Neutral Citation Number: [2021] EWHC 2793 (TCC)

Case No: HT-2021-000297

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
BUSINESS AND PROPERTY COURTS
OF ENGLAND AND WALES
TECHNOLOGY AND CONSTRUCTION COURT

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

Date: 20/10/2021

Before :

MR JUSTICE KERR

- -

Between :

VODAFONE LIMITED	**Claimant**
- and -	
(1) SECRETARY OF STATE FOR FOREIGN, COMMONWEALTH AND DEVELOPMENT AFFAIRS	**Defendants**
(2) THE BRITISH COUNCIL	

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Mr Ewan West (instructed by **Osborne Clarke LLP**) for the **Claimant**
Ms Sarah Hannaford QC and Mr Jonathan Lewis (instructed by **Gowling WLG (UK) LLP**) for the **Defendants**

Hearing date: 6 October 2021

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Approved Judgment

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

Covid-19 Protocol: This judgment was handed down by the judge remotely by circulation to the parties' representatives by email and release to Bailii. The date and time for hand-down is deemed to be 2pm on Wednesday, 20 October 2021

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MR JUSTICE KERR

Mr Justice Kerr :

Introduction and Summary

1. I will tread carefully in this judgment because the evidence includes sensitive material that is self-evidently confidential on both commercial and national security grounds. No application was made for the court to sit in private but certain evidence was identified as sensitive and confidential within CPR 39.2. I can give this judgment without revealing the content of that material, but without otherwise derogating from open justice.

2. There are two applications before me. Both arise out of a public procurement exercise carried out by the department headed by the first defendant, or her predecessor the Secretary of State for Foreign and Commonwealth Affairs (interchangeably **the FCO** or the **FCDO** save where the context requires otherwise). The FCDO emerged from an amalgamation of two government departments in September 2020.

3. The procurement exercise was for a framework agreement (**the ECHO 2 contract** or **the contract**) for provision of "network integration services", i.e. a system of secure electronic communications for the defendants. The ECHO 2 system involves provision of connectivity between 532 sites in more than 170 countries. The claimant (**Vodafone**) is one of two unsuccessful tenderers in that exercise. The successful tenderer was Fujitsu Services Limited (**Fujitsu**).

4. The first application is that of the FCDO seeking to lift the automatic suspension under regulation 95 of the Public Contracts Regulations 2015 (**the PCR 2015**) of the power to award the relevant contract to Fujitsu. The second is Vodafone's application for a direction that there should instead be an expedited trial of a preliminary issue in a window starting on 24 January 2022.

5. The proposed preliminary issue is, essentially, whether the defendants acted unlawfully in abridging the timetable and awarding the contract on the basis of initial tenders only, without further negotiation. Vodafone's formulation of it (with minor immaterial editing) is:

> "Assuming the outcome of the evaluation of tender responses was lawfully undertaken, were the Defendants lawfully entitled to proceed to and award the Framework to Fujitsu on the basis of the Defendants' evaluation of the Initial Tenders submitted?"

6. Vodafone accepts that if the court decides, on the assumption that "the evaluation of tender responses was lawfully undertaken", that the defendants were "entitled to … award the Framework to Fujitsu on the basis of … evaluation of the Initial Tenders…", the automatic stay should be lifted, leaving Vodafone to pursue, at large and without expedition, its claim for damages.

An Outline of the Facts

7. From about October 2010, Cable & Wireless Limited (subsequently acquired by Vodafone) provided secure communications services to the FCO. From October 2011, it began to provide such services to the second defendant (**the British Council**) as well. The framework agreement under which those services were (and still are) provided, and the operating system, is called **ECHO 1**. The original end date for ECHO 1 was 13 September 2016, though certain call off contracts under the framework lasted longer.

8. The ECHO 1 contract was extended so as to terminate on 31 March 2018 for the FCO and 31 March 2019 for the British Council. In 2018, with the end of ECHO 1's time approaching, the FCO undertook a procurement exercise to award a framework agreement for a replacement system, **ECHO 2**. The incumbent, Vodafone, was evaluated as the winner but following a challenge from Fujitsu that procurement was abandoned.

9. A contract such as the ECHO 1 framework agreement cannot end abruptly. A transition to a successor communications system takes time. There is therefore provision for a "Termination Assistance Period" to smooth the path of the transition. That period was set to last until 13 September 2020 for the FCO and 13 September 2021 for the British Council. Pursuant to further extensions to which I am coming, the ECHO 1 system is still operating now.

10. The FCO, on behalf of itself and the British Council, proposed to undertake a further tendering exercise to procure secure communications services under a fresh framework agreement to introduce the new ECHO 2 system. The detailed ECHO 2 specification is confidential as it could be useful to persons wishing harm to this country. It is more up to date and state of the art than ECHO 1 in various ways, as you would expect. The parties did not agree on the extent to which its performance would outstrip that of ECHO 1.

11. In early 2020, the FCO engaged with the market to identify potential bidders. In early March 2020, it published a "Prior Information Notice" about the intended procurement. Vodafone objected to its contents, contending that they indicated an intention to replace Vodafone and not give it a fair chance of staying on as provider of the ECHO 2 services. The FCO then withdrew that notice and issued a substitute version which met Vodafone's objections.

12. On 3 June 2020, the FCO's tender exercise was formally commenced by publication in the Official Journal of the European Union of a notice (**the OJEU notice**). It stated in outline the nature of the services to be provided, in the usual way. The procurement would be governed by the PCR 2015. The competitive procedure with negotiation would be used, under regulation 29. The estimated value of the contract was stated to be £184 million.

13. The FCO was undertaking the procurement on behalf of itself and the British Council. The latter was therefore also a "contracting authority" under the PCR 2015, which is why it is also a defendant. Then on 2 September 2020, the FCO merged with the Department for International Development to form the FCDO, which took over the procurement and issued an "Invitation to Submit Initial Tenders" (**the ISIT**) on 3 September 2020.

14. The ISIT gave an outline of the process in section 6. One of the "key features" of the regulation 29 procedure (competitive procedure with negotiation) was that the authority "reserves the right to award the Framework Agreement following Initial Tenders without further negotiation (in accordance with Regulation 29(15)…" (paragraph 6.2). That is indeed what regulation 29(15) provides.

15. This point was developed further in paragraph 6.6:

> "6.6. **Stage 3 (Award on Initial Tender) (Optional)**
>
> 6.6.1. As per the Competitive Procedure with Negotiation, the Authority reserves the right to award a Framework Agreement to a highest scoring Tenderer at the conclusion of evaluation of the Initial Tenders (based on the Award Criteria specified within the ISIT).
>
> 6.6.2. The Authority may determine that it is able to award the Framework Agreement on the basis of an Initial Tender without further negotiation where the following conditions are met:
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> 6.6.2.1. The Initial Tender is complete in all respects, has been reviewed for compliance and is capable of assessment;
>
> 6.6.2.2. The Initial Tender meets the Minimum Requirements;
>
> 6.6.2.3. The Initial Tender has been evaluated by the Authority in accordance with the published Award Criteria resulting in a clear winner. There are no outstanding queries, errors and omissions that require further clarification and there are no issues that would warrant disqualification from the Process; and
>
> 6.6.2.4. The Draft Contract is capable of being awarded without negotiation."

16. Section 8 stated an "indicative timetable", which the FCDO reserved the right to change, with changes being notified "through the Portal" (8.3). Initial tenders were to be submitted by 26 October 2020. Evaluation would be complete by 24 November 2020. Any invitation to negotiate would be issued by 18 December 2020.

17. There were then indicative dates for negotiations, if any, based on either one or two rounds of negotiations; and for subsequent and final tenders, which were optional. With one round of negotiations, 28 July 2021 was the envisaged date for the provisional announcement of the winner. With two rounds, the date was 25 October 2021. The proposed contract award and signature date was 8 September 2021 if there was one round or 2 December 2021 if there were two.

18. Section 13 contained "Instructions for Completion of Tenders". It included at 13.6:

> "In the event that there are insufficient Tenders deemed satisfactory (and without prejudice to any other rights to terminate the Procurement), the Authority reserves the right to terminate the Procurement and where appropriate to re-advertise the procurement."

19. In section 18 there was an "Evaluation Overview". The evaluation process would identify the most economically advantageous tender, or "MEAT", on the basis of quality and price (paragraphs 18.1 and 18.2). The evaluation process comprised four steps: compliance, evaluation, moderation and ranking (paragraphs 18.6 to 18.9).

