the column headed "Check" to "Face to Face" without identifying that as a change. The volume for this line item was "0".
>
> (ii) For OH229 (Occupational Health Advisory – telephone/virtual), Optima had bid £165 whereas its Framework Maximum Price for this service line was £105. Optima states that in the Revised Pricing Schedule, DWP changed this cell to a telephone price without identifying that amendment. The volume for this line item was 10.
>
> (iii) For OH230 (Specialist Advisor – telephone/virtual) Optima had bid £560 whereas its Framework Maximum Price for this service line was £208.50. Optima states that in the Revised Pricing Schedule, DWP changed this cell to a telephone price without identifying that amendment. The volume for this line item was 0."

12. It is necessary to give a little more detail about those three errors. For OH58, the price of £105 had been given in the previous pricing schedules against an item in respect of a hearing test that was stated 'per check'. This was below the Framework Maximum Price for telephone checks. In the Revised Pricing Schedule, the item was changed from 'per check' to 'face to face', without that change being advertised. The change was not spotted by Optima, so the price of £105 was retained, even though that was now above the applicable Framework Maximum Price of £40[4]. The volume for OH58 was said to be '0', which meant that the erroneous figure did not form part of the evaluation and was not therefore an element of the scores awarded to the bidders.

13. The errors at OH229 and OH230 (which, as we shall see later, were described by DWP in the evaluation exercise as "cut and paste" errors), arose because Optima had

[3] Despite the safeguards in what DWP describes as their "robust" system, they missed a fourth error, which was identified by Optima themselves during the course of these proceedings (see paragraphs 150-151 below).

[4] The irony is that, in respect of this particular item, it was the Framework Maximum Prices that were the wrong way round. They had been incorrectly transposed, so that there was a higher figure for telephone checks than for face-to-face checks.

used the price for a face-to-face service rather than a telephone service, which was what these two line items required. The figures quoted by Optima were its Framework Maximum Prices for a face-to-face service, but were more than their Framework Maximum Prices for a telephone service.

14. As with OH58, the effect of the error at OH230 on the evaluation was nil because the anticipated volume in the ItT was again stated to be '0'. In respect of OH229, where the volumes were indicated as 10 and the figure quoted was £60 above the Framework Maximum Price, the overall effect on the price was therefore £600. DWP calculated at the time of the evaluation that this was the equivalent of 0.02% of the overall price. DWP also noted contemporaneously that this made no difference whatever to the overall score. This was a very low indicative volume: some items were shown with an indicative volume as high as 95,000.

15. It transpired that, in relation to the other four bidders, one had withdrawn, another had been excluded, and a third had also submitted prices in excess of its Framework Maximum Prices. The remaining bidder, People Asset Management Limited ("PAM"), had produced a compliant bid. Following the exclusion of Optima, PAM were awarded the contract. The circumstances in which the appellant came to be excluded from the competition are dealt with in detail under Issue 2, in Section 6 of this judgment below. As the judge noted at [59], PAM had been given a quality score of 74.38 and a total weighted quality score of 52.06. Optima's quality score was 95 and its total weighted quality score was 66.50. Thus, if Optima had not been excluded from the competition by reason of clerical errors worth £600, they would have been awarded the call-off contract, because theirs was comfortably the best bid. As will become apparent below, that is one of the elements of this procurement dispute which, in my view, make it notable.

16. Optima challenged their disqualification. They took a variety of points but they essentially now boil down to the three noted at the outset of this judgment. First they say that there was no clear warning in the ItT that, if the prices exceeded the Framework Maximum Prices for any line item, the whole tender would be excluded. Secondly, they say that DWP failed to exercise its discretion, properly or at all, when considering whether or not to seek clarification, because i) they erroneously concluded that there was a mandatory exclusion provision in the ItT; ii) they failed to give proper consideration to their options; and iii) they wrongly believed that any request for clarification would breach the requirement for equal treatment. Thirdly, they say that, not only is it common for contracting authorities to seek clarification in circumstances where there are obvious errors in a pricing schedule, but the particular circumstances meant that DWP had an obligation to seek such clarification here.

3. The Judgment Below

17. The judge was asked to address a number of Preliminary Issues. Those are not set out in the Judgment. Furthermore, the judge's sub-headings do not easily correlate with them. For the record, the Preliminary Issues were as follows:

> "1. Did the tender documentation clearly and transparently set out the consequence of exceeding the Framework Pricing Schedule. In particular:

> a. Would the RWIND bidder have understood the statement: "The maximum contract value is governed by the CCS Framework Occupational Health, Employee Assistance Programmes and Eye Care Services RM6182 Lot 1, any bids for any service line submitted to the Framework by invited bidders in excess of this will be discounted" to mean that its bid would be excluded if it included a service line in excess of Maximum Framework Prices?
>
> b. Would the RWIND bidder have otherwise understood that submitting a bid with a service line in excess of Maximum Framework Prices would render its bid non-compliant and therefore liable to disqualification?
>
> 2. If the tender documents were clear and DWP therefore had a discretion, did they act unlawfully by excluding Optima rather than taking alternative action, such as discounting the prices or seeking clarification? In particular:
>
> a. Did DWP consider whether to exercise discretion not to exclude Optima's bid?
>
> b. If the answer to (a) is "yes", did DWP nevertheless fail to take into account relevant considerations?
>
> c. Would discounting prices have been in breach of the principles of proportionality, equal treatment, and transparency?
>
> d. Would seeking clarification from Optima have been in breach of the principles of proportionality, equal treatment and transparency?
>
> e. Would issuing clarification and permitting resubmission of tenders have been in breach of the principles of proportionality, equal treatment and transparency?"

One of the difficulties for the judge was, although he was answering a list of issues agreed by the parties, they did not explain what effect a 'Yes' or 'No' answer to the first issue might have on the remaining Issues. That is often a fault of 'exam paper' preliminary issues like this, prepared by the parties and presented to the court as a *fait accompli*. It seems to me that this led to a certain amount of uncertainty and confusion, which was still apparent on appeal. That is a topic to which I return below.

18. The judge set out the facts between [5] and [69] and summarised briefly the evidence at [70]-[75]. He summarised the legal principles at [76]-[119].

19. The judge then dealt with the first preliminary issue, namely the mandatory exclusion provision, between [120]-[148]. His analysis is at [132]-[148]. By reference to the correct test, namely the "reasonably well-informed and normally diligent tenderer" (known as "the RWIND tenderer"), the judge said that he was satisfied that there were clear explanations at each stage which left the RWIND tenderer in no doubt as to the importance of complying with the requirement of not exceeding the Framework Maximum Prices and the possibility of being disqualified [134]. He said that the consequences of disqualification were spelt out by the terms of the ItT "and in particular at 6.9.2" [139]. He noted in the same paragraph that "there was a constancy about the requirement that the prices must not be exceeded." He rejected the argument that there was an ambiguity because the word "discounted" had been used in paragraph 2.2 of attachment 1 of the ItT but he went on to say at [142] even if there

was a potential ambiguity about the meaning of that word, "there was, on looking at the process as a whole, no ambiguity".

20. The judge then analysed the disputes broadly covered by the second set of Preliminary Issues, namely whether DWP had acted unlawfully by excluding Optima, rather than by taking alternative action (such as reducing the three figures in question to the Framework Maximum Prices, or at the very least seeking clarification). Having set out the submissions of the parties, the judge went on to make the following findings:

(a) He rejected Optima's contention that DWP failed to exercise any discretion at all ([161]-[170]). He also made references to the evidence and the documents to support the suggestion that, despite other documents to the contrary, DWP had exercised a discretion.

(b) He rejected Optima's case that DWP had failed to evidence the decision in writing in a way that enabled anyone to test whether the discretion had been exercised ([171]-[181]). This argument arose because of the heavy redactions from the contemporaneous documents as a result of DWP's assertion of legal professional privilege. The judge concluded that the redactions for legal advice privilege "do not prevent a broad understanding of why the other options were not exercised" [174].

(c) The judge held that there was no obvious mistake or ambiguity ([182]-[193]). He rejected Optima's case on this part of the dispute as "far too nuanced": [188].

(d) He held that DWP were not obliged to give Optima a chance to clarify and/or resubmit their tender: [194]-[197]. This was because they had received a compliant bid from PAM, so that seeking clarification or resubmission "was potentially a breach of the principle of equal treatment" [195].

(e) He rejected the appellant's submission that a bid could be changed provided it did not infringe equality of treatment and transparency: [198]-[200].

21. In addition, the judge found that a failure to make a compliant bid was the responsibility of Optima, not DWP ([201]-[205]); that the small over-pricing/triviality of the error was not a relevant issue and that waiver only arose in the most exceptional cases ([206]-[212]); that there was a pressing need to conclude the procurement process [213]; and that DWP did not act irrationally or arbitrarily or disproportionally or unreasonably in rejecting the appellant's bid [214]-[219].

4. The Grounds of Appeal

22. Optima's Grounds of Appeal sought to put in issue most of the judge's conclusions, although they accept that they cannot interfere with the judge's findings of fact. The Grounds of Appeal are as follows:

Ground 1

1. Erroneously concluding that there was a clear rule of mandatory exclusion.

Ground 2

2. Adopting an erroneous approach to determining whether there is an obvious mistake or ambiguity in a tender.

Ground 3

3. Erroneously holding that waiving, correcting or clarifying a pricing error is in breach of principles of transparency and equal treatment unless the contracting authority knows what sum was intended.

Ground 4

4. Erroneously finding that waiving, correcting or clarifying the error was not required and that the question of triviality or lack of impact does not arise.

Ground 5

5. Wrongly taking into account whether the error was avoidable, when that is legally irrelevant.

Ground 6

6. Adopting an erroneous approach to determining whether the Defendants exercised discretion and took account of all relevant factors, rather than finding that the Defendants had misdirected themselves in law.

23. Ground 1 of the appeal is a challenge to the judge's conclusion that the ItT made it plain that a bid would be excluded if the Framework Maximum Prices were exceeded. This was largely, but not exclusively, an issue concerned with paragraph 2.2 of Attachment 1 of the ItT (a point affirmed by the judge at [208], first sentence), and reflected the first Preliminary Issue before the judge. I have called that Issue 1/Ground 1. Again, however, it was unclear how the Grounds of Appeal related one to another, just as it had been unclear how the original Preliminary Issues were intended to fit together. So the court was obliged to ask both counsel what the consequences would be if Optima failed on Issue 1/Ground 1. On behalf of DWP, Mr Suterwalla originally said that, if DWP was right on Issue 1/Ground 1, then that was the end of the appeal: Optima had been lawfully excluded by reference to a mandatory exclusion provision. That had also been the thrust of his skeleton argument. However, on the morning of the second day of the appeal, he handed up a note which suggested that, even if he was right on Issue 1/Ground 1, DWP may still have had a residual discretion not to exclude. On behalf of Optima, Ms Sloane KC said that, even if there was a mandatory exclusion provision, there was still an opportunity for DWP to waive that provision, so on her case, defeat for Optima on Issue 1/Ground 1 was not the end of the appeal.

24. This lack of clarity as to the effect of Issue 1/Ground 1 is not, I think, an empty complaint. Amongst other things, the result – that there was a mandatory exclusion provision – has bled into other issues. It has also led to an elision in the arguments (still discernible on appeal) between the principles concerned with seeking clarification of obvious errors or ambiguities (on the one hand), and the principles relevant to waiving a requirement in an ItT (on the other). Those principles are very different and, in my judgment, the confusion between them has led to errors both below, and in the presentation of the respective cases on appeal.

25. It is also necessary to identify the other Grounds of Appeal and address them in a proper sequence. On analysis, Ground 5 (which seeks to take issue with the relevance

of the judge's finding of fault on the part of Optima as to how the errors came about) was a part of Optima's alternative case that, even if they lost on Issue 1/Ground 1, they had an alternative way round the mandatory exclusion clause by alleging waiver. It therefore follows that Ground 5 only arises directly if Optima are unsuccessful on Issue 1/Ground 1. To the extent that the issue of fault is relevant to proportionality, I address it under Ground 4.

26. The next issue that logically arises concerns Ground 6, namely that DWP misdirected themselves in law when they failed even to consider the options (including the option of seeking clarification), because they believed that there was a mandatory exclusion clause, and because they believed that any option other than exclusion breached the principle of equal treatment. If DWP wrongly failed to consider the options other than exclusion, they unlawfully fettered their own discretion. I have called that Issue 2/Ground 6.

27. The remaining Grounds are concerned with what I have called Issue 3: whether, on the facts here, DWP should have sought clarification and what would have happened if they had done so. Ground 2 is concerned with the first stage in the analysis: whether there was an obvious error or ambiguity in the tender. Ground 3 is concerned with the second and third stages, namely whether clarification request should have been sought and, if so, whether it would have been impermissible for the bid to have been changed or, as Mr Suterwalla kept putting it, for Optima "to have a second bite of the cherry". Ground 4 addresses a separate point, namely proportionality.

