OUTER HOUSE, COURT OF SESSION

[2023] CSOH 9

CA87/22

OPINION OF LORD BRAID

In the cause

CAPITA BUSINESS SERVICES LIMITED

Pursuer

against

THE COMMON SERVICES AGENCY FOR THE SCOTTISH HEALTH SERVICE

Defender

Pursuer: Crawford KC, D Blair; Addleshaw Goddard
Defender: Lord Davidson of Glen Clova KC; CMS Cameron McKenna, Nabarro and Olswang LLP

10 February 2023

Introduction

[1] The defender, more commonly known as NHS National Health Services Scotland (NSS) is currently undertaking the procurement of the Scottish Wide Area Network Replacement Programme (SWAN 2) and associated services. SWAN is a single broadband network which allows public sector organisations to connect to their offices, systems and each other. The defender's intention is to award a framework agreement to a single supplier for an initial term of six years, commencing on 1 April 2023, allowing SWAN Members to place individual contracts (referred to as Call Off Contracts) over a six year period. The

contract has a total value of £350 million. The pursuer is the incumbent service provider under the current programme, SWAN 1.

[2] The pursuer's Final Bid was submitted on 2 September 2022. Following a clarification request by the defender and various responses by the pursuer, the defender decided that the Bid was non-compliant with the Instructions to Bidders and should be disqualified, a decision which it communicated to the pursuer by letter dated 7 October 2022 (the Disqualification Notice). Consequently, no evaluation of the pursuer's Bid has taken place and, as things stand, the contract will be awarded to the only other Bidder.[1]

[3] The pursuer challenges that decision, and seeks, among other things (1) declarator that its Final Bid submission was fully compliant with the defender's Instructions to Bidders and (2) declarator that the defender's decision of 7 October 2022 to disqualify the pursuer from any further participation in the procurement process was in breach of the obligations imposed upon the defender by regulations 19, 30(23)(c) and 76(4) of the Public Contracts (Scotland Regulations) 2015.

The law

[4] The legal framework is not in dispute. The procurement was conducted under the 2015 Regulations, made in implementation of the UK's obligations under EU Directive 2014/24, as a competitive procedure with negotiation. The key principles of procurement derived from the EU jurisprudence are reflected in regulation 19, which provides insofar as material:

[1] There is an automatic suspension of the defender's power to award the contract until these proceedings have been determined, by virtue of Regulation 89 of the Public Contracts (Scotland Regulations) 2015. I previously refused the defender's motion to bring that suspension to an end, the defender's reclaiming motion (appeal) against that refusal itself being refused on 30 December 2022.

> "(1) A contracting authority must, in carrying out any procurement…which is subject to the application of these Regulations –
> (a) treat economic operators equally and without discrimination; and
> (b) act in a transparent and proportionate manner."

For completeness, although I need not narrate their terms, regulations 30(23)(c) and 76(4), referred to in the second declarator sought by the pursuer, require that a contracting authority, in conducting a competitive procedure with negotiation, must evaluate tenders on the basis of award criteria specified in the procurement documents.

[5] The relationship between the principles of equal treatment and transparency was explained in *SIAC Construction Limited* v *County Council of the County of Mayo* [2001] 3 CMLR 59 at paragraph 41 as being that the principle of equal treatment implies an obligation of transparency in order to enable compliance with it to be verified. The principles require that the contracting authority must apply its rules consistently throughout the procurement process. That requirement of internal consistency has two elements. First, the contracting authority must apply its rules consistently between different Bidders: *Energysolutions EU Limited* v *Nuclear Decommissioning Authority* [2-16] EWHC 1988 (TCC), paragraph 255 (there is no suggestion that did not happen in the present case). Second, the contracting authority must interpret the award criteria in the same way throughout the entire procedure: *SIAC Construction Limited*, paragraph 43.

[6] The principle of transparency also requires clarity. This is judged against what would be understood by that hypothetical person invoked by the ECJ, the reasonably well-informed and normally diligent (RWIND) tenderer. As Lord Reed explained in *Healthcare at Home Ltd* v *Common Services Agency* 2014 (UKSC) 247 at paragraph 8, this means that in an invitation to tender for a public contract, the formulation of the award criteria must be such as to allow all RWIND tenderers to interpret them in the same way. The question is not

whether all tenderers have in fact interpreted them in the same way, but whether the court considers that the criteria were sufficiently clear to permit of uniform interpretation by all RWIND tenderers. At paragraph 12, Lord Reed observed that the yardstick of the RWIND tenderer is an objective standard applied by the court, such a standard being essential to ensure equality of treatment. He went on to say at paragraph 14 that the court's task is to determine whether the invitation to tender is sufficiently clear to enable tenderers to interpret it in the same way, so ensuring equality of treatment.