20. The ranking system was explained in paragraph 18.9, as follows:

> "18.9.1. The component scores for the Quality and Price for each Tender will be combined in accordance with the evaluation model to generate an overall total score for each Tender.
>
> 18.9.2. A Tender must meet the Minimum Quality Threshold as described in Paragraph 20.13[1] to be considered further.
>
> "18.9.3. Tenders will be ranked according to their total score which will determine the MEAT and the successful Tenderer ("**the Supplier**").
>
> 18.9.4. In the circumstance that there is a tie in the total score, the Authority will apply the three tests described more fully in Paragraph 23 of this ISIT."

21. The Minimum Quality Threshold was addressed at paragraph 18.13. At 18.13.1 the following appeared:

> "18.13.1. A Minimum Quality Threshold is set for each of the quality aspects of each Tender as described in the Table 4 below. A Tenderer need [sic] to be awarded a minimum score of 'Adequate' for each of the Level 3 Criteria and a minimum score of 'Good' for the Level 2 Criteria. Weighted scores and the Minimum Quality Thresholds are described more fully at Paragraph 19.15 below."

22. Table 4 then set out which criteria were "Level 2" and which were "Level 3" criteria, within the overall rubric of "Quality", which carried an overall weighting of 60 per cent and "Price", carrying an overall weighting of 40 per cent. The Level 2 criteria were, in effect, sub-criteria of Quality and of Price, with sub-weightings each contributing a fixed percentage, together adding up to the 60 per cent weighting for Quality and the 40 per cent weighting for Price. The Level 3 criteria were sub-sub-criteria each contributing a percentage proportion of the Level 2 criteria.

23. In section 19, "Quality Evaluation" was addressed. For each of the Level 3 Criteria, tenderers had to submit a method statement, which would be evaluated against one of various scoring methods defined in certain tables (Tables 6 to 12). Using the appropriate scoring method, scores would be awarded to each method statement and those scores were then given the appropriate weightings.

24. The tables also indicated what scores related to the qualitative adjectives "good", "adequate", "poor", "very good" and so forth. A score of one was "poor"; to achieve the accolade "adequate", you have to score 4, to be considered "good" you have to score 9. A score of one for any level 3 criterion would therefore fall short of achieving the

[1] It is agreed that this reference is mistaken and should read "18.13.1".

standard of "'Adequate'" for each of the Level 3 Criteria", required to meet the Minimum Quality Threshold for that criterion.

25. Paragraph 19.12 stated:

> "The Tenderer with the highest Weighted Quality Score shall be awarded 60% as its Final Quality Score, with remaining Tenderers being awarded a percentage equal to their Weighted Quality Score, relative to the highest total Weighted [Quality] Score. If two or more Tenderers achieve the same Weighted Quality Score, each will receive the same Final Quality Score."

26. Paragraphs 19.15 and 19.16 provided:

> "19.15 A minimum quality threshold has been set for each of the quality aspects of each Tender. A Tenderer will need to be awarded a minimum score of 'Adequate' for each of the Level 3 Criteria and a minimum score of 'Good' for the Level 2 Criteria. Tenderers will need to achieve a minimum score of 'Good' for the Level 2 Criteria as stated below:
>
> a) a weighted score of at least 1.71 out of a maximum weighted score of 3.04 for Elective Services;
>
> b) a weighted score of at least 1.71 out of a maximum weighted score of 3.04 for Service Management and Performance Management;
>
> c) a weighted score of at least 0.18 out of a maximum weighted score of 0.32 for Optional Services;
>
> d) a weighted score of at least 0.45 out of a maximum weighted score of 0.8 for Security Management; and
>
> e) a weighted score of at least 1.35 out of a maximum weighted score of 2.4 for Implementation.
>
> 19.16 The Authority reserves the right to exclude from the Procurement any Tenderer that fails to meet the minimum quality thresholds set out in Paragraph 19.15."

27. Among the three bidders were Vodafone and Fujitsu. Vodafone submitted its initial tender on 26 October 2020. I infer that Fujitsu did too since I am told it is to expire on 26 October 2021, which is a year later. Paragraph 14.3.1 of the ISIT states that a tender is valid for 12 months from the date of receipt by the FCDO as an offer capable of acceptance.

28. The evaluations were, it appears, not complete by 24 November 2020. A series of messages on the portal informed bidders of this, giving "governance" issues as the reason. Internally, however, the FCDO's evaluators had made up their minds by 8 February 2021, and probably earlier, which was the best bid, namely that of Fujitsu. On that date, an FCO body called the ECHO 2 Steering Group produced a paper called "NSI Procurement - Outcome of ISIT Evaluation".

29. The executive summary indicates that the evaluation process was complete by 8 December 2020, when the Steering Group was informed of "the gap between first and second place Tenderers…". The Steering Group considered in its 8 February paper whether to proceed to an award based on initial tenders, or whether to proceed to

negotiations. Work done since December 2020 included "assurance activities" to minimise the risk of a successful legal challenge.

30. The paper recommended to another FCDO body, called the Programme Board, that the first of those options be followed; "all criteria for the award at ISIT stage had been met". However, the bidders should not be told immediately; the successful bidder must remain anonymous "whilst the ECHO 2 Programme proceeds through the governance and approvals process".

31. One of the benefits of dispensing with negotiations was that this:

> "would deliver a signed contract earlier than originally planned and enable the winning Tenderer to commence transition earlier, reducing the time pressure on the September 2023 deadline for the end of the ECHO 1 contract. This would represent savings of circa £400K per month in ECHO 2 Programme costs and potentially earlier delivery of savings."

32. Three days later, on 11 February 2021, the Programme Board met and endorsed the Steering Group's recommendation to proceed to an award on initial tenders, without negotiation. The presenter of the recommendation, a Mr Richard Hewlett, referred to costs savings and good value for money and a high level of "assurance" under the heading "Legal", indicating presumably a high level of confidence that any legal challenge could be seen off.

33. The risk of challenge would, Mr Hewlett indicated in response to a question, be better preserved by issuing "down-select letters sooner so that any challenge would not impact the Programme's critical path". However, he added that they could not be issued until after "ministerial approval of the FBC [Full Business Case]" which meant "the result would not be communicated until the summer". Mr Hewlett also said Fujitsu's tender was considered "fit for purpose".

34. The governance process then followed, making stately progress. On 24 March 2021, the Full Business Case papers were presented to the Programme Board and Steering Group. The next day, representatives of the FCDO told Vodafone's representatives that the tender would be awarded on initial tenders without further negotiation, but did not say to which bidder.

35. On 6 April 2021, the Programme Board met to consider the Full Business Case papers. The Steering Group considered them later the same day. The next day, they were passed on to an FCDO body called the Operations Committee, which is a subcommittee of the FCDO's Management Board, to which the Full Business Case papers were passed on for approval on 23 April 2021.

36. The Management Board then met on 30 April 2021 to consider those papers and approved them and the decision to award the contract to Fujitsu on the basis of initial tenders, subject to approval by the Minister, Lord Ahmad. He was able to consider the papers and bestow his approval on 19 May 2021. On 4 June 2021, the FCDO reported to tenderers that the delays were due to "ongoing Governance approvals".

37. The British Council's Board of Trustees then considered the matter and confirmed its approval, but not until 26 June 2021. That delay is attributed in some way to Covid-19, though it is not clear in what way the virus is held responsible. Then, on 29 June

2021 the Full Business Case was sent to the Cabinet Office and Her Majesty's Treasury (**HMT**) for review. Cabinet approval was received on 14 July and HMT's approval on 16 July 2021.

38. Mr Stephen Robbins, the senior civil servant responsible for the procurement, described that process as "fast-tracked (when compared to how long similar contracts can take to be approved by government)". He explained that security concerns generally, including any arising specifically from the transition to ECHO 2, were considered in other forums and not in the Steering Group or Programme Group where personnel did not have the necessary clearance.

39. On 22 July 2021, the defendants informed Vodafone that it had decided to reject its initial tender and to appoint Fujitsu on the basis of its initial tender, without further negotiation, as Fujitsu had provided the "MEAT". Tenderer 1 (Fujitsu) achieved a total weighted percentage score of 95.56 per cent, while Vodafone came third and last with 65.78 per cent. The letter also stated that the standstill period would expire at midnight on 2 August 2021.

40. Vodafone complains that the detailed scoring in Annex A to the notification letter indicated that both Vodafone and Fujitsu had been evaluated as failing to meet the Minimum Quality Threshold because Fujitsu had scored only 1 for level 3, criterion 4, Network Platform (Quality, Performance and Service assurance features) (Method Statement 4)).

41. Vodafone relies in particular on the wording of what it says is damning feedback for that criterion. I will not set it out here but it is quoted at paragraph 31 of Vodafone's skeleton argument and includes the twice used phrase "unfit for purpose". Vodafone accepts that its scores were worse and that it scored only 1 for each of Method Statements 9, 10, 12, 15 and 20.