28. Optima's overall case is that DWP acted unlawfully by excluding what would have been comfortably the winning bid, rather than by seeking clarification of what were accepted, at least for two of the three items, as being "cut and paste errors". Additionally, these "cut and paste" errors were in respect of exceptionally minor pricing items amongst almost 200 correct items. As noted above, it is these aspects of the appeal that are likely to be of wider interest to the public procurement community.

5. Issue 1/Ground 1: Was There A Mandatory Exclusion Clause?

5.1 The Relevant Provisions of the ItT

29. The starting point must be paragraph 2.2 of Attachment 1. That was in these terms:

> "2.2 The contract will be for 3 years with an option to extend for a further 1 year and will commence in May 2022.
> The maximum contract value is governed by the CCS Framework Occupational Health, Employee Assistance Programmes and Eye Care Services RM6182 Lot 1, any bids for any service line submitted to the Framework by invited bidders in excess of this will be discounted."

30. Provisions in the ItT which expressly warned about exclusion or disqualification were as follows:

(a) Paragraph 3.2.3:

"3.2.3. We recognise that subcontracting can change. You must tell us about any changes to the proposed subcontractors as soon as you know. If you do not, you may be excluded from this competition."

(b) Paragraph 6.9:

"6.9.1 We reserve the right to:

- Waive or change the requirements of this Bid Pack from time to time without notice
- Verify information, seek clarification or require evidence or further information about your bid
- Withdraw this Bid Pack at any time, to re-invite bids on the same or alternative basis
- Choose not to award any contract or Lot as a result of the competition
- Make any changes to that timetable, structure or content of the competition

6.9.2 Exclude you if:

- You submit a non-compliant bid
- Your bid contains false or misleading information
- You fail to tell us of any change in the contracting arrangements between bid submission and award
- The changes in the contracting arrangements would also result in a breach of procurement law
- For any reason provided in this Bid Pack
- For any reason set out in the Public Contracts Regulations 2015"

(c) Paragraph 6.10.1:

"6.10.1 If a serious misrepresentation by you induces the Contracting Authority to enter into a contract with you, you may be:

- Excluded from bidding for contracts for three years, under regulation 57(8)(h)(i) of the PCR 2015
- Sued by the Contracting Authority for damages, the Contracting Authority may rescind the contract under the Misrepresentation Act 1967"

31. In addition, the Bid Pack that was part of the ItT contained Questionnaire 4 which was concerned with quality. Question 4.9 was in these terms:

> "Social Value - part 1 WEIGHTING 5% No costings should be included in responses to this Questionnaire as this will result in disqualification. Anything submitted in excess of the **Word Count will not be considered.**"

32. The word "discounted" in paragraph 2.2 of Attachment 1 (paragraph 29 above) is not otherwise used in the ItT. However, the word "discount" is used to signify a reduction in price or cost: see paragraph 4.11 of the Core Terms and page 5 of Framework Schedule 7 (which refers separately to both "any discount to which the buyer may be entitled" and "confirmation of discounts applicable to the Deliverables").

5.2 The Law

33. The rules of any public procurement competition must be drawn up in a "clear, precise and unequivocal manner" so that tenderers can be "completely sure" of how they are going to be applied: see *Healthcare at Home Ltd v The Common Services Agency* [2014] UKSC 49 at [15], citing *Commission v The Netherlands* (C-368/10) [2013] All ER (EC) 804. Although disputes as to the meaning of a provision in the ItT are, in one sense, a matter of construction, the issue is not what the ItT meant, but whether its meaning would be clear to any RWIND tenderer: see [27] of *Healthcare at Home*. Lord Reed there made clear that, whilst evidence may be necessary a) to enable the court to put itself into the position of the RWIND tenderer (such as evidence about technical terms), and b) about the context in which the document has to be construed, the question could not be determined by such evidence, because it depended on the application of a legal test. It was, he said, suitable for objective determination.

34. In *Clinton (t/a Oriel Training Services) v Department for Employment and Learning and Anr* [2012] NIQB 2, the High Court of Northern Ireland set aside a decision to exclude a tender because the phraseology of the tender requirement "gave rise to an unacceptable degree of doubt and uncertainty" [40]. That decision was upheld on appeal ([2012] NICA 48) where it was held at [35] that if a criterion was going to be fatal at the outset to the whole tender, then it "was one in respect of which the principles of clarity, fairness and equality of treatment demanded particular clarity and transparency" [35].

35. If a part of an ItT is going to be relied on as providing for disqualification on the happening of a particular act or omission, the ItT "must clearly and transparently set that out": see *Capita Business Services Ltd v The Common Services Agency for the Scottish Health Service* [2023] Scot CSOH 9 at [7].

5.3 Paragraph 2.2 of Attachment 1 in Context

36. I am in no doubt that, when read in its context, paragraph 2.2 of Attachment 1 of the ItT (paragraph 29 above) did not contain a mandatory exclusion provision, and that no RWIND tenderer would have come to any such conclusion.

37. The first reason for that conclusion is because it is not what the paragraph says. There is no reference to exclusion or disqualification. If that had been the intention of the ItT at paragraph 2.2, then it would have been perfectly easy to make that plain. After all, the provisions noted in paragraphs 30 and 31 above, taken from other parts of the ItT,

expressly warn about the possibility of exclusion on the happening of particular acts or omissions. There is no such reference in paragraph 2.2.

38. Secondly, the key word in paragraph 2.2 is "discounted". It is, I think, common ground that that can have one of two very different meanings. It can mean discounted as in "reduced", and it can mean discounted as in "excluded" or "disqualified". But here, not only are the words "excluded" and "disqualified" used elsewhere in the ItT (which points away from that interpretation of "discounted"), but also "discounts" (meaning "reductions") were expressly provided for: see paragraph 32 above. In other words, in the context of the ItT as a whole, the obvious meaning of "discounted" was "reduced", not "excluded" or "disqualified". I note that, in their internal document of 3 May 2023, in which they seek to justify the exclusion of Optima (paragraph 97b) below), that is precisely how DWP themselves use the word "discounted".

39. Thirdly, what is it that is being discounted? It is a bid "for any service line" in excess of the Framework Maximum Price. In this way, the discounting is expressly limited to the tainted service line(s). Two points flow from that. It provides further support for the proposition that "discounted" means "reduced". It also demonstrates that the discounting is expressly *not* extended to the whole bid. On this basis, the only item that is discounted is a bid for any service line where the figure is more than the Framework Maximum Price, and the obvious discount, or reduction, is down to the Framework Maximum Price. The words in paragraph 2.2 are completely contrary to any suggestion that a bid on a service line in excess of the Framework Maximum Price would lead to the exclusion or disqualification of the entire bid.

40. There would appear to be no answer to these specific points, particularly that last one. Indeed, I note that at paragraph 39(a) of his skeleton argument, Mr Suterwalla made no attempt to do so. Instead he sought to advance the interpretation argument as if the relevant words were just "any bids" rather than the actual words used, which were "any bids *for any service line*". He did the same in his oral submissions.

41. I accept of course that there are other parts of the ItT which suggest that exclusion of a non-compliant bid is a possibility, and that bidding in excess of the Framework Maximum Price is, on one view, a non-compliance: see by way of example paragraph 6.9.2, set out in paragraph 30 above. But those provisions give rise to a discretion on the part of DWP: they provide no answer to Ground 1/Issue 1, which is solely concerned with whether or not paragraph 2.2 of Attachment 1 is a *mandatory* exclusion provision.

42. Finally, it is right to note that, at the very least, the words of paragraph 2.2 are wholly incapable of providing the clarity and transparency required of any exclusion provision, as reiterated in the three authorities set out at paragraphs 33-35 above. In their contemporaneous document of 3 May 2022, on which DWP themselves rely for other purposes, they refer to the words in paragraph 2.2 as "giving rise to some ambiguity which may be open to interpretation". On that basis alone, the paragraph cannot in law be construed as a mandatory exclusion provision.

5.4 The Judge's Approach

43. I consider that the judge's approach to Issue 1/Ground 1 was erroneous. First, he did not anywhere address paragraph 2.2 as a whole, or contrast it with those parts of the

ItT which expressly provided for exclusion or disqualification. Secondly, he failed to address my third reason, noted in paragraph 39 above, as to why it could only have been the offending service line which was "discounted", not the whole bid, and how that supported Optima's construction of the paragraph. Those specific points are not addressed in the judge's analysis at [132]-[148].

44. Thirdly, perhaps because of the muddle over which arguments fitted where, the judge's analysis of this issue ran together two different things. At [134] and following, he emphasised that the ItT made plain that the individual line items were not to exceed the Framework Maximum Prices. That is true. But that is a different point to the existence of a mandatory exclusion clause to the effect that, if the bidder did exceed the Framework Maximum Prices, even in one immaterial instance, their whole tender would be automatically excluded.

45. Fourthly, I consider that he was wrong to say that, in some way, paragraph 6.9.2 of Attachment 1 (to which he refers at [135] and [139]), somehow provided the necessary clear warning that the tender would be excluded if the price of a line item was more than the Framework Maximum Price. That paragraph is inconsistent with paragraph 2.2, so it can hardly have the necessary clarity. But in any event, paragraph 6.9.2 simply reserved a right on the part of DWP to exclude a non-compliant bid. In exercising that right, DWP had to exercise their discretion in accordance with their duties of equality and transparency, and with an eye on the purposes of public procurement generally, explained in greater detail below.

46. The judge's reliance on paragraph 6.9.2 suggests that he perhaps misunderstood Optima's case on Issue 1/Ground 1. Optima does not suggest (and have never suggested) that their errors did not potentially trigger a discretion on the part of the respondents to consider whether those three line items should simply be discounted down to the Framework Maximum Prices, or be the subject of a request for clarification. They say that the discretion was not exercised properly or at all, but that is a different argument. On Issue 1/Ground 1, Optima has always maintained the position that there was no mandatory exclusion. The judge's rejection of that argument, such as at [142], appears to expressly acknowledge that bids *could* be excluded, not that they would or must be, and therefore undermines his own conclusion on this first issue.

47. Fifthly, there is some force in the point made by Ms Sloane in reply that the judge also erred in [141] when he rejected the interpretation of "discounted" as "reducing". He said:

> "In context, it makes no sense that there would be a discount (meaning a reduction) when it would not have been possible to have divined what the reduction ought to have been between 0 and the amount of the maximum sum of the service line submitted."

This rather presupposes that there was no power to seek clarification on that point. That was an incorrect assumption for the reasons explained in greater detail below. But it appears to have factored into the judge's conclusion as to the meaning of "discounted" which was, therefore, a separate error.

48. Finally, the judge failed to acknowledge the significance of the fact that DWP themselves considered that paragraph 2.2 was "open to interpretation" (paragraph 42 above), and therefore could not have been clear, precise and unequivocal, as per *Healthcare At Home*. His attempt to diminish the importance of this by suggesting that a RWIND tenderer would not have had any difficulty in understanding the paragraph is unpersuasive: if the contracting authority who prepared the ItT thought it was open to interpretation, why would the economic operator have reached the opposite view?

49. Mr Suterwalla suggested that, if the judge had applied the right principles, it was not for this court to intervene, particularly as, in accordance with *Healthcare at Home*, there was an element of factual assessment in the trial judge's approach to these issues. As to the first point, I consider that the judge did err in principle for the various reasons that I have already outlined in paragraphs 43-48 above. As to the second point, there are no factual findings in any of the relevant parts of his judgment concerned with the mandatory exclusion clause. There were no technical terms that required to be explained. The judge considered the words used, rather than any wider evidence.

50. For these reasons, I would allow Ground 1 of the appeal. In my judgment, a RWIND tenderer would have read paragraph 2.2 as saying that, if the quoted price for any line item was in excess of the Framework Maximum Prices, it would be discounted (reduced) to that maximum price. On that basis, DWP failed to follow their own ItT. If that is wrong then, at the very least, DWP should have sought clarification. These conclusions make it unnecessary for this court to consider separately Ground 5 of the appeal (concerned with the issue of fault) because that was primarily raised as part of an alternative argument by Optima that, if there was a mandatory exclusion clause, it was or should have been waived. Since there was no mandatory exclusion clause, the question of fault does not directly arise. To the extent that the parties made some submissions as to fault in connection with proportionality and rationality, I address them at Section 11 below, under Ground 4.

51. Notwithstanding my conclusion that the proper interpretation of paragraph 2.2 may provide a complete answer to the problems posed by this appeal (namely, that the three line items should have been reduced to the Framework Maximum Prices and the call-off contract awarded to Optima), it is important to go on and address the other issues. I do so on the alternative basis advanced by Mr Suterwalla: namely that paragraph 2.2 should be put to one side as being unclear, and that DWP had a discretion/duty to decide what to do about the non-compliant bid (and, in particular, whether to seek clarification). In doing that, I shall follow the outline set out in paragraphs 26-27 above. So in Section 6 below, I address briefly the law relating to a waiver of an ItT condition, because DWP rely on these cases in support of one of their later submissions. In Section 7, I set out the law concerning post-tender clarifications. In Section 8, I deal with Issue 2/Ground 6 of the appeal, which is to the effect that DWP wrongly fettered their discretion when deciding not to seek clarification. In Sections 9-11, I deal with Issue 3/Grounds 2, 3 and 4 of the appeal, primarily concerned with when a power to request a clarification becomes a duty, and the limits on what a tenderer can do when replying. There is a short summary of my conclusions in Section 12 below.