[7] Where disqualification of a Bid is an option open to a contracting authority, the principles of fairness and equality of treatment demand particular transparency and clarity: *William Clinton (t/a Oriel Training Services)* v *Department for Employment and Learning and another* [2012] No NICA 48, paragraph 35; see also *MLS (Overseas) Limited* v *Secretary of State for Defence* [2017] EWHC 3389 (TCC). If failure to meet a particular criterion or to comply with a particular requirement of the process is to result in disqualification of the tenderer, the tender documentation must clearly and transparently spell that out. Whether there is such transparency and clarity is to be determined by having regard to what the RWIND tenderer would have understood the documentation to mean: *Federal Security Services Limited* v *Northern Ireland Court Service* [2009] NIQB 15.

[8] The contracting authority is also required to act proportionately in exercising powers under the tender documentation. For present purposes, the appropriate test is whether the step taken was manifestly disproportionate: *R (Lumsdon)* v *Legal Services Board* [2016] AC 697, paragraph 73. Any exercise of discretion must not be exercised on an unlimited, capricious or arbitrary basis: *Stagecoach East Midlands Trains Ltd and others* v *Secretary of State for Transport and others* [2020] EWHC 1568 (TCC), paragraph 44.

The Issue

[9] Although the pursuer refers to regulations 30(23)(c) and 76(4), it accepts that if its Bid was lawfully disqualified, the defender did not require to evaluate it. The principal issue between the parties is whether, in disqualifying the pursuer's Bid the defender breached its obligation under regulation 19 to act transparently and proportionately. This can be broken down into the following questions:

(i) Were the defender's Instructions to Bidders sufficiently clear to permit of uniform interpretation by all RWIND tenderers? If not, the defender will be held to have breached its duty of transparency (and further inquiry into whether the Bid complied with the Instructions would not be required).

(ii) If the defender's Instructions to Bidders were sufficiently clear, was the pursuer's Final Bid compliant with those instructions? If so, the defender was not entitled to disqualify it.

(iii) If the pursuer's Bid was non-compliant, did the defender act proportionately (and rationally) in deciding to disqualify it?

The proof

[10] I fixed a preliminary proof to resolve whether the pursuer is entitled to the decrees of declarator which it seeks. In view of the imminence of the proposed start date for SWAN 2, early dates were found. For the pursuer, evidence was given by three of its directors: Tom McLaughlin, a Solution Director; Jim Crawford, Business Development and Regional Sales Director; and Melony Buchanan, SWAN managing director. The pursuer also led

opinion evidence from one skilled witness, Edward King, a freelance consultant. Evidence was given for the defender by three of its employees at the material time: William (Billy) Hislop, formerly the Category Manager – IT, Strategic Sourcing, National Procurement, who was the procurement lead for the SWAN reprocurement programme until he left NSS on 16 September 2022; Stephen McSherry, Associate Director of Digital and Security (Cloud Engineering & Operations); and Roderick Cameron, SWAN Contract Manager.

[11] Since the issues predominantly turn on how the procurement documentation falls objectively to be interpreted, some of the evidence was irrelevant and strictly inadmissible, for example, evidence of what the witnesses thought that the documentation meant, which I have disregarded. However, the remainder of the evidence was helpful in informing my understanding of the technical background to the case; why the pursuer's Final Bid was formulated in the way it was; and why the defender reached the view that it was non-compliant. Although issues of credibility and reliability are not at the forefront of the case, I found all of the witnesses to be credible – doing their best to tell the truth – and, as regards their recollection of events, mostly reliable. The principal witness for the pursuer was Mr McLaughlin. Ms Buchanan added little and part of her witness statement was devoted to matters beyond the scope of the preliminary proof. On one of the main points of controversy – whether the pursuer had made a pricing assumption in its Final Bid – Ms Buchanan's evidence chimed with Mr McLaughlin's to the extent that it was clear the issue had been discussed. I do not criticise that, because the evidence was all honestly given and it is natural that the issues would have been discussed by the directors of the pursuer before proceedings were raised. Nonetheless, it does diminish the weight to be attached to Ms Buchanan's evidence. Mr Crawford's evidence was mainly directed towards wayleaves