42. In a letter of 3 August 2021, the defendants' solicitors defended the decision, denying any partiality and arguing that the defendants had "discretion in deciding whether or not to exclude any tenders in relation to the Minimum Quality Thresholds". The discretion point no doubt arises from the words of paragraph 19.6 ("reserves the right to exclude from the Procurement any Tenderer that fails to meet the minimum quality thresholds …").

43. Vodafone then brought the present challenge by a Part 7 claim, alleging in summary two categories of breaches of duty: (i) awarding the contract without further negotiation, on the basis of initial tenders only; and (ii) flaws in the scoring exercise. The case was fleshed out in much more detail in particulars of claim dated 16 August 2021.

44. The allegations were wide-ranging, enormously detailed and lengthy. I need not set them all out here. The following summary from Vodafone's skeleton argument will suffice, explaining that the claim falls into two parts:

> "The first concerns the process the Defendants have followed, namely to proceed to an award of the Framework on the basis of Initial Tenders without undertaking any process of negotiation, in particular in circumstances where all tenderers have purportedly failed to meet the Minimum Quality Threshold and where Fujitsu's tender response has been evaluated as having "*significant deficiencies resulting in a technical solution that is likely*

> *to be unfit for purpose, and requiring workarounds"*: see Particulars of Claim, §§82-85. … If Vodafone is correct that in those circumstances the Defendants were not entitled to proceed to award the Framework, the contract award decision will be rendered unlawful.
>
> ….. the deficiencies in Level 3 criterion 4, (Network Platform (Quality, Performance and Service assurance features), and the deficiencies in Fujitsu's tender identified by the Defendants, go to the heart of the concerns …. in relation to network security and performance … .
>
> The second basis of the Claim concerns the actual evaluation of the tender responses of Vodafone and Fujitsu. This is in all material respects a conventional scoring challenge. However, it would only fall for determination if it were held that the Defendants were entitled, in all the circumstances, to proceed to award the Framework on the basis of the Initial Tenders. …"

45. After that, the correspondence continued along conventional lines and I need not go through it. In late August 2021, the defendants' solicitors asked Vodafone for its consent to lift the automatic suspension under regulation 95. Consent was not forthcoming. On 1 September 2021, the defendants provided some limited disclosure.

46. On 9 September 2021, the defendants applied to lift the automatic suspension, seeking an order that "any requirement arising by virtue of Regulation 95(1) of the Public Contract Regulations 2015 that the Defendants refrain from awarding the contract that is the subject of these proceedings to Fujitsu … is hereby brought to an end".

47. On 13 September, the defendants served their defence. As one would expect, they relied on the statements in the ISIT and in regulation 29(15) permitting the award of a contract on the basis of an initial tender and asserted their discretion to do so and that it was properly exercised. They also defended against the detailed challenge to the scoring exercise, in terms that I need not set out here.

48. On 28 September, Vodafone applied for trial of a preliminary issue, with expedition. In a witness statement its solicitor, Mr Craig McCarthy, identified "two main elements": the "Decision to Proceed" and "Scoring Decisions". He defined the former as "[c]laims in relation to the Defendants' decision to proceed to award a contract to Fujitsu following receipt of Initial Tenders". That part of the case, he argued, is "capable of being a '*succinct, knock out point*"'.

49. Further witness statements were exchanged in the run up to the hearing before me, which took place on 6 October 2021. In these statements, the parties identified and disagreed about the evidence relevant to the points I have to decide, i.e. whether damages are adequate for either side, the balance of convenience - in particular, the issue of urgency - the viability of the preliminary issue and whether expedition was justified.

50. I will consider this evidence below, but mention here that it included a detailed letter from Fujitsu to Mr Robbins dated 1 October 2021. Fujitsu noted that its tender would expire on 26 October 2021 and consequently arrangements with certain third party suppliers also due to expire on that date would have to be reviewed; delay would result, costs would rise and the defendants would have to pay them or some of them.

51. Fujitsu asserted in the letter that the "long stop date" for roll out of ECHO 2, 30 September 2023, would or might have to be put back unless the contract were signed by 26 October 2021. It went on to explain the importance of the contract to it and the resources committed to it, including personnel, who must remain in a state of uncertainty until the automatic stay is lifted.

52. Fujitsu's business, it explained, would be adversely affected by the delay because ECHO 2 will also be available to other government departments under call off arrangements. Developing ECHO 2 for the FCDO and British Council would help Fujitsu to obtain ECHO 2 contracts for other public sector clients such as the National Crime Agency, the Ministry of Defence, Her Majesty's Revenue and Customs and the National Health Service.

53. Fujitsu also included in the letter a more technical discussion about the relative merits of ECHO 1 and ECHO 2 from a security perspective. The details are sensitive and confidential and I do not set them out here. As you would expect, Fujitsu stressed the superiority of ECHO 2 and the disadvantages of prolonging the life of ECHO 1.

54. Just before the hearing on 6 October 2021, Vodafone secured an indication from the listing office of this court that it would be possible for the court to accommodate a four day hearing in this case, starting on 24 January 2022. That is after the expiry of Fujitsu's tender, on 26 October next. It is about eight weeks after the expected date in the indicative timetable for award of the framework, if two rounds of negotiations had taken place and final tenders submitted.

55. Mr Robbins states in his initial witness statement that the ECHO 1 contract includes provision for agreeing a six month extension to the long stop termination date, to 31 March 2024, as a "contingency". He regards that extension as a "last resort". The evidence of Mr Stephen Rosenberg, Vodafone's business development director, is that the defendants have actively sought and already secured that six month extension.

56. As for the costs of the extension, Mr Robbins states that Vodafone indicated after the litigation had started that it would "commit to holding the current ECHO 1 pricing for the six month period …" but that does not take account of "any extra liabilities which will be incurred" as a result. He cautiously adds however that "in this regard there is no contractual obligation upon which the Defendants could rely …"; there would have to be further negotiations.

The Issues, Reasoning and Conclusions

The application to lift the automatic stay

57. It is agreed that the well known *American Cyanamid* tests apply to whether the automatic stay should be lifted. As recently formulated by O'Farrell J in *Draeger Safety UK Limited v London Fire Commissioner* [2021] EWHC 2221 (TCC), at [21]:

> "21. When determining an application to lift the automatic suspension in a procurement challenge case, the Court must consider the following issues:
>
> i) Is there a serious issue to be tried?

ii) If so, would damages be an adequate remedy for the claimant if the suspension were lifted and they succeeded at trial; is it just in all the circumstances that the claimant should be confined to its remedy of damages?

iii) If not, would damages be an adequate remedy for the defendant if the suspension remained in place and it succeeded at trial?

iv) Where there is doubt as to the adequacy of damages for either of the parties, which course of action is likely to carry the least risk of injustice if it transpires that it was wrong, that is, where does the balance of convenience lie?"

58. The last part of that formulation refers to what Lord Hoffmann described as the "least irremediable prejudice", giving the decision of the Privy Council in *National Commercial Bank Jamaica Ltd v Olint Corporation Ltd* [2009] UKPC 16, at [19].

59. The defendants' application was made first and, conceptually, must be considered separately from Vodafone's application for a trial of a preliminary issue; but in practice there is substantial overlap between the considerations relevant to the two applications. The viability of Vodafone's preliminary issue proposal could be important to whether the automatic stay should be lifted.

Serious issue to be tried

60. The defendants accept for present purposes that there is a serious issue to be tried as to whether the decision to appoint Fujitsu was, in some way, unlawful. On the back of that concession, I am warned by the parties against conducting a mini-trial and not to explore the merits further, loyally following the same admonition from Coulson J (as he then was) in *Sysmex (UK) Ltd v Imperial College Healthcare NHS Trust* [2017] EWHC 1824 (TCC), at [30].

Adequacy of damages for Vodafone

61. Vodafone's submissions were to the following effect, as I paraphrase them briefly. There is a category of especially high value and prestigious contracts, loss of which damages cannot adequately compensate (*Alstom Transport Limited v Eurostar International Limited* [2010] EWHC 2747 (Ch), per Vos J, as he then was, at [129]); *DHL Supply Chain Limited v Secretary of State for Health and Social Care* [2018] EWHC 2213 (TCC) per O'Farrell J at [39]-[48]); *Bombardier Transportation UK Limited v London Underground Limited* [2018] EWHC 2926 (TCC), per O'Farrell J at [48]-[66].