6. The Law Relating to Waiver of a Condition in the ItT

52. The law relating to a waiver of a condition in an ItT is summarised in three domestic cases. In *JB Leadbitter & Co Ltd v Devon County Council* [2009] EWHC 930 (Ch); [2010] Eu LR60 ("*Leadbitter*") there was a failure to provide all the written material by the deadline. David Richards J (as he then was) found that it was wrong to say that the tender contained an error: it was substantially incomplete by reason of the omission of certain case studies, as he explained at [44]. The judge rejected the contracting authority's submission that the principle of proportionality did not apply to the implementation of the terms of the procurement process, but at [55]-[63] he concluded that its application depended on a number of limitations. These included that, since the exercise of discretionary powers necessarily involved judgment on the part of the contracting authority, the court would not intervene unless the decision was unjustifiable. That accorded with the proper meaning of a "manifest error" in this context.

53. More importantly for present purposes, the judge reiterated that a waiver of terms which were stated in the ItT as applying without exception was a departure from the terms of the procurement process and was therefore an exceptional course. All of the remaining arguments advanced in that case, such as an alleged duty to select contractors only on the basis of the most economically advantageous tenders, the duty to act proportionately, and so forth, all failed because the contracting authority had set out precisely what would happen if a tender was not delivered in complete form by the deadline, and any sort of waiver was impermissible. David Richards J said at [56]:

> "56. Secondly, a waiver of terms which are stated as applying without exception is a departure from the terms of the procurement process and is therefore an exceptional course. A waiver of such terms carries the very risks of unequal treatment, discrimination and a lack of transparency which the contracting authority is required to avoid. It is to be noted that the Commission's action under review in *Tideland Signal* involved a failure to exercise an express power under the invitation to tender, not a failure to waive express terms."

54. In *Energy Solutions EU LTD v Nuclear Decommissioning Authority* [2016] EWHC 1988 (TCC) ("*Energy Solutions*"), Fraser J (as he then was) dealt with a 'kitchen sink' procurement challenge which succeeded on numerous grounds. During the course of his lengthy judgment, he dealt with the limited scope to argue that a condition in the ItT had been or could be waived. At paragraphs [889] and [890] he said:

> "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."

55. The last of this trilogy of cases was *Azam & Co Solicitors v Legal Services Commission* [2010] EWCA Civ 1194, [2011] Eu LR 131 ("*Azam")*. This was another case about a tender not submitted in time. The Court of Appeal rejected the appellant's argument that it should have been given direct notification of the deadline based on their previous existing relationship with the respondent. The court also said that the decision to refuse an extension had not been disproportionate because deadlines were a necessary part of the tender process. The court cited and approved the decision of David Richards J in *Leadbitter*.

56. Rimer LJ said at [52]:

> "The essence of a competition by way of tender such as that in question is to provide all competitors with an equal opportunity to make their case. It is obviously essential to that end that all competitors should have to work to the same deadline, and it will obviously be perceived to be, and in fact be, unfair for the Commission to then change the rules to allow those who carelessly failed to meet the deadline to make late bids."

Mr Suterwalla submitted that if one read "tender requirements" instead of "deadline" in the above passage, this would be an accurate statement of the law.

57. I consider that submission to be wrong in principle. Failure to comply with a deadline gives rise to relatively straightforward principles, as set out in *Leadbitter*. The present appeal is a different sort of case, concerned with requests for clarification, a process which is expressly permitted by the PCR 2015. As with a number of Mr Suterwalla's submissions, if his blanket statement was applied to all facets of any tender, then there would never be any power on the part of a contracting authority to seek clarification. So the argument misses the point at issue in the present appeal.

58. These cases demonstrate that a bidder who wishes to avoid the consequences of non-compliance with an ItT – principally because the tender was late - by seeking a waiver of (or some other way round) the relevant condition faces an uphill task. As we shall see, the law relating to the seeking of clarification is not quite so onerous from a

bidder's perspective. On the face of it, the principle applied in *Leadbitter*, *Energy Solutions* and *Azam* has no direct application here because of my answer to Issue1/Ground 1, to the effect that there was no mandatory exclusion clause. There was therefore nothing that needed to be waived. However, Mr Suterwalla developed an argument by reference to these authorities, which he said applied to the (different) duty/obligation on the part of a contracting authority to seek clarification of obvious errors and ambiguities. I address that argument at paragraph 154 below.

7. The Law Relating to Post-Tender Clarifications

7.1 The Purpose of Rules relating to Public Procurement

59. As a result of some of the arguments advanced by DWP (many of which were accepted by the judge), it is necessary to start with how and why it is that the EU, and now the UK, have detailed rules relating to public procurement. They are designed to ensure healthy and effective competition (see *Archus and Gama v Polskie Gornictwo Naftlowe SA* EU:C:2017:358 ("*Archus*") at [25]) and so that there is a proper evaluation of the tenders submitted (see *R (Harrow Solicitors and Advocates) v Legal Services Commission* [2011] EWHC 1087 (Admin); [2011] PTSR D 49 ("*Harrow Solicitors*") at [31]). The rules are designed to avoid the kind of unfair and capricious decision-making such as occurred in one of the earliest domestic procurement cases, *Harmon CFEM Facades (UK) Ltd v Corporate Officer of the House of Commons* [1999] 10 WLUK 904.

60. The rules which have grown up around public procurement, such as the principle of equal treatment and the principle of transparency, exist to serve the purposes noted in the previous paragraph. They are not (and must never be allowed to become) an end in themselves, just as those rules should not be applied in a formulaic and unrealistic way.

61. It has been said that "the purpose underlying the principle of transparency, which is a corollary of the principle of equality, is essentially to ensure that any interested operator must take the decision to tender for contracts on the basis of all the relevant information and to preclude any risk of favouritism or arbitrariness on the part of the licensing authority": see *Stanley International Betting Ltd* (ECLI:EU:CD:2018:1026) (19 December 2018) at [57]. As to the definition of equal treatment, that can be found in *Fabricom SA v Belgian State (Case C-2103)* [2005] ECR i/1559:

> "Furthermore, it is settled caselaw that the principle of equal treatment requires that comparable situations must not be treated differently and that different situations must not be treated in the same way unless such treatment is objectively justified."

Observance of the principle of equal treatment of tenderers requires that all the tenders comply with the tender conditions so as to ensure an objective comparison of the tenders submitted by the various tenderers: see *Commission v Denmark* [1993] E.C.R.I-3353;(1995) 11 Const.L.J. 63.

62. Stuart-Smith J (as he then was) explained in *Stagecoach East Midlands Trains Ltd & Ors v SoS for Transport & Ors* [2020] EWHC 1568 (TCC); 1919 Con LR 176

("*Stagecoach*") that the exercise of discretion at various stages in any public procurement was capable of engaging and infringing the principles of equal treatment and transparency (see [41]). The terms of any ItT may preclude the exercise of an independent discretion and mandate an outcome; if not the discretion was subject to principled limits and may not be exercised on an unlimited, capricious or arbitrary basis (see [44]).

7.2 The PCR 2015

63. The PCR 2015 contain the following Regulations relevant to the issues on appeal. They are:

(a) Regulation 18 (entitled 'Principles of Procurement'):

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

(b) Regulation 56 (entitled 'Choice of Participants and Award of Contracts: General Principle in Awarding Contracts Etc'):

> "(1) 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 [...] and in the procurement documents, taking into account, where applicable, regulation 45;
>
> (b) the tender comes from a tenderer that—
>
> (i) is not excluded in accordance with regulation 57, and
>
> (ii) meets—
>
> (aa) the selection criteria, and
>
> (bb) where applicable, the non-discriminatory rules and criteria referred to in regulation 65.
>
> …
>
> (4) Where information or documentation to be submitted by economic operators is or appears to be incomplete or erroneous, or where specific documents are missing, contracting authorities may request the economic operators concerned to submit, supplement, clarify or complete the relevant

> information or documentation within an appropriate time limit, provided that such requests are made in full compliance with the principles of equal treatment and transparency."

7.3 Clarification and Correction of Errors

64. There are a dozen or so cases concerned with a contracting authority's rights and duties in connection with the clarification or correction of errors in the tender of an economic operator. As we shall see, many of them are concerned with tenders which were late or where there were unanswered questions, or missing documents. Whilst they are of some relevance, they arise out of a different factual matrix, as noted in paragraph 57 above.

65. For the purposes of this appeal, I consider that the more important cases are those concerned with errors in the pricing of the bids. That is because those errors, if corrected, are more likely to lead to what could potentially be labelled a new bid, and that may be impermissible. Only three of the authorities are concerned with that situation. Moreover, the first (*Adia Interim SA v E.C. Commission* [1996] 3 CLMR 849 ("*Adia*")) is now 30 years old, and there has been a lot of water under the public procurement bridge since then. The other two (*Antwerpse Bouwwerken NV v European Commission* [2009] ECR II-4439 ("*Antwerpse*") and *Siemens Mobility Ltd* v *High Speed 2 (HS2) Ltd* [2023] EWHC 2768 (TCC); [2024] 212, Con LR 136 ("*Siemens*") are more recent. Moreover, they are both cases where the contracting authority carefully sought clarification from the bidder, and awarded the contract to that bidder on the basis of the clarification provided. That would appear to confirm that seeking clarification and acting on the answers received is more common than once it was. The litigation in each of those cases concerned a challenge by the ultimately unsuccessful bidder to the original decision to seek clarification. Both challenges were unsuccessful.

7.3.1 The European Authorities

66. *Adia* is the first of the cases concerned with an error in the figures. The tender contained an erroneous figure for the coefficient turning the gross hourly rate into the billing rate. The European Court rejected the submission that the contracting authority – in that case the Commission itself – should have itself corrected the error. The Court said that the systematic calculation error was not "particularly obvious" [46] and the selection committee could not determine "its exact nature or cause" [47]. It was not clear whether the error was a calculation error made in applying the formula presented by the applicant; an error in determining the coefficient; or simply a clerical error. The court went on to say in [47] that "in those circumstances, any contact made by the Commission with the applicant in order to seek out jointly with it the exact nature and cause of the systematic calculation error would have involved a risk that other factors taken into account in order to establish its tender price – in particular those relating to the calculation of the coefficient encompassing its profit margin – might have been adjusted, and this would have entailed, contrary to the applicant's claims, an infringement of the principle of equal treatment to the detriment of the other tenderers".

67. In *Tideland Signal Limited v EC Commission* [2002] 3 CMLR 33 ("*Tideland")* there was an error in the date by which the tender had to be accepted. This error arose because the contracting authority (again the EC Commission) had issued an addendum to the re-tendered dossier and had thus extended the procurement period, but Tideland had not altered the date for acceptance in consequence. The Commission rejected the tender because of that error. They argued that there was no ambiguity and that the strict rules of the tender competition should apply. At [25] of the court's judgment, it was noted that the Commission argued that the tender contained a formal error "in respect of one of the basic tender conditions, which cannot be corrected." That was as Ms Sloane correctly pointed out, very similar to the arguments run by DWP in the present case.

68. The European Court upheld the economic operator's challenge, noting that the incorrect date "did not necessarily constitute a formal error, but rather gave rise to an ambiguity" [36]. The Court went on to hold that the principle of equality did not preclude the contracting authority from allowing tenderers to clarify any ambiguities in their tenders [38]. The Court had regard to the principle of proportionality [39], and noted that "where there is a choice between several appropriate measures recourse must be had to the least onerous." In the circumstances, the principle of good administration and the principle of proportionality "required [the contracting authority] to resolve the resulting ambiguity by seeking clarification of the period for validity of the applicant's tender" [42]. The ultimate conclusion at [43] was that the decision to reject the tender without seeking clarification of the intended period of validity was clearly disproportionate and thus vitiated by a manifest error of assessment. I should add for completeness that, whilst the principle of good administration does not apply in English law (see *Bechtel v HS2* [2021] EWHC 458 (TCC) at [297]), the alternative finding based on the principle of proportionality certainly does, as of course does the specific English concept of irrationality.

69. *Antwerpse* is the second case concerned with an error in the figures of a bid. There, company C omitted a unit price for a particular item in the cost estimation summary. The contracting authority originally rejected company C's bid because of this non-compliance, and company C stated that the price for the missing item could clearly be deduced from the price bid for another item in that summary, which was worded identically. As a result, the sum of €903.69 was added to their original offer and Company C was awarded the contract.