and remote service premium charges, an issue which withered into insignificance as the proof progressed, and which I do not intend to discuss further. Mr King's evidence explained some of the technical factual issues and to that extent was helpful, but otherwise did not add a great deal. Mr Hislop appeared uncomfortable when asked technical questions, being beyond his sphere of expertise, but his evidence and that of Mr McSherry and Mr Cameron was helpful in illuminating the defender's approach to the procurement. I reject the suggestion by senior counsel for the defender that Mr Hislop's evidence should be accorded special weight because he is no longer employed by the defender and can be seen as impartial. He played a major role in the preparation of the documentation and in the conduct of the process and is as much invested as the other witnesses in seeing a successful outcome. I simply accord his evidence the same weight as that of the other witnesses. The principal factual matter where there was some disagreement was in relation to precisely what was said at the various negotiation meetings which took place in June and July 2022, which I discuss below.

[12] The parties also entered into a joint minute of agreement before the proof, agreeing among other things that all productions were what they bore to be and were admitted into evidence whether or not spoken to by any witness. The factual account which follows is culled from the evidence as a whole; where it is necessary to attribute any piece of evidence to a particular witness or document, I have done so.

Background

Introduction

[13] Ninety-four public sector organisations (SWAN Members) participate in SWAN. Currently broadband services are provided to more than 6,000 public sector sites across Scotland. Under the proposed new framework and as is the case under the current framework, the service provider will provide a single shared network and common ICT infrastructure to the SWAN Members. The services include the provision of core network infrastructure and additional optional services, which SWAN Members can procure via the framework as required, by entering into a Call Off Contract. SWAN Members include GPs, community pharmacies, schools, local government and Scottish Government.

[14] The procurement required Bidders to price for a spectrum of Catalogue Services based on the requirements set out in an Output Based Specification (OBS). An OBS is one which requires the Bidder to choose how to deliver the required services (or outputs), the manner of delivery not being prescribed by the contracting authority.

Technical matters

Connectivity services

[15] To explain the controversy over the pursuer's Final Bid, I first need to cover some technical ground. Appendix F of the OBS (Model Catalogue Services) included a table (F1) setting out the minimum requirements for each of the connectivity services to be offered as part of the Catalogue Services. It included the bandwidth, latency, availability and lead time requirements for each connectivity service, of which there were 56 in total. By way of example, one connectivity service was direct internet access with a bandwidth of 20Mb/s;

another was direct internet access with a bandwidth of 1Gb/s; and yet another was 4G/5G. In order to provide the connectivity services it was open to Bidders to use a number of different technologies, including fibre to the premises; ethernet fibre; 4G/5G; and others, which I need not list for present purposes.

Fibre to the Premises (FTTP)

[16] FTTP is the modern technology which permits superfast broadband. It evolved following the advent, earlier this century, of Next Generation Access broadband technology (NGA). FTTP differs from ethernet fibre in that the latter involves connecting each site using a dedicated fibre, whereas FTTP provides connectivity via shared fibre infrastructure, enabling multiple premises to be connected using a shared fibre and achieving faster upload and download speeds. FTTP services can only be delivered in parts of Scotland where the necessary infrastructure enabling works (infrastructure build) have been undertaken. These works include the provision of infrastructure within BT exchanges, the provision of street cabinets, and the connectivity between these infrastructure elements. Only when the infrastructure is in place is it then possible to connect an end-user's premises (or, in the current context, a SWAN site) to the nearest viable access point on a carrier's access network. That connection involves minimal wiring and hardware but is a relatively straightforward (and cheap) process.

Infrastructure Build/FFIB

[17] SWAN Members wish to avail themselves of FTTP and the higher speeds which it permits. The fly in that ointment is that infrastructure build has not yet been undertaken in

many parts of Scotland where SWAN sites are, and there is some uncertainty as to the date by which it will have been fully rolled out. As emerged from the evidence, there are three mechanisms by which future infrastructure build might be provided.