62. There are cases, such as *Draeger* (cited above) where the particular importance of the contract to the claimant is established not by reference to the financial value of the contract. That is important here, Vodafone submits, because the contract is not particularly lucrative but is global in its coverage and prestige and, on the evidence, is likely to open up other prestigious public sector contracts including some that can be called off from the same framework.

63. The loss of those opportunities is more than just a general assertion of loss of reputation, which courts often greet with scepticism because in the normal run of procurement exercises a failed bid must be regarded as an ordinary commercial risk. The lost opportunities here are tangible and not general or remote. There will be no further

opportunity to bid for several years. Contracts of such truly international standing and prestige come to market infrequently.

64. About 60 experienced Vodafone personnel will have to transfer to Fujitsu if Vodafone is left to its remedy in damages. A valuable research and development opportunity, already invested in, will be lost. Losing the contract will delay Vodafone's project to establish a UK Sovereign Secure core platform hosted within UK non-public cloud data centres.

65. The blow to reputation would be all the worse because Vodafone is the longstanding incumbent provider and previous winner of the aborted 2018-19 procurement exercise. Money could not make up for that; it would be impossible to quantify the financial value of that intangible loss.

66. Specifically, Vodafone relies on the powerful points made by Fujitsu in its letter of 1 October 2021; the concerns it expresses about *its* loss of business and opportunity should the stay be lifted and should it lose the contract, must apply equally to Vodafone; the defendants cannot have it both ways. Fujitsu is relying on the same kind of uncompensatable benefits as Vodafone does.

67. I paraphrase briefly the defendants' contrary submissions as follows. The court should treat with caution an argument that damages are not adequate, not least to ensure the public interest is protected: see *Group M UK Limited v Minister for the Cabinet Office* [2015] 1 CMLR 43 (Akenhead J at [31]-[35]); *Sysmex UK Ltd v Imperial College NHS Health Trust* [2017] EWHC 1824 (TCC) (Coulson J at [35]-[50]); and *OpenView Security Solutions v Merton LBC* [2015] EWHC 2694 (TCC) at [29], per Stuart-Smith J (as he then was) at [28] to [39].

68. The defendants' submissions on the facts were detailed but amount to the proposition that this is not an exceptional case where the tenderer can show a real prospect of future unquantifiable loss that will prove to have been attributable to the loss of this particular contract. Rather, the case was one of temporary setback and ordinary commercial risk run. As Ms Sarah Hannaford QC for the defendants put it, "you win some, you lose some".

69. Vodafone's preparation of its tender, the defendants argued, enabled it to consider carefully the nature of the services it could provide and profit margins it would seek to earn. Although the value of the framework was estimated by the FCO in the OJEU notice as £184 million, Vodafone's bid included estimated turnover and profit margin figures (which I will not set out publicly here) that are markedly more modest than the estimated £184 million of value.

70. Those figures showed that damages could be quantified without undue difficulty. As for claims that the contract was uniquely prestigious and therefore its loss would lead to unquantifiable lost future business, the evidence was not satisfactory. The assertion of loss of reputation, goodwill and the ability to secure future contracts was vague and speculative. It is not enough that a contract is large and prestigious (*Sysmex* at [39]).

71. Vodafone, the defendants argued, is still able to bid for other contracts to provide services to other public sector bodies including UK government departments. The supposed prestige of this contract is belied by the fact that only three bidders took part

and several major players abstained from competing. Being the incumbent confers no special status; every incumbent knows the risk of losing the next competition is an occupational hazard.

72. Vodafone, say the defendants, has not produced evidence to support its claim that this contract, not being particularly lucrative in itself, was regarded as a strategic opportunity to obtain leverage for other contracts and a future "reference contract" to supply the technology on which the ECHO 2 system is based. Although it attributes a high financial value to those opportunities, running to hundreds of millions of pounds, no calculations support that estimate.

73. Furthermore, the provision since 2010 of the ECHO 1 system to the FCO and the British Council can also serve as a reference contract when bidding for future work. There is no evidence that ECHO 1 would not be recognised for that purpose in future tendering exercises.

74. Equally, no concrete evidence supports the assertion that the ECHO 1 contract has enabled Vodafone to build partner relationships with suppliers which will be put at risk and diminished if it is confined to damages. The partners will be able to replenish their store by making relationships with the next incumbent, which is adequate to secure the public interest in their continuing to flourish. Transfer of personnel in consequence of the change of provider is, similarly, an ordinary incident of periodic competitive tendering for services such as these.

75. As for research and development, Vodafone alleges that losing the contract will delay its project to establish a UK Sovereign Secure core platform hosted within UK non-public cloud data centres; but, say the defendants, no link between that alleged delay and loss of the ECHO 2 contract is made out. The suggestion that technology was being developed in expectation of winning the contract sits uncomfortably with the claim that the same contract is not profitable.

76. Turning to my reasoning and conclusions on this first issue, I begin by reminding myself of the modern approach adopted, particularly in procurement cases. I draw on the judgment of Stuart-Smith J (as he then was) in *Alstom Transport UK Ltd v London Underground Ltd Transport for London* [2017] EWHC 1521 (TCC). At [22], after reviewing authorities, he said:

> "In my judgment the modern approach has been accurately summarised by Coulson J in *Covanta Energy Ltd v Merseyside Waste Disposal Authority (No 2)* [2013] EWHC 2922 (TCC), (2013) 151 Con LR 146 at [48] and again in *Bristol Missing Link Ltd v Bristol City Council* [2015] EWHC 876 (TCC), (2015) 160 ConLR 93, [2015] LGR 480 (at [49]) as follows:
>
> > '… (a) If damages are an adequate remedy, that will normally be sufficient to defeat an application for an interim injunction, but that will not always be so (*American Cyanamid, [Fellowes & Son v Fisher* [1975] 2 All ER 829, [1976] QB 122], [*National Commercial Bank Jamaica Ltd v Olint Corp Ltd* [2009] UKPC 16, [2009] 5 LRC 370, [2009] 1 WLR 1405]);
> >
> > (b) In more recent times, the simple concept of the adequacy of damages has been modified at least to an extent, so that the court must assess whether it is just, in all the circumstances, that the claimant be confined to his remedy of damages (as in

> [*Evans Marshall & Co v Bertola SA* [1973] 1 All ER 992, [1973] 1 WLR 349] and the passage from [Chitty on Contracts]) …'"

77. And in the *OpenView Security Solutions* case, cited above, Stuart-Smith J said at [28]:

> "Counsel were unable to identify (and I have not found) any statements of general principle about what uncompensatable disadvantages should or should not be regarded as rendering damages an inadequate remedy."

78. Thus, it is not always evident whether "specific and uncompensatable benefits" (in Vos J's phrase in *Alstom Transport Ltd v. Eurostar International Ltd* at [129]) should be taken to flow from winning the relevant contract. Which side of the line does this case fall? In the first *Alstom* case, Vos J referred in the same paragraph to Alstom being "the leading French train manufacturer"; the contract was high value and highly prestigious; damages would not be adequate merely because Alstom could "get over it".

79. As for loss of reputation, the assessment is not much easier. When does it make damages inadequate for a disappointed bidder? In *DWF v. Secretary of State for Business, Innovation and Skills* [2014] EWCA Civ 900, a contract to provide specialist Great Britain-wide legal services to the Insolvency Service was worth £32 million to £50 million (see Sir Robin Jacob's judgment at [2]). Finding damages to be inadequate, he referred at [52] to one reason as:

> "loss to the firm of general damage to its insolvency department, not only loss of or damage to an individual team but also loss of reputation. That is quite impossible to quantify fairly".

80. A more cautious approach to loss of reputation is found in Coulson J's approach in *Sysmex* at [35]-[50], including his observation at [50] that:

> "it is fundamentally wrong in principle to say that an award of damages would not restore a reputation lost because of the rejection of a tender, but the award of the contract itself would. What would matter in those circumstances would be the public acknowledgement that their bid had been wrongly rejected, not the precise remedy which the court provides in consequence of that finding."

81. Stuart-Smith J in *OpenView Security Solutions* proposed three criteria at [39], linking any loss of reputation to financial loss:

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

82. In the *Draeger* case, O'Farrell J found arguable the claimant's proposition that damages would not be adequate as a remedy, at [40]-[41]:

> "40. As this court stated in *Bombardier Transportation UK Limited v London Underground Limited* [2018] EWHC 2926 TCC at [58]:
>
> > 'In most cases, unsuccessful bids are part of the normal commercial risks taken by a business and will not have any adverse impact apart from potential wasted costs of the tender and lost profits. Not every failed bid will result in damage to reputation causing uncompensatable loss. There must be cogent evidence showing that the loss of reputation alleged would lead to financial losses that would be significant and irrecoverable as damages or very difficult to quantify fairly.'
>
> 41. The evidence before the Court does not indicate that this procurement is unique or high value. However, it is being closely watched by a number of other fire and rescue services and is likely to be perceived as setting the standard for improved protective equipment in this sector. On that basis, it is arguable that, if the automatic suspension is lifted and Draeger is ousted from its position as the incumbent provider of breathing apparatus for LFB, it will suffer a loss for which damages are not an adequate remedy."