70. Antwerpse, the company that would otherwise have obtained the contract, complained that the contracting authority had acted unlawfully in contacting company C. They were able to rely on a condition in the ItT to the effect that a failure to state all the prices required in the tender summary "will result in exclusion". The Court identified the power which the contracting authority had to seek clarification, noting at [54] and [55] that, in exceptional, limited circumstances, that power has evolved into an obligation on the part of the Commission to contact a tenderer" (and for that proposition, the court cited *Adia*). The court went on to say:

> "56. That is the position, inter alia, where a tender has been drafted in ambiguous terms and the circumstances of the case, of which the Commission is aware, suggest that the ambiguity probably has a simple explanation and is capable of being easily resolved. In principle, it would be contrary to the requirements of sound administration for the Commission to reject the tender

> in such circumstances without exercising its power to seek clarification. It would be contrary to the principle of equal treatment to accept that, in such circumstances, the Commission enjoys an unfettered discretion (see, to that effect, Case T-211/02 *Tideland Signal v Commission* [2002] ECR II-3781, paragraphs 37 and 38).
>
> 57 In addition, the principle of proportionality requires that measures adopted by the institutions do not exceed the limits of what is appropriate and necessary in order to attain the objectives legitimately pursued, it being understood that, where there is a choice between several appropriate measures, recourse must be had to the least onerous and that the disadvantages caused must not be disproportionate to the aims pursued (Case C-157/96 *National Farmers' Union and Others* [1998] ECR I-2211, paragraph 60). That principle requires that, when the contracting authority is faced with an ambiguous tender and a request for clarification of the terms of the tender would be capable of ensuring legal certainty in the same way as the immediate rejection of that tender, the contracting authority must seek clarification from the tenderer concerned rather than opt purely and simply to reject the tender (see, to that effect, *Tideland Signal v Commission*, paragraph 56 above, paragraph 43).
>
> 58 However, it is also essential, in the interests of legal certainty, that the Commission be able to ascertain precisely what a tender submitted in the course of a procurement procedure means and, in particular, to determine whether the tender complies with the conditions set out in the contract documents. Thus, where a tender is ambiguous and the Commission is not in a position to establish, quickly and efficiently, what it actually means, that institution has no choice but to reject the tender (*Tideland Signal v Commission*, paragraph 56 above, paragraph 34).
>
> 59 Lastly, it is ultimately for the Court to determine whether a tenderer's replies to requests from the contracting authority for clarification can be regarded as explanations of the terms of the tender or whether those replies go beyond clarification and modify the substantive terms of the tender in relation to the conditions laid down in the contract documents (see to that effect, *Esedra v Commission*, paragraph 49 above, paragraph 52)."

71. Applying those principles to the facts of the case, the European Court held that a purely literal and strict interpretation of the exclusion provision "would lead to the rejection of economically advantageous tenders because of clerical errors which are obvious and insignificant, a course of action which…cannot, in the long run, be reconciled with the 'principle of economy'" [65]. The Court said that the Commission was correct in concluding that the price could be deduced with certainty from the price quoted for another item in the cost estimation summary [66]. The Commission had therefore been right to find that the omission had constituted a simple clerical error or, at the very least, an ambiguity with a simple explanation and which was capable of being easily resolved [74].

72. *SAG ELV Slovensko A.S. & Ors v Urad pre verejne obstaravanie* [2012] 2 CLMR 36 ("*SAG*") is often held up as the leading case in this area. However, the facts were very particular. The clarifications which were sought concerned the abnormally low prices

provided by the claimant SAG, who was subsequently excluded from the tender. The tender also did not meet the technical requirements of the tender specifications. The claim that there was a general obligation on the part of the contracting authority to seek clarification of the unsatisfactory tender was rejected. The principle passages from the judgment are [37]-[40]:

> "37. To enable the contracting authority to require a tenderer whose tender it regards as imprecise or as failing to meet the technical requirements of the tender specifications to provide clarification in that regard would be to run the risk of making the contracting authority appear to have negotiated with the tenderer on a confidential basis, in the event that that tenderer was finally successful, to the detriment of the other tenderers and in breach of the principle of equal treatment.
>
> 38. In any event, it does not follow from art.2 or from any other provision of Directive 2004/18, or from the principle of equal treatment or the obligation of transparency, that, in such a situation, the contracting authority is obliged to contact the tenderers concerned. Those tenderers cannot, moreover, complain that there is no such obligation on the contracting authority since the lack of clarity of their tender is attributable solely to their failure to exercise due diligence in the drafting of their tender, to which they, like other tenderers, are subject.
>
> 39. Article 2 of Directive 2004/18 does not therefore preclude the absence, in national legislation, of a provision which would oblige the contracting authority to request tenderers, in a restricted public procurement procedure, to clarify their tenders in the light of the technical requirements of the tender specifications before rejecting them because they are imprecise or do not meet those requirements.
>
> 40. Nonetheless, art.2 of that directive does not preclude, in particular, the correction or amplification of details of a tender where appropriate, on an exceptional basis, particularly when it is clear that they require mere clarification, or to correct obvious material errors, provided that such amendment does not in reality lead to the submission of a new tender. Nor does that article preclude a provision of national legislation such as art.42(2) of Law 25/2006, according to which, in essence, the contracting authority may ask tenderers in writing to clarify their tender without, however, requesting or accepting any amendment to the tender."

73. The last of the European authorities is *Archus*. There the complaint concerned the rejection of a bid because the microfilm sample annexed to the tender did not conform to the tender specifications. The Court had no difficulty in concluding that the principle of equal treatment precluded the contracting authority from inviting a tenderer to submit declarations or documents whose communication was required by the tender specification and which had not been submitted in the relevant time limit [39]. The Court reiterated that, if a request for clarification was sent, it had to be sent to all tenderers in the same situation and that clarification of a correction "may not be equated with the submission of a new tender" [39].

74. Earlier passages of general principle, which are often repeated in other authorities (although they were of peripheral relevance in deciding the case) include:

> "29 However, the Court has also previously held that the principle of equal treatment does not preclude the correction or amplification of details of a tender, where it is clear that they require clarification or where it is a question of the correction of obvious clerical errors, subject, however, to the fulfilment of certain requirements (see, to that effect, in the context of tendering procedures under Directive 2004/18/EC of the European Parliament and of 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 (OJ 2004 L 134, p. 114), judgments of 29 March 2012, *SAG ELV Slovensko and Others*, C-599/10, EU:C:2012:191, paragraphs 35 to 45, concerning the evaluation of offers stage, and of 10 October 2013, *Manova*, C-336/12, EU:C:2013:647, paragraphs 30 to 39, concerning the stage of pre-selection of tenderers).
>
> 30 First of all, a request for clarification of a tender, which may not be made until after the contracting authority has looked at all the tenders, must, as a general rule, be sent in an equivalent manner to all undertakings which are in the same situation and must relate to all sections of the tender which require clarification (see judgments of 29 March 2012, *SAG ELV Slovensko and Others*, C-599/10, EU:C:2012:191, paragraphs 42 to 44, and of 10 October 2013, *Manova*, C-336/12, EU:C:2013:647, paragraphs 34 and 35).
>
> 31 In addition, that request may not lead to the submission by a tenderer of what would appear in reality to be a new tender (see judgments of 29 March 2012, *SAG ELV Slovensko and Others*, C-599/10, EU:C:2012:191, paragraph 40, and of 10 October 2013, *Manova*, C-336/12, EU:C:2013:647, paragraph 36).
>
> 32 Lastly, as a general rule, when exercising its discretion as regards the right to ask a tenderer to clarify its tender, the contracting authority must treat tenderers equally and fairly, in such a way that a request for clarification does not appear unduly to have favoured or disadvantaged the tenderer or tenderers to which the request was addressed, once the procedure for selection of tenders has been completed and in the light of its outcome (see judgments of 29 March 2012, *SAG ELV Slovensko and Others*, C-599/10, EU:C:2012:191, paragraph 41, and of 10 October 2013, *Manova*, C-336/12, EU:C:2013:647, paragraph 37)…
>
> 36 In accordance with the case-law referred to in paragraph 29 above, a request sent by the contracting authority to a tenderer to supply the declarations and documents required cannot, in principle, have any other aim than the clarification of the tender or the correction of an obvious error vitiating the tender. It cannot, therefore, permit a tenderer generally to supply declarations and documents which were required to be sent in accordance with the tender specification and which were not sent within the time limit for tenders to be submitted. Nor can it, in accordance with the case-law referred to in paragraph 31 above, result in the presentation

> by a tenderer of documents containing corrections where in reality they constitute a new tender.
>
> 37. In any event, the obligation which a contracting authority may have under national law, to invite tenderers to submit the declarations and documents required which they have not sent within the time limit given for the submission of offers, or to correct those declarations and documents in the event of errors, cannot be permitted except in so far as the additions or corrections made to the initial tender do not result in a substantial amendment of that tender. It is apparent from paragraph 40 of the judgment of 29 March 2012, *SAG ELV Slovensko and Others* (C-599/10, EU:C:2012:191) that the initial tender cannot be amended to correct obvious clerical errors other than exceptionally and where that amendment does not result, in reality, in the proposal of a new tender."

7.3.2 The Domestic Authorities

75. The Lord Chancellor's 2010 legal aid procurement exercise gave rise to at least seven procurement challenges. They were all based on a claim that the Lord Chancellor should have sought clarification in circumstances where the tenderers either failed to answer questions or had ticked the wrong box. All the challenges failed. It is necessary only to refer to three of them.

76. In *R (Hoole & Co) v Legal Services Commission* [2011] EWHC 886 (Admin); [2011] Info TLR 1 ("*Hoole*"), the bidding solicitor had failed to answer various selection criteria questions. At paragraph 30 of his judgment Blake J considered the tension between the duty to act fairly on the one hand, and the duty to treat all tenderers equally on the other. He said:

> "30. In my judgment, this is the answer to the claimant's case that there was duty on the defendant to assist them make good the defects in their application. Viewed entirely from the point of view of a public law duty to act fairly, it may well be that the exercise of a discretion to grant a benefit should be based on all matters that could or should be known to the authority, and that fairness might well include a reasonable opportunity to correct obvious errors without changing the fundamental nature of the bid submitted. It is after all in the public interest that a well-qualified and experienced provider of legal services in the field of immigration should be permitted to continue in business. However, any such duty is severely circumscribed where there is a competitive tender and an over-riding duty to treat all tenderers equally… Any general duty to give an applicant an opportunity to correct errors in the absence of fault by the defendant, yields to the duty to apply the rules of the competition consistently and fairly between all applicants, and not afford an individual applicant an opportunity to amend the bid and improve its prospects of success in the competition after the submission date had passed."

77. In *Harrow Solicitors*, before HH Judge Waksman QC (as he then was) sitting as a judge of the Queen's Bench Division, the suggestion was that the bidder's answer to a particular question, which had been 'No', was an error because they meant to say

'Yes'. The argument was that the duty to seek clarification should apply in all cases where the error was "objectively verifiable". Judge Waksman rejected that submission. He said:

> "31. In my judgment, the critical factor which gives rise, or may give rise, to a duty to seek clarification is where the tender as it stands cannot be properly considered because it is ambiguous or incomplete or contains an obvious clerical error rendering suspect that part of the bid. If the inability to proceed with a bid, which may be an advantageous addition to the competitive process, can be resolved easily and quickly it should be done, assuming there is no change to the bid or risk of that happening. If there is an obvious error or ambiguity or gap, clarifying it does not change the bid because, objectively the bid never positively said otherwise."

78. The judge also made plain why an apparent ambiguity or other deficiency was required before there can be a request for clarification. He said:

> "32…it is only in those cases where there is an obstacle, as perceived by the awarding authority, to considering the bid. If the awarding authority perceives no such obstacle it is entitled to consider it in the usual way. If, on occasion, this may work against a tenderer which has not taken care with its tender, that is unfortunate but it is a function of the overriding need to have properly prepared, timely and accurate tenders as a matter of good administration…
>
> 35 Ambiguity, or inability otherwise to proceed with the tender, works as the essential threshold for interference because (a) resolving the problem does not necessarily entail a positive change in the bid and (b) it constitutes a sensible and workable limit to the obligation of the awarding authority to investigate beneath the surface of a bid. And even here, not every case of ambiguity or inability to proceed will require relief to be granted by the awarding authority: see the *Tideland* principle referred to in paragraph 27 above. Properly considered, the cases referred to above favour the LSC not Harrow. The broad principle contended for by Mr Clarke simply does not exist."

79. The last of the challenges to the 2010 legal aid procurement was *R (Hersi &Co Solicitors) v Lord Chancellor* [2017] EWHC 2667 (TCC); [2018] PTSR 850 ("*Hersi*"). That was another case where a number of questions had gone unanswered by the bidder. The argument was that the contracting authority should have sought clarification of the non-answers because the change generated by a request for clarification would have to alter fundamentally the nature of the bid before it became unacceptable. I rejected that submission as being unfounded in the authorities, which I summarised at [17]. I also made the following point about knowledge at [16]:

> "It was also a test that was unworkable in practice: how could a contracting authority sensibly decide whether an answer to a clarification question 'fundamentally altered the nature of the bid' once it had received the answer, let alone when it was asking itself whether or not to ask the clarification question in the first place?"