83. The apparent threshold of arguability may have owed something to the pragmatic balance of convenience point at [49] that the court had, between the hearing and handing down judgment, become able to offer a speedy trial within three months; illustrating a distinction that may arise between adequacy of damages in principle and whether it is just in the circumstances to confine a claimant to that remedy.

84. Here, the immediate value of the contract is relatively low, though it is fair to hold the defendants to their own estimate of £184 million overall, taking account of opportunities to obtain call off contracts. I accept that the contract is highly prestigious. The UK still tends to punch above its weight on the world stage to some extent; for example, it is a permanent member of the UN Security Council. The British Council is world renowned.

85. I am prepared to accept Vodafone's assessment, not directly contradicted by the defendants, that in the field of international global communications this contract is second only in prestige to an equivalent contract to supply those services to the government of the USA. Such opportunities do not arise frequently; the last one was 11 years ago.

86. I would not attach much weight to the transfer of about 60 staff to Fujitsu. That is, as the defendants rightly submit, a normal incident of losing a tender of this kind, and unavoidable. However, I do not think it is right to characterise this contract as run of the mill, with a sardonic "you win some, you lose some".

87. In the end, what helps to persuade me that it would not be just to confine Vodafone to its remedy in damages is the unquantifiable loss of opportunities to bid for and win other contracts on the back of this one. I do not accept that the evidence of this was vague and speculative, as the defendants suggested.

88. The disparity between the relatively modest value of the services immediately to be provided and the overall estimated value of £184 million shows the difficulty of quantifying losses that are, in my judgment, likely to prove irrecoverable as damages in future. While Vodafone can bid for other government and public sector contracts without having won this one, it would not be able to secure call off contracts and build its standing by that means.

89. I also find persuasive Vodafone's point that Fujitsu has heavily relied in its letter on threats to its future business opportunities and relationships with suppliers arising from any risk that it might, after all, not hold onto this contract. I see no reason why the same logic should not hold good for both companies.

90. Finally, I do not find it possible to ignore, in the real world, the availability of a preliminary issue trial window in January 2022, any more than O'Farrell J in the *Draeger* case ignored the availability of an early trial window. I will consider separately below the viability of the preliminary issue solution proposed by Vodafone. In considering the present issue, the possibility that it may be adopted strengthens the proposition that it would not be just to confine Vodafone to its remedy in damages.

Adequacy of damages for defendants

91. I paraphrase first Vodafone's main submissions as follows, much more briefly than they were made. They are to a large extent concerned with timing. The proposed preliminary issue, further considered below, is relevant to how long a delay the court is considering and on what basis. Those issues overlap with the adequacy of damages for the defendants and the balance of convenience.

92. Vodafone considers that the court should be considering a delay up to February 2022, while the defendants reject the preliminary issue solution. Against that background, Vodafone argues that there is no material risk to the long stop date for implementation of ECHO 2, at present 30 September 2023, but extendable to 31 March 2024; and that in any case the urgency of the timescale cited by the defendants is exaggerated.

93. Vodafone denies that the ECHO 1 system is "outdated", as the defendants say. The suggested deficiencies in the security capabilities of ECHO 1 are not made out. While accepting the self-evident importance of maintaining security of communications, absence of which could not be compensated in damages, it disputes the proposition that the UK's global reputation would be put at risk if the time is taken to air the preliminary issue in court early next year.

94. The supposed urgency now emphasised, submits Vodafone, is contradicted by, first, the indicative timetable which envisaged the contract not yet (as at now) necessarily having been entered into, with a last date of 2 December 2021; second, the insouciant leisurely pace at which governance issues were addressed and the concern to use the time to help fend off any legal challenge, rather than address any genuine security issue; and third, the consequent silence on any real security threat in the Steering Group and Programme Board documents.

95. Vodafone contends in effect that the FCDO was content to let pass the time the passing of which, it now says, will have endangered the security of the nation if the preliminary issue is aired in court. Vodafone, by contrast, after being kept in the dark until 22 July 2021, acted promptly by issuing its claim, as it had to do, on 3 August 2021. Another month and more was then lost by the defendants waiting until 9 September before applying to lift the stay.

96. The defendants, moreover, have failed to engage with Vodafone on discussion of security issues, as shown by the evidence of Mr Rosenberg and of Mr Matthew Barclay, the relevant sector head of Vodafone. Vodafone acknowledges that the defendants do

not accept this point but rely on it nonetheless at this stage. Vodafone also argues that the number of sites is diminishing through closures and co-location and will diminish further.

97. On the subject of security, Vodafone further relies on Mr Robbins' acknowledgment that the FCDO took a "risk based decision" not to implement certain security improvements to the ECHO 1 system offered by Vodafone, evidently on cost grounds. That must have been because any security concerns were not sufficiently pressing to justify the cost of the upgrades.

98. Vodafone made further detailed submissions in a supplemental skeleton argument, after the hearing, commenting on a further witness statement from Mr Robbins which I allowed to be produced in response to late evidence from Vodafone's side. The further submissions boil down to two propositions.

99. The first is that there is no evidence of any specific discussion of security concerns arising from ECHO 1 and the transition to ECHO 2 by those with clearance to know about and discuss them. The second is that if any such concerns had been identified, any necessary abridgment of the timescale would have been imposed on the Steering Group and Programme Board; yet, there is no evidence of any pressure to accelerate the process on security grounds.

100. Next, it submits that the six month extension until 31 March 2024 is available and can if necessary make up for the short delay occasioned by trial of the preliminary issue. To call it, in Mr Robbins' phrase, an extension of "last resort", does not alter that. The use of a phrase connoting urgency does not add to the urgency when it is viewed objectively. Mr Barclay's evidence commits Vodafone to maintaining its existing prices during the six month extension.

101. The validity of Fujitsu's tender can be extended by consent without illegality (see Case T-133/13 *European Dynamics* (ECLI:EU:T:2015:46), at [22] to [25]). Finally, Vodafone relies on its cross-undertaking in damages which, it became clear at the hearing, is in the conventional form: it undertakes to pay any compensation the court decides it should pay if the court later decides that the defendants have suffered loss arising from the stay not being lifted.

102. The defendants' contrary submissions focussed heavily on the risk of security being undermined: the sooner the new system is implemented, the more protection the UK will have against hostile cyber attack, and vice versa. The spectre of harm to this country cannot be reduced to a financial issue; it is fundamental, as is the corresponding risk to the UK's global reputation. These considerations weigh heavily also in the balance of convenience.

103. As for delay, the defendants say the upgrading transition from ECHO 1 to ECHO 2 is all the more urgent because of the time that has elapsed since evaluation of the tenders. In support of the defendants' contention that ECHO 1 is "very outdated" (in Mr Robbins' phrase), the defendants give an account of perceived significant improvements in the security capabilities of ECHO 2.

104. The points relied on are sensitive and confidential for obvious reasons and I do not set them out here. They are in part technical in nature though helpfully explained in non-

technical language and so not all that complicated for a lay person to understand. Their capacity to deliver enhanced security is disputed and I must assess them as best I can at this stage, in their context and without expert evidence.

105. The defendants submit that none of the bidders in the procurement sought to replicate any of the ECHO 1 features in the design of ECHO 2, implicitly accepting the need for change. On the subject of the transition period, they rely on Mr Robbins' estimate of a 22 month transition period from contract signature. That leaves insufficient time for all the work to be done by the end of September 2023; especially given the disruption to Fujitsu's supply chain if the automatic stay is not lifted imminently.

106. As for the number of sites to be serviced by the new equipment, it will be reduced, say the defendants, by only 35 sites; mainly because of the merger of the two government departments in September 2020. The reduction in the number of sites can, moreover, itself give rise to complexities for reasons the defendants state (but which I do not repeat here). The level of security required for British Council sites is no less than for FCDO sites.

107. On this issue, I start with the obvious point that Vodafone, a substantial company, has offered a standard undertaking in damages and there is no evidence that there would be any difficulty in enforcing it. If it were just a matter of money, damages pursuant to that undertaking might well be adequate to compensate the defendants should the automatic stay turn out to have been wrongly kept in place.