80. There have been a number of domestic cases since *Hersi* in which the duty to seek clarification has been considered, although it is not apparent that any of them makes any further contribution on the question of principle. In *Stagecoach,* one of the numerous issues considered as part of this 'kitchen-sink' procurement challenge concerned the conflict between the principles of equal treatment, transparency and proportionality. I have already referred to the summary of principles at paragraph 59 above. However, the particular issues with which this court is concerned did not arise there. In *Inhealth Intelligence Ltd v NHS England* [2023] EWHC 352 (TCC); [2023] PTSR 1179, the economic operator uploaded a document in the wrong place and the error was not corrected by the deadline for closure (it was therefore very similar to *Leadbitter*). Adam Constable KC (as he then was) sitting as a Deputy High Court judge, concluded that the contracting authority's determination to apply the deadline strictly was well within its discretion.

81. *Siemens* was another 'kitchen sink' procurement challenge. One of those challenges related to the stage 5 evaluation where the decision by HS2 was criticised for a whole raft of reasons. One concerned HS2's decision to seek clarification from the successful tenderer in relation to the date for delivery of 'Option Units'. The relevant parts of O'Farrell J's comprehensive judgment start at [510]. The judge referred to my summary of the principles in *Hersi* at [515], and she also referred to the judgment in *Energy Solutions* at [516]. Having set out the evidence in relation to the Option Units the judgment on the point is crisp:

> "539.Siemens alleges that HS2 acted unlawfully in allowing the JV to correct an inconsistency in its bid as to the timing of the 'Option Units' and the Option Unit intermediate milestones.
>
> 540.Mr Warren [the HS2 evaluator] identified an inconsistency in the JV's bid relating to the dates for delivery of the Option Units and the sequence of activities for the same. He permitted the JV to correct the inconsistency by providing new dates for the Option Units with the correct sequence, allowing for a two-week period between delivery and acceptance as required by Table 13 of the IfT (rather than one week between each delivery as initially shown by the JV).
>
> 541.The revised dates had no impact on the prices for each Option Unit, the milestone payments or service charge values in the bid but they did affect the NPV figures in the Financial Pro Forma and resulted in a modest adjustment to the JV's Assessed Price (a few hundred thousand pounds).
>
> 542.This request for clarification and correction to the JV's bid was within HS2's discretion under section 6.6.3 of the IfT because the dates originally submitted were obviously erroneous and the change to the JV's Assessed Price was not substantial or material to the outcome."

7.4 Summary of Relevant Principles

82. I consider that the authorities demonstrate that there are three stages to consider when addressing whether or not, in the particular circumstances of any given case, a contracting authority has the discretion to seek clarification, when that discretion

becomes a duty, and what the permissible limits are to any response to a request for clarification.

Stage One

83. The first stage arises only where the error or ambiguity is obvious to the contracting authority and is material to the outcome of the competition. That will be rare, which explains why any duty to seek clarification will only arise in exceptional cases (*Tideland, SAG, Archus* at [37]). Thus the claim in *Adia* failed at this first hurdle because the court found that the error was not particularly obvious. Moreover, as Judge Waksman stressed in *Harrow Solicitors*, the only question is whether the error or ambiguity was obvious to the contracting authority: it is not a question of the error or ambiguity being "objectively verifiable".

84. All of the cases stress that the error or ambiguity must be "serious" and "manifest" (*Adia)*; "obvious" (*SAG)*; "simple" (*Tideland, Antwerpse)*. The error or ambiguity must also be "material" (*SAG* at [40]*, Hersi* at [17d)]) or "significant" (*Antwerpse* at [65]): it must be relevant to the "outcome" of the tender process (see *Archus* at [32]). If the error or ambiguity is immaterial or irrelevant to the final outcome of the competition, no further action is necessary.

Stage Two

85. The second stage presupposes that there is an obvious and material error or ambiguity. The contracting authority must then consider whether clarification should or must be sought. The authority has a discretion ("may" is the word used in Regulation 56(4)) and it can only ever be the factual circumstances of any given case that would turn that discretion into an obligation (see *Antwerpse* at [56] and [65] and *Harrow Solicitors* at [30](3)(b)). An obligation to seek clarification has been said to arise "where the terms of the tender itself and the surrounding circumstances known to [the contracting authority] indicate that the ambiguity probably has a simple explanation and is capable of being easily resolved" (*Tideland* at [37])[5]. In *Archus* at [29] it was said to arise "where it is clear that they [the details of a tender] require clarification or where it is a question of the correction of obvious clerical errors".

86. Speaking for myself, I consider that the broader test in *Archus* is to be preferred: if a request for clarification is necessary to fulfil the purposes of public procurement and the PCR 2015 (see paragraphs 59-62 above), the formulation of the test in *Tideland* may be too restrictive, in particular because of the second-guessing it appears to require on the part of the contracting authority. But, as I explain, that difference of emphasis does not affect the outcome of this appeal (see in particular paragraph 121 below).

87. At this second stage, a contracting authority will only be considering whether or not to seek clarification. They must therefore take the least onerous option: as *Antwerpse* makes plain at [57], that will usually be to seek clarification rather than to exclude the tender altogether. The option of seeking clarification may, in the right circumstances,

[5] Although this test is expressly formulated under the heading of 'good administration', then (subject to what I say in paragraph 86), it is likely also to be of relevance under the rules relating to rationality and proportionality.

avoid the stark clash of principles described by Blake J in *Hoole* (paragraph 76 above).

88. A contracting authority should not spend too much time second guessing what the answer to any request for clarification might be. Although the authorities suggest that the contracting authority should have a pretty good idea of what the answer is (after all, that is what makes the error or ambiguity obvious in the first place), over-much speculation should be discouraged: *Hersi* at [16]. The contracting authority can only properly consider what the clarification demonstrates, and whether it is legitimate to consider the answer at all, once that answer has been sought and received.

Stage Three

89. The third stage is concerned with the limited room for manoeuvre that a tenderer has when answering any request for clarification. A tenderer cannot use the mechanism of clarification to put in a new bid (*SAG)* or make substantial amendments to the existing bid (*Archus)*. It is important to understand what is meant by these requirements, neither of which is to be applied on a literal or strict basis. The correction of an error will usually, if not inevitably, result in something which is in a strict or literal sense "new", as the document contains something which was not there before. Moreover, as the authorities show, a change worth several hundreds of thousands of pounds was not regarded as a substantial amendment or a new bid (*Siemens*) when, on an overly literal view, it was both.

90. Much will depend on the nature, scope and extent of the obvious material error or ambiguity that is being corrected. The provision of new information which affects the price is not of itself impermissible (see *Antwerpse, Siemens*). That approach is justified because, on the analysis in *Harrow Solicitors,* it might be said that the new information is not a change at all, because objectively the bid did not contain the relevant information in the first place. On the other hand, I think Mr Suterwalla is plainly right to say that the mechanism of clarification cannot be used to allow the tenderer to 'have another go': that would destroy the need for proper and fair discipline in the tender process.

91. The ultimate purpose of the rules relating to public procurement, as set out in paragraphs 59-62 above, is the need for healthy and fair competition and to permit the proper evaluation of the tenders. Common sense is therefore required when applying the rules to achieve those ends: experienced evaluators working for contracting authorities should know when a response to a request for clarification is a simple adjustment of the kind they generally expected, and when it is an attempt to have another go. The latter is a new bid or a substantial change to the original bid. What is to be avoided is a strict and over-literal approach which may lead to the exclusion of the best tender for no objectively justifiable reason (see *Antwerpse* at [65]).

92. I revert to some of these principles, and give further examples when addressing the issues in the appeal below. I note that, during the course of his oral submissions, Mr Suterwalla advanced a number of propositions which were based, in one way or another, on DWP's belief – apparent throughout this dispute – in the centrality of the principle of equal treatment to the exclusion of all else, and how and why any request for clarification of the tender in this (or really in any other) case would have breached that principle and was therefore impermissible. I consider that each of his propositions

was contrary to those from the authorities that I have summarised in the previous paragraphs, and I explain why in the relevant sections of the judgment below. These fundamental errors of principle explain how and why this procurement went wrong: how it was that DWP knowingly awarded the call-off contract to a significantly inferior bid because they considered, based on an erroneous understanding of the law, that there was a mandatory exclusion provision, and that their duty of equal treatment to PAM overrode their duty to the public, both in terms of ensuring a healthy and effective competition, and ensuring that the outcome of the competition was in the public interest.

8. Issue 2/Ground 6: A Failure To Exercise Discretion Due To A Misdirection of Law

8.1 The Judgment

93. Optima submitted that DWP did not exercise any meaningful discretion at all; that they had misdirected themselves in law on the basis that a) there was a mandatory exclusion provision; b) they did not properly consider the options; c) they could not seek clarification of the tender in respect of the three line items in question, because to do so would have put them in breach of their obligations of transparency and equal treatment. Optima's case was that, as a result of these errors, DWP had always thought that they had no realistic option but to exclude, and so failed to exercise any meaningful discretion.

94. The judge rejected Optima's submissions. At [161] – [170], he explained why he concluded that DWP had exercised their discretion. He referred to the meaning he ascribed to the ItT: that there was a mandatory exclusion provision. Thereafter, at [164]-[170] the judge concluded that the other options had been considered and that therefore there had been a proper exercise of discretion. He also found that any request for clarification was a breach of the equal treatment duty owed to PAM.

95. I consider that the judge's approach was wrong in law. First, both DWP's original stance and the judge's judgment on this issue were tainted by the erroneous belief that there was a mandatory exclusion provision in the ItT. Second, I consider that the judge was wrong to say that other options short of exclusion had been properly considered. Third, there was, on the facts, no question of the rules relating to equal treatment being infringed. For the reasons set out below, there was either a failure to exercise any discretion, or a wrongful exercise of discretion, because DWP fettered themselves from the outset. That is what the judge should have found.

96. For the avoidance of doubt, I consider that any assessment of the relevant evidence confirms beyond peradventure that DWP failed to exercise their discretion at all, or in a lawful and unfettered way. That assessment is straightforward because the relevant evidence is of narrow compass.

8.2 The Relevant Evidence

97. The relevant evidence was:

a) An internal DWP email dated 5 April 2023 timed at 13:23, where the writer says that she has finished the check on the errors. In relation to OH229 and OH230 she

describes those as "copy and paste" errors. She was not sure about the OH58. The reply at 2:37 says:

> "Exactly same outcome as me, the two cut and paste errors I can understand (though disappointing) the OH58 is a genuine overprice from a compliance point of view."

b) DWP's internal document dated 3 May 2023. It says:

> "Further to the OHEAP CAB pre-brief and the specific question raised around the Departments right to exclude non-compliant bidders, the following is evident:
>
> Whilst the ITT documentation includes the specific right to exclude non-compliant bids at paragraph 6.9.2 of the document entitled "*About the Procurement*", stating "*We reserve the right to exclude you if you submit a non-compliant bid*" however, the ITT documentation is not explicit in what circumstances this remedy is used.
>
> With regards to exceeding the framework pricing specifically there is an obligation in all procurement documentation and the framework itself not to exceed the framework price caps which are the maximum allowable costs under any Call-Off competition, however the ITT documentation uses the word "discounted" as opposed to "excluded" or "disqualified", stating "*any bids for any service line submitted to the Framework by invited bidders in excess of this will be discounted*" giving rise to some ambiguity which may be open to interpretation.

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The above approach, i.e. excluding Optima and [ABC], has to be viewed commercially in comparison to the risks associated with the potential other 3 options available to the Department.

- Clarify pricing with bidders and request resubmissions of those prices above framework caps – whilst this would have been an option had all bidders been non-compliant **PRIVILIGED**

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- Discounting the prices that are over framework price caps by not taking them into account – this would essentially remove line items from the evaluation that have volumes and would skew the entire financial evaluation,
- Discounting the prices that are over the framework price caps back to the framework price caps – there is no process identified for this in any documentation **PRIVILIGED**

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- Abandon the procurement and re-run – **PRIVILIGED**

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c) As part of DWP's assessment of Optima's bid, it was "normalised back to Framework pricing" in other words, the prices were reduced to the Framework Maximum Prices. DWP recorded that "this actually had minimal impact on pricing with [Optima] adjusted down -0.02% (£600)."

d) During the oral evidence of Mr Birch, a Commercial Specialist at the DWP, he agreed that this type of tender exercise meant that "it is exceptionally difficult even for a diligent person to avoid inadvertent errors" (transcript/205/lines 15-18).

e) Similarly, Mr McPherson, a Commercial Lead at the DWP, agreed that it was exceptionally difficult to ensure that every single cell in the pricing schedule did not exceed Maximum Framework Prices (transcript/273, lines 4-12). He said this was because "there was only one delivery applied in the individual schedules which would have made it difficult necessarily to understand what price cap that they were comparing against". He also confirmed (transcript/278-279) that the errors were obvious, and how they had arisen "was not necessarily obvious but could be assumed".

f) Mr McPherson's evidence in respect of the decision to exclude Optima was graphic:

> "Q. Thank you. Mr. McPherson, just before we leave this, do you think it is fair to exclude a bidder for making a mistake of this sort when you make the same category of mistake despite quadruple checking?
> A. I don't necessarily believe it is fair. However, I do not believe we really had a choice from a commercial perspective.
> Q. When you say "from a commercial perspective", what do you mean?
> A. In terms of we were mandated to -- not mandated but we felt we were left in no position but to exclude non-compliant bids because we had a compliant bid and to have gone back out and clarified any further on the non-compliances would have meant that the compliant bidder would have been treated unfairly or unequally."

g) DWP's answer to the appellant's letter before action, dated 22 June 2023. Particular paragraphs of relevance include:

i) Paragraph 4.5, which said:

> "It would simply not be a fair and transparent process to allow one bidder to correct pricing errors in its bid in order to make it compliant and avoid disqualification when another bidder has correctly complied with the rules of the competition. Other than allowing your client to change its bid or

> evaluating the bid based on a price other than what was submitted, both of which would be unacceptable under a regulated procurement process, we do not see what proportionate alternative your client believes should have been followed. The procurement documents set out very clearly that pricing above the framework prices was not permitted and *there was no discretion around disqualification if that requirement was breached*. There is also a separate right to disqualify non-compliant bids under clause 6.9.2." (Emphasis supplied)

ii) Paragraph 5.2, which reiterated that "the decision to disqualify was the correct one as your clients submitted a non-compliant pricing submission and the rules required our client to refuse such a bid."