108. Next, it is not possible at this stage to resolve beyond doubt the issue of whether the current ECHO 1 system is outdated and unsuitable to protect the security of the relevant communications. That is a technical question; the court would need expert assistance to decide it. I accept as common sense that the ECHO 2 system is likely, by its nature, to improve security at least to some extent.

109. I accept as a broad general and common sense proposition that the sooner ECHO 2 is implemented, the safer we in this country are likely to be because ECHO 2 is by its nature likely to protect against cyber attacks or erroneous disclosures more effectively than ECHO 1. I cannot make any detailed and nuanced appraisal of the extent to which that is so, but I accept it as a generality.

110. It follows that I accept, again as a broad general proposition but without being able to engage in any detailed technical comparison between the two systems, the logic that better protection of the defendants' secure communications must equate to better protection of this country's global reputation. The second proposition flows naturally from the first.

111. Other things being equal, I would therefore incline to the conclusion that damages are not an adequate remedy for the defendants if the automatic stay is kept in place, despite the undertaking in damages. It goes without saying that the security and reputation of the UK cannot be measured in money terms.

112. However, that is not the end of the matter. Again, the evidence of perceived threat levels and on timing must be taken into account. On the first point, it is striking that there is no evidence that any specific threat to security has been linked to obsolescence

of ECHO 1. The evidence about threats of cyber warfare, such as it is, is generic and not linked to this procurement.

113. Thus, the "SolarWinds" cyber attack about which on 15 April 2021 the FCDO issued a press release, has not been linked to any specific flaw in ECHO 1. The most Mr Robbins could say about it in his third witness statement was that it "highlights the sort of threat that the Defendants would be in a better position to monitor under ECHO 2."

114. I do not accept that the appointment of the new contractor proceeded anything like as swiftly as it would have done if the defendants were responding to any specific such threat which ECHO 2 could remove but ECHO 1 could not. Mr Robbins had security clearance and was on the "need to know" bodies within the FCDO where security threats are confidentially assessed.

115. Mr Robbins is also on the Steering Group and the Programme Board. Through him or otherwise, the FCDO could easily have imposed on itself a faster timescale to convert the "in principle" decision in favour of Fujitsu to a hard decision with the necessary approvals.

116. As for ministerial, Cabinet and HMT approval, delays associated with governance issues of the type relied on here are, fortunately, readily avoided when the security of this country so requires. Governments often make routine decisions rather slowly but on matters of real urgency those same decisions can be made in days or hours.

117. I conclude that the extreme urgency asserted by the defendants is, on the evidence, not made out. The adequacy of damages for the defendants therefore comes back, again, to a question of timing. For a delay of a year or more in limbo, I would without difficulty find the undertaking in damages of little assistance. A delay of only four months or so may be a different matter.

118. I will consider below whether the preliminary issue is a viable solution, as Vodafone contends. If it is, prejudice to the defendants arising from the automatic stay is time limited, since it will be lifted should Vodafone lose on the preliminary issue.

119. The defendants rely on the evidence that the ISIT indicates a transition period to full ECHO 2 operation of 22 months from contract signature. Other things being equal, if contract signature is delayed by, say, four to six months (allowing for the possibility of an expedited appeal against the court's decision), the contract could be signed in about mid-2022 with full transition by spring 2024.

120. While that linear timeline may be too simplistic, it correlates approximately with an extended long stop termination date of 31 March 2024. As a rough guide, that seems to me not an unreasonable timescale into which the preliminary issue trial, if viable as a solution, could be squeezed.

121. It is true that there is some evidence that the defendants fear a longer delay, in particular because of possible disruption to Fujitsu's supply chain if the stay is not lifted. However, a legal challenge was always foreseen and was part of the reason why the FCDO delayed its "in principle" decision from December 2020 to February 2021 and its final decision until later. I do not think the FCDO would have allowed the period

from February to July 2021 to go by without communicating a decision, if its fears about delay had been really acute.

122. I do not attach significant weight to the imminent expiry on 26 October next of Fujitsu's tender. Its letter makes clear that extending it is, for the most part, a matter of cost. There is nothing to indicate that it would refuse to extend it and turn down the appointment. In so far as the defendants may lose savings or incur increased charges, these are likely to be quantifiable and covered by the undertaking in damages.

123. I conclude that the defendants are adequately protected by Vodafone's undertaking in damages, if but only if the preliminary issue trial is a viable proposition.

Balance of convenience and justice

124. I prefer to refer to the balance of convenience and justice, since the court is looking for the "least irremediable prejudice" (in Lord Hoffmann's phrase), which is not just a matter of convenience. The same point has been made by other judges in a number of the cases.

125. Vodafone relies on the submissions already summarised. The preliminary issue, it submits, can be tried in January 2022 and will end the matter unless Vodafone prevails. The defendants are protected by its agreement that the automatic stay should be lifted if it does not.

126. The trial can take place less than two months after the latest envisaged date for contract signature, 2 December 2021. A delay as short as that, it is submitted, cannot realistically compromise national security or otherwise lead to irremediable prejudice to the defendants, given that they now rely on concerns that played no real part in the timing of the decision during the first half of 2021 and are not found in the decision documents.

127. Even if the whole claim were tried, Vodafone submits alternatively, a degree of expedition could be ordered which would still keep the balance of convenience and justice on the side of maintaining the automatic stay.

128. Vodafone also points to the public interest in compliance with the law by a contracting authority, while accepting that this does not trump other factors, as explained by Coulson J in *Sysmex* at [25]-[27]. It submits that here, compliance is an important matter because of the importance of the procurement as a large, flagship project and because there has been a radical departure from the envisaged procedure.

129. In consequence, Vodafone submits, a "valuable arrangement essential to the safe and efficient conduct of the UK's representation abroad [is] to be entrusted to a tenderer whose offer contained (on the Defendants' own case) 'significant deficiencies resulting in a technical solution that is likely to be unfit for purpose, and requiring workarounds'".

130. Any prejudice to the defendants will be short lived and transitory, while the prejudice to Vodafone will be deep seated and long lasting, it contends. While the defendants also rely on prejudice to Fujitsu, the latter may acquire an undeserved windfall contract if the tender process turns out to have been unlawful. The identity of the contractor

should not become final on an interlocutory basis, without the legality of the process being properly tested.

131. Vodafone adds the submissions that the public may have to pay twice over for the services if it is left to its remedy in damages; to Fujitsu for the services and to Vodafone damages for unlawfully denying it the opportunity to provide them. This is relevant to the public interest and a factor to weigh in the balance: see *Alstom Transport v. Eurostar* (cited above) per Vos J at [38] and *Kent Community Health NHS Foundation Trust v NHS Swale Clinical Commissioning Group* [2016] EWHC 1393 (TCC) per Stuart-Smith J at [39].

132. Finally, Vodafone points to the government's Green Paper published in December 2020, *Transforming Public Procurement* (Command Paper 353), at paragraphs 203-204, where it is suggested that the PCR 2015 may be modified to instil a preference for keeping the automatic stay in place while a speedy trial is arranged. The direction of travel, it submits, is in favour of that procedure becoming the norm.

133. For the defendants, the following main points are made, in my paraphrase, if it is necessary for the court to consider the balance of convenience and justice at all. In addition to critical national security concerns and impact on the UK's global reputation, the defendants rely on the following.

134. They rely, again, on imminent expiry of Fujitsu's tender, likely to lead to increased costs and further delay; the loss to the defendants and Fujitsu or reallocation of skilled personnel; disruption to supply chains, probably exacerbated by global shortages e.g. of microchips; disruption to the defendants' planning, and Fujitsu's, of the transition to ECHO 2 and in the case of the defendants knock on effects on other, non-ECHO projects; and having to repeat the governance approvals process using revised parameters, which takes about five months.

135. They also estimate that the ECHO 2 contract will deliver substantial savings by comparison with ECHO 1 prices, across the life of the ECHO 2 contract. Estimated figures are provided, though these are confidential and I do not set them out. A disproportionate impact on the British Council is complained of; it has lost much income in recent times though closure of English language schools and test centres because of the Covid-19 pandemic.

136. The defendants rely, in addition, on the adverse impacts on Fujitsu set out in its letter of 1 October 2021. These have been touched upon already. The defendants also argue that even if, which they deny, the FCDO has been at fault in delaying communication of the result until July 2021, the court should view the matter as at now; water under the bridge cannot alter the balance of prejudice as it now stands, wherever blame may lie for past handling of the process.

137. I come to my reasoning and conclusions on this issue. For reasons already touched upon, I am firmly of the view that which side the balance comes down depends on the viability of the preliminary issue solution proposed; if it is viable, in Vodafone's favour; if it is not, in the defendants' favour.