8.3 Analysis

98. In my judgment, all that evidence (both separately and when taken together) confirms beyond any doubt that DWP did not exercise any meaningful discretion and/or that any discretion that DWP did exercise was fundamentally flawed because, in Mr McPherson's words, they felt that they "really had no choice" and "were left in no position but to exclude". That is not the language of a proper exercise of a discretion. It stems from DWP's erroneous view that they had an automatic right to exclude if the Framework Maximum Prices were exceeded. It explains why DWP said in the letter of 22 June in express terms that "there was no discretion around disqualification if that requirement was breached". The documents show that, whilst concerns about equal treatment were raised, they were never properly explored, because of the belief in the mandatory exclusion.

99. The high water mark of DWP's discretion case is the heavily redacted document of 3 May 2023 (paragraph 97b) above). However, in my view, on a proper analysis, that document is firmly against them. The very first paragraph, which talked of the "right to exclude non-compliant bidders" demonstrates that what it was recording was a justification for the exclusion of Optima, not a proper consideration of any less onerous options (as required by law). Furthermore, the four options are only said to arise as a means of comparison to "the above approach, i.e. excluding Optima". In other words, it appears that a decision had already been taken to exclude Optima's bid in the first half of the page. Of course, a large section of that part of the document is redacted as "privileged" which is particularly unfortunate given that it is in the redacted part that "the above approach, i.e. excluding Optima", is apparently set out. But there is more than sufficient material to permit this court to conclude that this was all about exclusion, not an exercise of discretion.

100. The document goes on to say that that decision (i.e. to exclude Optima) was "to be viewed commercially in comparison to the risks associated with the potential other three options". That again suggests that the decision was taken first to exclude, and that the options were either an irrelevance or simply a means of viewing the decision "commercially".

101. Another indication of DWP's erroneous approach can be seen at the third bullet point, where they discuss the option of seeking clarification. That makes plain that DWP only thought that this was an option if every bidder had produced a non-compliant bid. Since that was not the case, this option was not considered further. That was

wrong in law; as explained above, what matters is the nature of the errors made, and whether they were obvious and material. Clarification may have been required from more than one bidder, but only if those threshold conditions had been met. On the facts here, as explained below, any request for clarification would have been limited to Optima. In addition, this document undermines DWP's case before the judge, and on appeal, that they gave careful thought to seeking clarification of the three line item errors; the document suggests that DWP looked at it the wrong way round, and once they knew there was a compliant bid, that was the end of the matter.

102. It is perhaps unnecessary to dwell further on the 3 May document, given the errors within it that I have already pointed out. But I should add that:

a) Another option identified, namely discounting the quoted prices back to the Framework Maximum Prices, is rejected simply because "there is no process identified for this in any documentation". Of course, I consider that there was, because that is how I have found a RWIND tenderer would or could have understood paragraph 2.2. But even putting that paragraph to one side, this objection does not add up. The ItT was anxious to emphasise that the Framework Maximum Prices should not be exceeded, so DWP may not have wanted to set out an express process as to what should happen if they were. But that is why paragraph 6.9.1 (second bullet) and Regulation 56(4) allowed DWP to seek clarification in respect of obvious errors and ambiguities which should not have happened but which (on DWP's own evidence) were inevitable in an exercise of this kind. So this reason for rejecting the discounting option is, on analysis, no reason at all.

b) Another option identified, removing the three line items altogether, is allegedly discounted because that "would skew the entire financial evaluation". That was wholly wrong. Removing the three line items made a difference of just 0.02% to the financial evaluation; it would not have skewed anything.

c) It is not at all clear from the 3 May document as a whole that, beyond the incorrect statement that clarification could only be sought if all the bids were non-compliant, any further consideration was given to the clarification option and how the principle of equal treatment would work in the situation that had arisen.

103. I set out in Section 10.3 below, when explaining what should have happened on these facts, why I consider DWP were obliged to seek clarification from Optima, and how that option would not have been a breach of any principle of equal treatment. But it is appropriate here to deal with two general propositions that were advanced in support of DWP's case that the principle of equal treatment precluded any request for clarification. The first proposition was that the principle of equal treatment was an end in itself and concerned only with the treatment of bidders. The second proposition was that equal treatment was not concerned with the outcome of the competition.

104. I reject both these propositions as being contrary to the authorities which I have summarised above. As to the first proposition, I repeat that equal treatment is not an end in itself. Equal treatment is simply one of the ways in which the *purpose* of public procurement are advanced. The purpose of public procurement is to ensure healthy and effective competition and to allow a proper evaluation of the tenders. It is to move away from arbitrary and capricious decision-making. Thus, when a contracting

authority is considering or applying the principle of equal treatment, it must do so not as an end in itself, but always with one eye on that over-riding purpose.

105. As to the second proposition, I reject the suggestion that equal treatment is not concerned with the outcome of the competition. That proposition is contrary to *SAG, Antwerpse, Archus* and *Hersi*: see paragraph 84 above. Furthermore, as a matter of common sense, the materiality of the obvious error or ambiguity in question is critical. If an obvious error has been made that is irrelevant to the outcome of competition then seeking clarification of it cannot affect the need for a healthy and effective competition. By the same token, if the error or ambiguity is relevant to the outcome, as happened here, then that is a potentially critical factor. So what matters are obvious errors or ambiguities that might affect the result of the tender competition.

106. The only other defence put up to the charge of irrationality was the importance of finality, a point the judge made at [215]. I understand of course that, because of the previous failures in the management of the tender process, it had become increasingly important to let this call-off contract as soon as possible. But there was no evidence, or attempt at rational explanation, which sought to balance, on the one hand, the importance of letting the contract as soon as possible with, on the other, the downside of awarding the contract to an inferior bid because of three clerical errors. Such evidence and such an exercise would have been required if a contracting authority was going successfully to argue that, despite all that happened, finality trumped all else. In addition, I am bound to say that, given that the failures in the tender process were, at least *prima facie*, the responsibility of DWP, that could hardly be used as a reason for DWP's failure to exercise their discretion and properly consider the options available to them (including of course the option of seeking clarification).

107. It follows from the above paragraphs that I consider that there was no rational basis for the decision to exclude Optima. I address proportionality under Issue 3/Ground 4 below. For present purposes, it is suffice to say that I consider that it was plainly disproportionate to disqualify Optima in circumstances where the quality of their bid was so much higher than any of the others; where theirs was easily the best bid overall, regardless of the errors; and where the errors had – and were known by DWP at the time to have - a *de minimis* impact on the tender evaluation. In accordance with principle, the least onerous option should have been taken, which was to seek clarification.

108. For all these reasons, therefore, I consider that DWP misdirected themselves in law and failed properly to exercise their discretion when considering whether or not to seek clarification from Optima in respect of the three line items. I consider that the judge erred in reaching the contrary conclusion, partly because of his incorrect answer to Issue 1/Ground 1; partly because the evidence that a meaningful discretion had not been properly exercised was so stark; and partly because he failed to grapple with the problem that, although there was a document that identified the options, these were not properly considered by DWP because their (incorrect) view of the principle of equal treatment had already caused them to decide to exclude Optima.

109. In the light of my answer to Issue 2/Ground 6, then, if my Lords agree, there will have been no proper exercise of discretion in this case at all, and Optima were wrongfully excluded from this competition when they should have been just about to win it. It is then necessary to go on and consider what DWP should have done, how that would

have resolved the errors without breaching any obligation of equal treatment, and why, in my view, the call-off contract should and would have been awarded to Optima.

9. Issue 3/Ground 2: Obvious Mistake or Ambiguity

9.1 The Proper Approach

110. The principles are clear: see paragraphs 83-84 above. A contracting authority has no duty, let alone an obligation, even to consider seeking clarification unless there is an obvious and material error or ambiguity in the submitted tender. The reason that the mistake or ambiguity must be obvious is because it is not for the contracting authority to rootle through a detailed bid, looking for errors or ambiguities. The contracting authority is entitled to assume, at least in the first instance, that the tenderers have undertaken their task properly and in accordance with the rules of the ItT.

111. However, if an obvious error or ambiguity does become apparent to the contracting authority during the evaluation of the bids, then different considerations will apply. It is here that the relevance or materiality of the obvious mistake or ambiguity becomes important. If it is an obvious mistake or ambiguity but was, in all the circumstances, irrelevant to the outcome of the competition (because the mistake had been made by a bidder who, whatever the clarification, was not going to win the contract anyway), the contracting authority will be justified in not doing anything about it. If, however, the obvious mistake or ambiguity is, or may be, material to the outcome of the competition then it is likely that the contracting authority may be *obliged* to seek clarification.

112. Why do I say that they may be obliged to seek clarification? The reason is because, if there is an obvious mistake or ambiguity which is material to the outcome of the competition, then the contracting authority may be unable to undertake a proper evaluation of the tenders without knowing the answer to the request for clarification (*Harrow Solicitors*, at [31]-[32]). Ultimately what matters in these cases is that a proper evaluation is undertaken and completed by the contracting authority. A contracting authority may not be able to undertake such an evaluation if there is an obvious and material mistake or ambiguity.

9.2 The Judgment

113. The judge dealt with the question of mistake or ambiguity at [182]-[193]. Throughout this part of his analysis, I consider that, with respect, the judge confused the question of the nature of the error or ambiguity with whether a request for clarification was appropriate and what might be revealed by any such request. Those were each separate stages in the process. The first stage was simply to see whether or not there was an obvious and material error or ambiguity.

114. To the extent that the judge gave consideration as to whether or not there was an obvious mistake or an ambiguity, I consider that his reasoning was limited to [192] and [193] as follows:

> "192. It follows that whilst it appears to have been a mistake to have bid above the maximum, there was no obvious mistake where the intended

> price was not within the knowledge of the Defendants. Nor was it a mistake which could be easily resolved by reference to documents within the tender itself or documents within the possession of the Defendants. The mistake could not be resolved by an assumption that the maximum line sum had been intended, when there was no basis to infer that this was the case. It therefore followed that any question would have to be one which inquired of the actual intended sum. On the authorities, that would be objectionable because it opened up a change of bid or at least the opportunity for a change of bid. That infringed the principles of equality of treatment and of transparency or gave rise to a serious risk of infringing these principles.
>
> 193. Ms Sloane KC submitted in the alternative to there being an obvious mistake that there was an ambiguity because at the same time Optima was certifying that it was complying with the requirements, but that it was providing prices which were not in accordance with the requirements. In my judgment, that does not lead to an ambiguity. It leads to a conclusion that Optima failed to provide a compliant bid and to make an accurate statement that it was providing a compliant bid. If, contrary to the foregoing, there was an ambiguity, the same objections exist about seeking to find out what was intended as set out in the last two sentences of paragraph 191 above."

115. The judge repeated some of these points again later in the judgment: see [196]-[198], [200], [209], and [216(iii)]. But he did not develop or expand upon the reasoning in these paragraphs. Mr Suterwalla agreed that, certainly on the issue of ambiguity, [193] was the extent of the judge's analysis.

9.3 An Obvious Error

116. The undisputed facts here were that Optima had made a mistake because, for three of the service line items, they had put in prices which were above the Framework Maximum Prices. The errors were obvious because they were spotted by DWP during the evaluation. Moreover, to the extent that the quality or obviousness of the mistake is a relevant factor, I note that two of the three mistakes were described by DWP themselves simply as "cut and paste errors". In those circumstances, it would appear plain that the prices in the three line items were an obvious mistake.

117. The judge came to a different conclusion because he said that the intended prices were not within knowledge of DWP. He said that the mistake could not be resolved by reference to the other tender documents and was therefore not an obvious mistake. In support of this outcome, Mr Suterwalla submitted that, by reference to *Tideland*, an error could only be the subject of a request for clarification if the contracting authority could see what the right answer should have been from the other tender documents.

118. However, I reject this approach for a number of reasons. First, I consider that it is based on much too strict an interpretation of *Tideland*. As noted in paragraphs 85 and 86 above, I consider that the broader test in *Archus* is more consistent with the relevant principles. Secondly, I consider that the relevance of what may be apparent from the other tender documents lies simply in the fact that, if the answer is or may be

apparent from information provided elsewhere, it helps to demonstrate the obviousness of the error.

119. Thirdly, a requirement for an obvious mistake that the answer must be apparent from the other tender documents would again render worthless the process under Regulation 56(4) (of seeking clarification and permitting a tenderer to supplement or complete its bid). If the contracting authority already knows the answer, there is nothing that requires clarification, so there is no need for a request at all. Mr Suterwalla said that Regulation 56(4) was designed to allow a tenderer to *confirm* what was already in the contracting authority's knowledge. But that would be to rewrite Regulation 56(4): that provides a power to seek clarification where the information in the tender needs to be supplemented, clarified or completed, and is not limited to seeking mere confirmation of something the contracting authority already knows.

120. The judge's only reason for concluding that this was not an obvious mistake was because DWP could not work out what the intended price was. For the three reasons that I have given, that approach was wrong in law. But I also consider that it was not a conclusion open to the judge on the undisputed facts. The evidence was that these mistakes were so obvious that DWP themselves described two out of three of them as a 'cut and paste' error. What is more, DWP would have known that these mistakes were neither here nor there, because they did not affect quality (70%) and, to the extent that it affected the evaluation of the price (30%), they made a difference of just 0.02%. They did not affect the outcome of the competition in any way, unless of course DWP decided that their very existence meant that they had to exclude Optima altogether.

121. Most importantly of all, even if, in order to be 'obvious', the correct prices should have been apparent from other parts of the tender, these three errors were caught fairly and squarely by that test. DWP knew, from the information that they had, what the maximum prices had to be for the call-off contract, because they knew what the Framework Maximum Prices were. So they already had all the relevant information. That was how they knew there was an obvious mistake. Moreover, if they wanted to check whether, as a result of the errors, lower figures than the Framework Maximum Prices had been intended, they could have requested clarification, since any lower figures would only make Optima's bid even more attractive, and even more superior to that of PAM.

122. The absurdity of the position that DWP (and subsequently the judge) got themselves into was to say that they were entitled not to seek clarification because they did not know if the three intended prices were the Framework Maximum Prices or some lower prices. First, they should have asked: then they would have known the answer. But secondly, what difference did that make to the outcome of the tender competition, since even with the Framework Maximum Prices replacing the three erroneous figures, the difference was nugatory? In this way, DWP's position was a triumph of form over substance; to cite *Antwerpse*, they let it become a situation where the best tender was excluded "because of clerical errors which are obvious and insignificant". I am bound to observe that the public interest was not well-served by such an outcome.

9.4 An Obvious Ambiguity

123. As noted at paragraph 114 above, the judge's conclusion was that there was no obvious ambiguity (between the declaration that they would comply with the requirements of the Framework Agreement, including the Maximum Prices, and the three line items in question which exceeded those prices), because Optima had simply failed to make an accurate statement that it was providing a compliant bid. There are a number of difficulties with that analysis.

124. First, the fact that one part of the bid said X (the express confirmation that the prices did not exceed the Framework Maximum Prices) and the three line items said Y (which did exceed the maximum prices), was an obvious ambiguity. Two parts of the same bid said different things. That made it similar to the situation in *Tideland* and the situation in *Siemens.* It made it different to the cases which stemmed from the 2010 legal aid procurement, like *Hoole*, because there were no ambiguities there, simply a failure to fill in various boxes. The judge's analysis, which effectively ignored one part of the documentation giving rise to the ambiguity, is impermissible.

125. Furthermore, there is force in Ms Sloane's observation that the judge's approach was akin to that of the unsuccessful respondent in *Tideland*. There, the Commission had argued that the inclusion of an erroneous date was not an ambiguity but a non-compliance. The court rejected that argument. In my view, the judge should have rejected it here. Again, for the same reasons as before, the obvious ambiguity here was material.

9.5 Conclusion as to Obvious Error/Ambiguity

126. For the reasons set out above, I conclude that all of the ingredients were in place for the first stage of the exercise to be triggered. There was an obvious error and/or an obvious ambiguity which could not have been more material. It was noted by DWP and expressed in terms at the time that made it clear that this is precisely how DWP categorised it. The next question is: What should they have done about it?

10. Issue 3/Ground 3: Seeking Clarification and Changing the Bid

10.1 Introduction

127. This concerns what I have called stages 2 and 3: the contracting authority's power/duty to seek clarification and, if a request is made, deciding what to do about any answer. This latter issue will often turn on whether any such clarification amounts to a new bid. Again, it is important for contracting authorities to keep those stages separate. The relevant principles are set out at paragraphs 85-91 above.

10.2 The Judgment

128. The judge dealt with DWP's failure to seek clarification at [194]-[197]. He said at [195] that, because DWP had received a compliant bid from PAM, it would have been potentially a breach of the principle of equal treatment to seek clarification. That is because, he said, a request for clarification "could only have benefited Optima and the other non-compliant tenderers to the detriment of PAM." He said that the failure or refusal to seek clarification was supported by the decision in *Adia*.

129. As to changing the bid, the judge dealt with that at [198]-[200]. He again said that was a breach of the duty of equal treatment because "after the clarification, there is for the first time a potentially effective bid for the item in question to the detriment of the compliant tenderer at least." His reasoning at [200] returned to his earlier (erroneous) conclusion that there was no error or ambiguity.

10.3 Stage 2: Seeking Clarification

130. In my judgment, the judge was wrong to suggest that, simply by seeking clarification of the obvious errors/ambiguities, DWP would have been in breach of the duty of equal treatment. There are a number of strands to that conclusion.

131. First, the duty to seek clarification arises because there was an obvious and material error or ambiguity. It does not arise otherwise. Accordingly, the judge's analysis is circular, because it seeks to rely on the erroneous conclusion that there was no obvious error or ambiguity. In addition, his reliance on *Adia* was misplaced because – unlike here - there was no obvious error or ambiguity in that case. Once it is accepted that there was an obvious error and/or ambiguity which was highly material to the outcome of the competition (because unless clarification was sought, DWP thought they could simply exclude Optima's bid, even though it was the best), then I consider that DWP had an obligation to seek clarification.

132. Secondly, the judge failed to look beyond the principle of equal treatment in order to see that that principle is not an end in itself, but merely a tool by which a healthy competition and a proper evaluation is achieved. In my view, that is why Judge Waksman's analysis in *Harrow Solicitors* is important. If there is an obvious material error or ambiguity then, until that is clarified, it may well not be possible for there to be a proper evaluation of the tender in question. Provided that the clarification is sought in a fair and transparent way, DWP were obliged to obtain the necessary clarification in order that they could carry out a proper evaluation.

133. Thirdly, the judge failed to address the *Fabricom* point (see paragraph 61 above) that the principle of equal treatment requires that "comparable situations must not be treated differently and that different situations must not be treated in the same way". Thus, here, both Optima and at least one other bidder had made the same sort of mistake. However, the mistake(s) made by the other bidder was immaterial because, regardless of the outcome of any clarification process, the other bidder would never have won the call-off contract. Thus the other bidder's error(s) did not affect the outcome of the competition. In this way, the principle of equal treatment did not prevent DWP from asking Optima to clarify the three line errors set out above.

134. It is wrong to say that a request for clarification would be a breach of the equal treatment principle because it would prejudice PAM, whose bid was compliant. On the principle expressed in *Tideland* at [36], and in *Harrow Solicitors*, until clarification had been sought, it was not possible to say whether or not Optima's bid was compliant or not: the bid was, in that sense, not yet complete (and Regulation 56(4) permits an economic operator to "complete" the tender information in answer to a request). Furthermore, it was wrong to elevate PAM's compliance into an insurmountable hurdle for Optima to overcome. If that were right, Regulation 56(4) would (again) be denuded of any meaningful effect, because it could never be used in

circumstances where one bid, no matter how inferior, contained no obvious and material errors.

135. DWP's position on equal treatment was stark. As Mr Suterwalla put it during his oral submissions, "DWP does not shy away from its position. It did not seek clarification because to do so would have been a breach of the principle of equal treatment." Mr Suterwalla confirmed in his oral submissions that, on DWP's case, a change to the pricing schedule was impermissible and that, in consequence, "DWP cannot exercise their discretion, because that would be a breach of equal treatment". In my judgment, these erroneous submissions put DWP's case too high; I have already explained how the equal treatment point was not front and centre in the document of 3 May. But in any event, the propositions are wrong in law for the reasons that I have given. Public procurement must be more flexible than that: hence Regulation 56(4).

136. For all those reasons, therefore, I consider that the judge was wrong to say that there was no duty on the part of DWP to seek clarification. In my view, on these facts, that duty arose once it had become apparent that Optima's tender contained obvious mistakes and/or ambiguities which were highly material to the outcome of the competition and affected the proper evaluation of the tenders.

10.4 The Risks Inherent in Any Answer

137. Throughout the judgment, the judge repeatedly referred to the risk that, if DWP asked Optima to clarify the three line items, they would change their bid, and that that would be illegitimate. That was supported by another of Mr Suterwalla's over-arching propositions, namely that a contracting authority cannot seek clarification if there is a risk that, in the response, a different price is provided for any line item.

138. I reject that proposition, and the judge's approach, as being unfounded in the authorities and much too broad. There are two reasons for that. First it imposes far too great a restraint on the exercise of a contracting authority's discretion/duty. The contracting authority has an obligation to ensure that there is a healthy and effective competition. If there is an obvious and material error which potentially undermines that purpose, then a duty to seek clarification may arise, irrespective of the answer or the potential answer. Secondly, it elevates or exaggerates the degree to which the contracting authority must assess the risks posed by the possible answer before seeking clarification. If they have a duty to seek clarification of an obvious and material error or ambiguity, then it cannot sensibly be suggested that such an obligation was somehow negated by the contracting authority's assessment of the risk posed by the potential answer, even before they have asked the question.

139. In answer to a question from my Lord, Lord Justice Fraser (which pointed out the difficulties of assessing the nature of the answer before you have asked the question) Mr Suterwalla said that "you can know before seeking clarification the inevitable answer will be the submission of a new bid". He said that that was because, in a case like this, it would involve "a different number". But as I have already said, the mere fact that a different number is provided is not illegitimate (see, for example, *Antwerpse* and *Siemens*): it all depends on the factual context. It is also wrong for the contracting authority to form views as to what "the inevitable answer" might be before they even formulate the question: it is their job simply to ask the question, not to be clairvoyant. I made that same point at [16] in *Hersi* (see paragraph 88 above).

10.5 Stage 3: Changing the Bid

140. As we have seen, the judge concluded that a change of bid was "inimical to the principles of equality of treatment and transparency". He indicated that any change to price or quality features of the tender would fall into that category. This was supported by another of Mr Suterwalla's propositions, to the effect that *"*it is the definition of unfair treatment to allow any change to the bid*".* Mr Suterwalla again put this point very high: he argued that any change to a single line item amounted to a new tender and was therefore impermissible. The judge accepted this at [195] in concluding that any potential correction to the bid was unfair to the other tenderer(s).

141. Whilst I agree that a new bid or a substantial change to a bid are impermissible, I reject Mr Suterwalla's propositions as being too broad, and therefore contrary to the authorities (*Tideland, Antwerpse, Siemens)*. They would again make a nonsense of Regulation 56(4), which expressly allows an economic operator to "submit, supplement, clarify or complete the relevant information". I accept that where the line is to be drawn is a more difficult question, which will always depend on the facts, but I am quite certain it is not to be drawn in a way that prohibits any 'change' at all. In my view, both the judge's conclusion and Mr Suterwalla's propositions go far further than any of the existing case law.

142. As we have seen, the European authorities make clear that changes as a result of a request for clarification are admissible, provided that they do not amount to "a new bid" (*Antwerpse*) or "a substantial amendment to the tender" (*Archus*). Although Mr Suterwalla sought to argue that "substantial" meant "a change to the substance", it is quite clear from the context in which it is used in *Archus* that that was not what the court had in mind. As noted at [89] above, these terms are not to be taken literally and, as *Siemens* demonstrates, if there is an obvious error, it can be corrected through a process of seeking clarification even if it results in a change of several hundreds of thousands of pounds.

143. In *Antwerpse*, the additional figure was modest, and similar to the difference here (less than €1000). It was held that its addition did not amount to a new bid. Although *Archus* talked about a substantial amendment, that was irrelevant to the outcome of the case, because it was actually concerned with a late attempt to file tender documents. Both *Antwerpse* and *Siemens* would fall foul of Mr Suterwalla's mantra that any change to the figures was a new bid and thus impermissible.

144. I also note that, in relation to *Siemens*, Mr Suterwalla was obliged to argue that the new dates "were always there" so that the large increase in price was simply the knock-on effect of the change of dates provided by way of clarification, and was therefore "just a function of the ambiguity". I do not agree with that analysis, but even if it was correct, it does not help DWP: the Framework Maximum Prices "were always there" and so, if they had been confirmed by Optima by way of clarification, that too was "just a function of the ambiguity".