138. The defendants' assertions of prejudice through delay are not particularly compelling, for reasons already explained. It is not a matter of blame for past delays; I fully accept

the defendants' point that "we are where we are". The relevance of the pre-notification delay is not that it should persuade the court to punish the defendants for it. Rather, it diminishes the weight to be placed on the urgency of transition and professed security concerns.

139. I do not attach great weight to the expiry of Fujitsu's tender on 26 October next, as already stated. I do not find strong evidence that any disruption to personnel and supply chains will endure long or cause permanent prejudice. As for loss to the defendants of savings from the new contract, these can be compensated, if the court thinks fit, pursuant to the undertaking in damages.

140. By similar reasoning, the protestations from Fujitsu of adverse impact on it if contract signature is delayed are merely the flip side of the prejudice on which Vodafone relies if the stay is now lifted. I have touched on this point too already.

141. I do not attach weight to the public interest in compliance with procurement law. To assess the right amount of weight the court would have to enter the forbidden territory of the merits, rather than staying with the "serious issue to be tried" threshold. The same applies to the argument about the risk of payment twice over, once for services and once as damages.

142. I conclude that the balance of convenience depends on the viability of the preliminary issue and it is to that issue that I now at last turn.

The application for trial of a preliminary issue with expedition

143. I was referred to the power to direct a separate trial of any issue (CPR rule 3.1(2)(i)) and to take any other step for the purpose of managing the case and furthering the overriding objective (rule 3.1(2)(m)). Vodafone referred me to the guidance of Neuberger J, as he then was, in *Steele v Steele* [2001] CP Rep. 106. Both parties referred me to provisions in the TCC Guide. Vodafone referred me to David Steel J's shorter formulation of relevant considerations in *McLoughlin v Grovers (a firm)* [2001] EWCA Civ 1743, at [66].

144. In supplemental written submissions, the defendants referred me to two "cautionary tale" or "treacherous short cut" cases as examples where on appeal it had been recognised that a decision to direct a trial of preliminary issues had not been a good idea. They were *Tilling v Whiteman* [1979] 1 All ER 737 and *Rossetti Marketing Ltd v Diamond Sofa Co Ltd* [2012] EWCA Civ 1021.

145. Neither involved interim injunction considerations of the *American Cyanamid* kind, but they do remind me how important it is that, in the words of Lord Neuberger MR in the latter case, at [1], "the issues themselves, and the agreed facts or assumptions on which they are based, are simply, clearly and precisely formulated, and … once formulated, the issues should be answered in a clear and precise way."

146. As for expedition, both parties cited the list of factors approved in *Petter v EMC Europe* [2015] EWCA Civ 480, by Vos LJ at [12]:

> "The applicable principles were then succinctly expressed by Neuberger LJ (as he then was) in *WL Gore and Associates GmbH v Geox SpA* [2008] EWCA Civ 622 where he alluded to four factors to be taken into account as follows: (1) whether the applicants have

> shown good reason for expedition; (2) whether expedition would interfere with the good administration of justice; (3) whether expedition would cause prejudice to the party; and (4) whether there are any other special factors."

147. Vodafone's main points may be summarised as follows. Preliminary issues can be useful as well as treacherous. While the second part of Vodafone's claim (the challenge to the scores awarded) is not susceptible to early separate determination, the first (the challenge to the decision to proceed) is. It is confined to an examination of whether the defendants acted lawfully by deciding to dispense with further negotiations and award the contract on the basis of initial tenders only.

148. According to Vodafone, that exercise "would involve consideration of the relevant legislative provisions and the terms of the procurement documents against the outcome of the evaluation process." Vodafone invites the court to assume, for the purpose of the preliminary issue, that the evaluation process was properly carried out in the sense that there could be no challenge to the decision reached on each score awarded, nor, it follows, to the score itself.

149. The court would need to look at the "output" of the evaluation process, i.e. the scores reached and the recorded reasons for reaching them, which neither the parties nor the court would go behind. The court would then decide "whether, faced with that output, it was lawful for the Defendants to proceed as they did in seeking to award the Framework to Fujitsu or whether they should have taken some different course."

150. If so, the court would not, Vodafone emphasised, be asked what that course should have been. That, as I understand it, would be a matter remitted to the defendants to consider on the basis of the court's judgment. The decision to award the framework agreement to Fujitsu would be set aside but that is all; the court would not dictate what the outcome should have been.

151. As for expedition, the case was not one simply of a desire for early determination; expedition is a weighty factor in the balance of convenience and justice and is entirely appropriate in the light of Vodafone's concession that the automatic stay must be lifted if it should fail at the trial of the preliminary issue.

152. Expedition also reduces to vanishing point, Vodafone submitted, the weight of delay and prejudice to the defendants in the balance because the delay is so short and cushioned by the available six months extension to the end of March 2024. An expedited trial of the preliminary issue would promote compliance with procurement law and reduce the risk of the taxpayer having to pay twice in respect of the procurement. Far from interfering with the good administration of justice, Vodafone's proposal would promote it.

153. At my invitation, after the oral hearing, Vodafone revised the part of its pleaded case covering the territory of the preliminary issue, so that the court could gauge its assurance that contrary to the warnings of the defendants, there would be no duplication of evidence or risk of inconsistent findings being made later when the scoring challenge is tried as a damages claim.

154. Counsel for Vodafone, Mr Ewan West, clarified that Vodafone is:

> "content that any trial of preliminary issues should be conducted on the basis that the scores and rationales produced after the moderation stage should be treated as reflecting the outcome of a lawful evaluation and moderation process.
>
> …. the focus of a trial of preliminary issues would be on whether or not it was lawful to award the Framework to Fujitsu.
>
> … there is no intention to challenge the underlying evaluation and moderation of tenders on a trial of preliminary issues. Any references to manifest error are to manifest error in the decision-making process following the moderation stage.
>
> The … second sentence of paragraph 84(l) ["*In circumstances where all tenderers had purportedly failed the Minimum Quality Threshold, the Defendants should have considered what led to the curious and anomalous outcome whereby major international providers of the services sought, with established track records, failed to satisfy a minimal standard."*] is not seeking to challenge the underlying evaluation and moderation of tenders but is rather intended to indicate the factors that the decision-makers should have considered once all tenderers had failed the Minimum Quality Threshold."

155. The defendants submitted that the preliminary issue was not precisely defined; Vodafone had failed to "circulate a precise draft of the proposed preliminary issues to the other parties and to the court well in advance of the relevant hearing" (TCC Guide, paragraph 8.6.1).

156. According to the defendants, there is a "significant overlap" between the allegations in the "decision to proceed" challenge and those made in the "scoring decisions" challenge. That was a recipe, they warned, for duplication of evidence, the risk of inconsistent findings, increased costs and added inconvenience to the parties and detriment to the administration of justice.

157. Furthermore, repeating and adopting the submissions summarised above, the defendants argued that even a trial in January 2022 was too late, given the urgency of achieving a timely transition to ECHO 2. Allowing Vodafone a chance to defeat the application to lift the automatic stay was not a good reason for expedition, they submitted.

158. In a supplemental skeleton produced at my invitation, the defendants complained that the preliminary issue (by then drafted in the short manner set out at the start of this judgment), was "asymmetrical"; it would produce finality on one outcome (if Vodafone succeeded), but not the other (if it failed). In the latter event the parties faced a second trial. That was a point against allowing it.

159. Furthermore, the defendants complained, Vodafone had not abandoned its allegations of unlawful scoring; these were only temporarily shelved and assumed to be ill founded rather than it being conceded they were ill founded. That was another point against allowing the preliminary issue to be tried separately.

160. At any subsequent main trial, should Vodafone fail at the preliminary issue trial, the defendants submitted that the court would have to look again at matters of process: if it turned out that the scores were unlawful, was the contract award decision bad on the ground that it was based on unlawful scores, even if it were found untainted in the

earlier procedural challenge? That was unsatisfactory and would involve duplication of evidence.

161. The defendants set out in their supplemental skeleton six points they say would, undesirably, need to be decided. These were formulated widely; for example, "whether Fujitsu's Initial Tender was incapable … of acceptance without substantial reworking of its technical solution"; "the nature of the criticisms made of Fujitsu's tender – whether they were 'serious'"; and "whether the Level 3 Criterion in respect of which Fujitsu failed to achieve the minimum score goes to the heart of the service requirement".

162. The defendants surmised that the parties might need to call witnesses to explain the scoring even though not to justify it. The defendants would, they submitted, need to call those who exercised the discretion not to exclude the bidders for failure to meet the Minimum Quality Threshold, on what basis they decided to exercise that discretion.