145. I am not attracted by the proposition that a response to a request for clarification would not save the tender if it led to a significant increase in price, but would or might save it if the increase was very modest. After all, any change in price could, on a strict and formulaic analysis, be regarded as a new bid. That would be very difficult to assess. The answer to where the line is drawn may therefore lie elsewhere.

146. In my view, the answer lies in the analysis of Blake J in *Hoole* and the analysis of Judge Waksman in *Harrow Solicitors*. Blake J said that what had to be avoided were changes to the bid which improved the errant tenderer's prospects of success in the competition. I agree with that. But as Judge Waksman said, if there is an obvious mistake or ambiguity such that the clarification is necessary in order to complete the bid, then the bid might be said to be incomplete, and will not be completed until the provision of the new information. In that way, there is only ever one bid. Those analyses have the additional advantage of meeting Mr Suterwalla's fair point that it is important to prevent a tenderer having what he called "a second bite at the cherry". What he meant was that the contracting authority should not allow a tenderer to have another go at the exercise, and revise its prices in such a way that might affect the outcome of the competition. He is right about that. But if in fact, because of an obvious error, the right price for three line items had not been identified in the first place, then it may be said that the bidder is not being given a second bite at the cherry, but simply being allowed to complete the first bite. By reason of the obvious error, the figure originally intended was not in the bid.

147. The correctness of this approach can be illustrated by three examples, the first of which was explored by my Lord, Lord Justice Fraser, during the course of argument. He put to Mr Suterwalla a situation where a tenderer was asked to complete a tender that was capable of acceptance at any date specified by the tenderer in 2026. In fact, the tenderer made an obvious mistake, and filled in a date for acceptance in 2036. My Lord asked Mr Suterwalla if the contracting authority could clarify that date with the tenderer in order for the error to be corrected.

148. Mr Suterwalla said that the contracting authority was not entitled to seek clarification in those circumstances. He said that that would be a breach of the duty of equal treatment. I consider that he was driven to that answer because, of course, any other would fundamentally weaken DWP's case here. But it is an answer which demonstrates the extreme nature of the propositions on which DWP rely, and which formed the basis of the judge's judgment. It cannot be right. That is precisely the sort of obvious error that Regulation 56(4) was designed to tease out.

149. A similar example can be identified in terms of amount. Let us say that a contractor's bid for a particular item was €2.3m, but, as a result of a typographical error, the figure put in was €23m. The contracting authority sees that that was an obvious error and was material to the outcome. Again, could it seek clarification? Again Mr Suterwalla would have to answer in the negative, doubtless pointing to a change in the bid worth £20 million. But again, and for the same reasons, that would be the wrong answer.

150. Finally, there is the existence of a fourth error in the present case which neither DWP nor Optima spotted until after the commencement of these proceedings. This was in respect of item OH98. In a similar way as the two other 'cut and paste' errors, the prices in the tender were transposed. That meant that the Framework Maximum Price was £175, whilst the rate quoted for the line item was £180. There was zero volume against this line item. It therefore made no difference to the evaluation whatsoever.

151. However, on DWP's approach, if this had been the only error, and they had discovered it during the tender evaluation, it would have meant that Optima's tender was non-compliant and would have been excluded from consideration. That is the effect of Mr Suterwalla's submission that any change to a single line item amounted

to a new tender and was therefore impermissible. On his case, a £5 difference with nil volume would lead inexorably to the disqualification of the best bid. For the reasons I have given, I reject such a box-ticking result.

152. As I have said, I consider that Mr Suterwalla was right to say that the rules must be applied to prevent any attempt by a tenderer to have 'a second bite at the cherry' to increase its chances of winning the competition. But I do not believe that this appeal is concerned with the risk of a second bite of the cherry: it is not about the tenderer 'having another go'. Optima had already quoted prices for all of these services in the Framework Agreement. The cut and paste errors that they had made in transposing the wrong price for the item could have been clarified very easily, without the resulting clarification amounting to a new bid or a substantial amendment.

153. That comes back to a point I have already made. On the particular facts of this case, DWP already had in their possession the Framework Maximum Prices for these lines. They already knew, therefore, the maximum amount which Optima were entitled to charge for these services. If those figures were reduced to the maximum prices, the effect on the overall price was nugatory, for the reasons referred to above. Moreover, although the judge was right to say that DWP did not know whether Optima could have bid for figures that were even lower, I have already noted (paragraphs 47 and 122 above) that that point goes nowhere. Clarification could only have resulted either in the restatement of the Framework Maximum Prices (which I consider the most likely outcome) or possibly the quotation of lower prices, which would simply have increased the gap – which was already significant – between their score and PAM's score. To put it another way, any answer to the request for clarification could not have improved Optima's prospects of success (as per *Hoole*); theirs always was the best bid.

154. Finally, there was Mr Suterwalla's alternative proposition, namely that "the only errors that could be the subject of a request for clarification were errors of form, not content". In pursuit of that point, Mr Suterwalla relied on the analysis of Fraser J in *Energy Solutions,* set out in paragraph 54 above. But I reject it for the reason already advertised. The analysis in *Energy Solutions* is concerned with an entirely different issue, namely the circumstances in which it might be possible for a contracting authority to waive a condition of the ItT, the condition being one which required disqualification of that bidder. That is a very different legal situation to a contracting authority's power/obligation to seek clarification of errors or ambiguities. Moreover, it would again amount to a rewrite of Regulation 56(4) to make plain that it was only requests for clarification of form, not substance, that could be made, because of the duty of equal treatment.

10.6 Summary on Stages 2 and 3

155. For these reasons, therefore, I consider that the judge was wrong to say that DWP could not seek clarification and that, if the clarification had led to any change to any line item, it would have been a breach of the duty of equal treatment. Indeed, on the particular facts of this case, I conclude that (even if I was wrong about paragraph 2.2 of Attachment 1, and there was no automatic discount down to the Framework

Maximum Prices), DWP had an obligation to seek clarification from Optima[6] and that the most likely outcome was that, once the clarification had been provided, the Framework Maximum Prices would have been inserted instead. DWP would then have had an obligation to award the call-off contract to Optima. Any other result would elevate form over substance, prioritise the interests of one bidder (in this case PAM) over the public interest in a healthy competition and the best outcome; and achieve a result which is contrary to good procurement practice and plain common sense.

11. Issue 3/Ground 4: Rationality and Proportionality

156. Although it is not entirely clear from the wording, the appeal was argued on the basis that Ground 4 was concerned with rationality and, in particular, proportionality. I have already summarised my view that the decision was irrational at paragraphs 106-108 above.

157. The judge's erroneous conclusion on Issue 1, that there was a mandatory exclusion provision, had an impact on his other conclusions. Thus, for example, it was a factor in his consideration of rationality and proportionality (see [208]). His conclusions on this topic are at [216] as follows:

> "216. As noted above and in the citations of decisions of Coulson J as he then was in *Woods Building Services v Milton Keynes Council* and in *BY Development Ltd and others v Covent Garden Market Authority*, the court's function is not substituting its own view for the awarding authority or undertaking the tender evaluation again. It is considering whether an error has clearly been made. In my judgment, the Defendants did not act irrationally or arbitrarily or unreasonably or disproportionately in rejecting the bid of Optima. DWP was entitled to reach the views which it did. In particular, it was entitled to reach the following views, namely:
>
> (i) The tender was clear and transparent for the reasons set out above.
>
> (ii) There was a danger of infringement of equality of treatment to have allowed Optima to change its bid in circumstances where PAM had made a compliant bid.
>
> (iii) This was not a case where it was obvious what the intended bid of Optima was. In particular, it was not obvious that the maximum line price was intended, and it could have been lower.
>
> (iv) In particular, it was not obvious that it would be a quick and easily verifiable process to adopt what the true intention of Optima had been as regards the non-compliant parts of its bids.
>
> (v) There was a danger that allowing Optima to change from a non-compliant bid to a compliant bid was in breach of the requirement that a party should

[6] On the application of the test for equal treatment in *Fabricom*, they need not have sought clarification from the other bidder who had exceeded the Framework Maximum Prices because their errors were not material to the outcome: whatever the corrections, they would not have been awarded the call-off contract.

not be allowed to change its bid or to act in a manner which made it likely that it would or might change its bid.

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

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

158. For the detailed reasons that I have already given, I can summarise my disagreement with the analysis in these sub-paragraphs in the following way:

(i) The ItT was either clear that the erroneous prices would be reduced to the Framework Maximum Prices, or (at worst) there was no clear and transparent exclusion: see my answer to Issue 1/Ground 1.

(ii) There was no danger of infringement of equality of treatment: see *Tideland* and *Antwerpse* in particular, and the analysis set out at paragraphs 130-136 above.

(ii) DWP had clear and obvious options: they could either reduce the erroneous figures down to the Framework Maximum Prices or seek clarification of the errors (which would probably have had the same result). But even if Optima had indicated that the intended prices were lower than the maximums, that was simply an advantage to DWP (and therefore the public). It would have made no difference to the outcome of the tender competition because Optima's was the best bid anyway.

(iv) There was no need for a process to identify Optima's true intention. There was a quick and easily verifiable process which i) identified that there was an obvious and material error/ambiguity; ii) required DWP to seek clarification and; iii) on consideration of the likely answer, required DWP to award the tender to the best bidder.

(v) There was no requirement that a party should not act in a manner which made it likely that it would or might change its bid. No authority is cited for that. In any event, it all depends on what you mean by 'change'. Still further, this principle wholly ignored the power under Regulation 56(4).

(vi) The equality of treatment may, in some circumstances, have required requests for clarification being sent to other bidders. But the evidence is plain that there was no other bidder who, even if their prices were adjusted, would have come anywhere close to matching the Optima bid. As Ms Sloane KC succinctly put it, "Optima were always going to be first". Furthermore, as she also pointed out in her submissions, this same argument (the need to contact multiple bidders) was run by the contracting authority in *Tideland*, but was not successful.

(vii) This adds nothing to the reasoning.

159. In those circumstances it is probably not necessary to add very much about proportionality. I have already made the critical point, namely that the request for clarification would probably have identified the Framework Maximum Prices, or possibly prices lower than the maximum, and either way, they would simply have enhanced the fact that Optima's was the best bid. But as to wider questions of proportionality, the effect of the clerical errors was so tiny (a difference of 0.02% on the price and no effect at all on quality), and Optima's bid was so obviously the best (with or without clarification of the three prices), that this is a case where the decision to exclude Optima was plainly disproportionate.

160. Two final points arise in relation to proportionality. First, if there is one or more course of action open to the contracting authority, the cases say that they must take the least onerous to the bidder. *Antwerpse* at [57] is authority for the proposition that, where the options are either to clarify or exclude, the contracting authority must clarify. That is another reason for concluding that this was a disproportionate decision.

161. Finally, I have not forgotten that these errors were Optima's fault. That is what the judge found and Optima cannot appeal that. Of course, in different factual circumstances, that might make a difference to the power/duty to seek clarification. But in my judgment, the finding of fault can make no difference here. That is because DWP were fully aware of the three mistakes that Optima had made and which, on their evidence, were all but inevitable in this sort of process. If (and it is not entirely clear whether he did or did not) the judge had regard to fault in his conclusions as to rationality or proportionality, then he was wrong to do so. The fact that the mistakes were Optima's fault has, on these facts, no bearing on the issues of rationality of proportionality. That brings this case in line with the principles in both *Tideland* and *Antwerpse*. I note that in the former, the argument that the mistake was the tenderer's fault, and that this was somehow decisive, was rejected.

12. Conclusions

162. For the reasons that I have given, if my Lords agree, I would allow the appeal. That is because:

(a) In Section 5, I have concluded that, not only was paragraph 2.2 not a mandatory exclusion provision, but a RWIND tenderer would have understood it to mean that, if they mistakenly quoted prices in excess of the Framework Maximum Prices, those erroneous prices would be discounted – i.e. reduced – down to the Framework Maximum Prices. At the very least, prices in excess of the Framework Maximum Prices necessitated a request for clarification.

(b) In Section 8, I have concluded that DWP failed properly to exercise their discretion in respect of the obvious errors/ambiguities, or wrongly fettered that discretion. In consequence, their decision to disqualify Optima was irrational. For the reasons set out in Section 11 above, I consider that it was also disproportionate.

(c) In Section 9 above, I have concluded that the three line items amounted to obvious and material errors/ambiguities. For the reasons set out in Sections 10.3 and 10.4 above, I consider that DWP were obliged to seek clarification of those line items and could have done so without a breach of the duty of equal treatment.

(d) For the reasons set out in Section 10.5 above, I consider that the most probable answer to the request for clarification was that the erroneous prices should be reduced back to the Framework Maximum Prices, and that this would have been a permissible answer which would not have amounted to a new bid or a substantial amendment to the existing bid.

(e) In consequence of these conclusions, DWP should have awarded Optima the call-off contract.

163. That leaves the question of remedy. We did not hear the parties on that issue. It is hoped that they will be able to agree the order resulting from this judgment. If not, and depending on the nature of the disagreements, a short further hearing may be required.

LORD JUSTICE FRASER

164. I agree.

LORD JUSTICE ZACAROLI

165. I also agree.