163. They submitted, further, that a second judge at a final trial could make findings inconsistent with findings of fact made by the first judge. (This must refer to any findings not producing an issue estoppel binding as being between the same parties in the same claim). Once the assumption of legality of the scores is dropped at a second trial, the legality of the decision to proceed might appear in a different light.

164. After careful reflection, I have come to the conclusion that directing a trial of the preliminary issue, though an imperfect solution, represents the fairest outcome, with the automatic stay to abide the outcome of that trial, or further order.

165. The preliminary issue, as formulated by Vodafone and set out at the start of this judgment, requires the court to assume that the evaluation was lawfully conducted. That means the court must assume that the scores were justified. It will not be open to Vodafone to contend either that a particular score was unjustified, or that the documented rationale for deciding upon that score was inadequate or insufficient to sustain the decision to award a particular score.

166. In the main scoring challenge, by contrast, Vodafone proposes to attack the scores awarded. No doubt it would do so by attacking the reasons provided in the documents for deciding to award particular scores. Vodafone can be expected, at that final trial stage, to argue that its scores were unlawfully low and/or that Fujitsu's, and/or the third bidder's, unlawfully high; and that consequently Vodafone's was the strongest bid and should have prevailed.

167. It is therefore correct to say that the factual assumptions on which the preliminary issue trial will take place are not the same as the factual position that will be taken by Vodafone at the final trial. That is an imperfection but it is not, of itself, fatal to the viability of the preliminary issue as a fair way forward.

168. Without, for obvious reasons, saying anything about the merits of the preliminary issue, it seems to me that a trial of it in January 2022 would be largely if not entirely a paper exercise. The documents before the court would be limited in compass, as you would expect where the estimate is only four days.

169. I would have thought the documents would be (apart from court documents such as pleadings) (i) the tender documents (ii) possibly, Vodafone's tender or part of it (iii) possibly, Fujitsu's tender (no doubt heavily redacted if produced at all) (iv) the evaluation and scoring documents, including feedback afterwards (v) the correspondence and (vi) limited written witness evidence on the procedures followed and reasons for exercising discretion to award the contract to Fujitsu.

170. I see no need for other documents. The hearing seems to me to be similar in scope to those routinely held in the Administrative Court in judicial review claims. The short point for decision is whether the defendants, on the true construction of the documents and on the facts and applying the appropriate standard (that of a reasonable contracting authority, or whatever the correct standard is) acted lawfully by deciding to award the contract to Fujitsu.

171. That exercise, no doubt, would turn on an examination of the tender documents, in particular the ISIT, consideration of the true construction of its provisions, of the scores awarded and of the reasons given for awarding those scores. The court will then have to decide whether the defendants were entitled to exercise their discretion (if, on the facts and on the true construction of the documents, it had one) to award the contract to Fujitsu.

172. If the answer to that question is yes, the automatic stay will be lifted. If the answer is no, then subject to any appeal the decision to award the contract to Fujitsu will be set aside and the matter remitted back to the defendants so they can decide what to do next. The court would not, as Vodafone has accepted, be asked to make any further determination such as a declaration or injunction.

173. If the matter were being heard in the Administrative Court, it is unlikely that cross-examination would be allowed. Although the culture is different in this court and cross-examination is normally permitted in a preliminary trial such as this, I see little scope for it. It would be difficult if not impossible for a party to go behind the written record of reasons for scores set out in the documents.

174. The court may therefore be prepared to curtail cross-examination and may disallow the costs of unnecessary witness statements that merely recite the contents of documents or serve as a vehicle for making submissions.

175. I have referred above to the six points in the defendants' supplemental skeleton which, they say, would have to be determined if the preliminary issue were tried. I have set out some of them above. In my judgment, they are not issues for decision requiring extensive and detailed evidence. Rather, they are points for argument on the documents of the kind I would expect to see in the parties' skeleton arguments. The sole issue for decision would be whether the decision to award the contract to Fujitsu was open to the defendants.

176. Restricting the issues to be determined is commonplace in many types of proceedings. For example, in judicial review proceedings, it is quite normal to grant permission to proceed on a narrow point of construction while withholding permission to argue a wider ground, usually free standing irrationality.

177. By the end of the hearing, it was clear that one of the most powerful objections of the defendants to the preliminary issue was that it would be based on assumptions that are contrary to Vodafone's real case, which Vodafone wants to litigate later on a different basis, i.e. on the basis that the scores were ill founded rather than well founded.

178. I accept that there is some force in that objection and that the proposed solution is not ideal. I accept also that the preliminary issue is asymmetrical in the sense that it is conclusive only if decided one way and not if decided the other way. The solution is, as I accept, not perfect.

179. But such is also the position where an application for summary judgment is made: the case, including disputed facts, is assumed to be at its highest in favour of the party resisting summary judgment. Issues of fact are "parked".

180. The party applying for summary judgment makes its application on a different assumed basis from that which would be its case at trial. The application is asymmetrical because it is only decisive if decided one way. Yet, summary judgment applications are routine and, I hope, do more good than harm.

181. By similar reasoning, I reject the defendants' argument that there is a risk of inconsistent findings by different judges (or even by the same judge) at the preliminary stage and at final trial. The assumption at the preliminary stage that the scores were justified for the reasons given for awarding them, is just that; it is not a finding of fact. Any subsequent finding that the scores were unjustified would, therefore, not be inconsistent with a previous finding.

182. The "cautionary tale" cases are, in my judgment, not fully on point. I accept that I must be very careful not to impose an unworkable solution on the parties and that those cases and the TCC Guide are replete with warnings to avoid doing so. But none of the cases cited involved considering a preliminary issue proposal as part of a balance of convenience exercise for the purpose of determining an interim application. In those cases, considerations of timing and irredeemable prejudice to one side or the other were not part of the court's reasoning.

183. I accept that there will be, or may be, a limited amount of duplicated evidence. But I think it will be confined to uncontroversial background, scene setting and matters of record that could not be in dispute. If the same judge hears the preliminary issue and the final trial, there would be no need for the background evidence to be called again.

184. If the final trial were heard by a different judge, the background facts set out in the first judgment would stand as agreed facts or binding by issue estoppel. The parties could be expected to produce an agreed statement of any other uncontroversial background facts not covered in the first judgment. The concern about duplication of evidence is, I think, overstated.

185. I have considered the revised paragraphs 82 to 84 of the particulars of claim. Some of the points are skeleton argument points rather than bare pleading. But the preliminary issue is clearly encapsulated in the short formulation at the start of this judgment. The case is simply that on the true construction of the tender documents and on the basis of the scores awarded and the reasons for those scores (which other than on very good grounds will be taken to be the reasons recorded in the contemporary documents) the

defendants were not entitled to award the contract to Fujitsu without further negotiations.

186. I conclude that the defendants' concerns are overstated and, while not a perfect solution, the preliminary issue is a viable solution and the one causing the least irremediable prejudice. I am satisfied that the matter is fit for expedition, applying the four tests in the *WL Gore and Associates* case. It follows that the balance of convenience and justice comes down in favour of maintaining the automatic stay until the preliminary issue has been tried.

187. However, I have also considered the court's powers under regulation 96(1)(b) of the PCR 2015. It provides that, instead of bringing to an end the requirement (imposed under regulation 95) not to enter into a contract, the court may "… where relevant, make an interim order … (b) … modifying that requirement". In the present case, I propose to make an order modifying the requirement to the extent that the defendants are permitted, in advance of the preliminary issue trial, to enter into a conditional contract with Fujitsu.

188. Neither counsel dissented from the proposition that I have jurisdiction to make such an order under regulation 96(1)(b), though neither counsel greeted the idea with great enthusiasm. I accept that it provides only limited comfort to the defendants during the period leading up to the trial of the preliminary issue in January 2022. Fujitsu might not be willing to enter into such an agreement.

189. If it were willing, the contract would have to be conditional on the outcome of the preliminary issue trial. If the outcome was in favour of Vodafone, the contract could not become final, at least until the issues were finally resolved. But it could be of some help to the defendants, for what it is worth. It might, for example, enable Fujitsu to enter into mirror conditional contracts with suppliers upstream in the supply chain.

190. I will therefore dismiss the application to lift the automatic stay save that I will modify the regulation 95 requirement not to enter into a contract, in the manner that I have just indicated. I will grant the application for trial of the preliminary issue and I will direct an expedited trial in January 2022.

191. I will hear counsel on the form of my order and any other consequential issues. Subject to argument, I am provisionally of the view that questions of costs arising from the two applications determined in this judgment should await determination of the preliminary issue, resolution of which will help the court to determine on better information than is yet available how successful each party has been relative to the other.