[18] The first is under the Scottish Government-funded R100 programme, which boasts (on the Scottish Government's website) a "commitment to provide access to superfast broadband of 30 Megabits per second (Mbps) to every home and business in Scotland". Delivery of R100 is being conducted by BT Openreach. The particular advantage of R100 is, as Mr McLaughlin put it, that it reaches the parts of Scotland that other providers do not, namely, less densely populated areas where commercial build is less attractive. Unfortunately, the R100 programme is running late. There was little oral evidence about the timetable for future build, but the final version of Table 1a, part of the pricing spreadsheet referred to more fully below, reveals expected delivery dates as far into the future as 30 September 2026. Accordingly, there is some visibility of which premises are – and perhaps more importantly in the present context, which are not – included in R100 programmes some years hence.

[19] The second means of providing infrastructure build is through commercial programmes. A number of network carriers, principally Openreach, have invested heavily in telecoms network infrastructure by undertaking their own infrastructure build. Mr King explained that carriers typically undertake such build using their own capital and at their own risk based on an analysis of market demand, population density and the level of existing competition. Openreach's product is called full-fibre infrastructure build (FFIB), the cost of providing which is recovered through circuit rentals. Openreach's rollout program provides information about FFITB planned for the following 9-12 months.

[20] For those who do not wish to, or their requirements are such that they cannot, wait for the rollout of either of the foregoing programmes – seemingly, including a number of SWAN Members – the third means of acquiring infrastructure build is to fund it themselves by obtaining and accepting a quote from a network carrier such as Openreach. The nature of FTTP and FFIB is such that, as explained by Mr McLaughlin, any quote requires to be for a geographical area, rather than for an individual site. On the basis of Mr McLaughlin's unchallenged evidence, it is not straightforward to procure FFIB on a privately-funded basis. Before making its Initial Bid, the pursuer sought a quote from a number of carriers including Openreach. Its quote was provided on the basis of FFIB being ordered for SWAN Member sites who required it as a single project, with no ability to influence the sequence in which individual sites were delivered. Moreover, Openreach would not offer a quote relating to sites that would be covered by R100 or other publicly-funded build projects. Nonetheless, as Mr McLaughlin also made clear, whatever the difficulties, it is possible to self-fund infrastructure build: one SWAN Member did so under SWAN 1.

ECCS and Infrastructure Build Costs

[21] Whereas the tender documentation appeared to proceed on the basis that ECCs and infrastructure build costs either mean the same thing, or that the former subsumes the latter, that is not a correct use of the terminology, as the defender's witnesses appeared ultimately not to challenge. Whether they did or not, I accept the evidence of Mr McLaughlin, supported by Mr King on this point, that ECC is a standard term, originally defined by Openreach but now used industry-wide, which refers to the costs associated with connecting an individual site to the local infrastructure build by means of the minimal

wiring and hardware costs referred to above. Those costs do not include the costs of providing the infrastructure build (or FFIB) itself, which are referred to, self-evidently, as infrastructure build, or FFIB, costs.

Consequences of the non-alignment of SWAN Members' requirements with the FFIB roll-out

[22] As will be seen, the tender documentation required Bidders to offer a price for the provision of the connectivity services specified by SWAN Members on specified dates, referred to as Transformation Dates. In many cases, these dates fall before the date of any currently planned infrastructure build. This means that if FTTP is proposed as the technical solution as at the Transformation Date, it cannot be provided on that date unless, either R100 or a commercial programme (or, for that matter, a privately funded build) has in fact delivered infrastructure build by then, or the SWAN Member or Members in question fund the provision of infrastructure build themselves.

[23] It is this which has led to the controversy between the parties. The pursuer, as discussed more fully below, proposed the solution which it thought would incur the least expenditure to SWAN Members, viz, that if infrastructure build was not available on the Transformation Date requested by a SWAN Member, that Member would either defer its requirement for FTTP until infrastructure build had been provided by one of the ongoing programs, or select another service. The pursuer repeatedly attempted to persuade the defender to clarify its requirement in relation to infrastructure build costs and to specify one way or the other whether infrastructure build costs were within the scope of the procurement or not; which the defender repeatedly declined to do.

The procurement process

[24] As already noted, the defender ran the procurement exercise as a competitive procedure with negotiation, in accordance with regulation 30 of the 2015 Regulations, which, in Mr Hislop's words, "provided a structured and targeted process but with a sufficient degree of flexibility to allow supplier-led solutions to meet the OBS". The OBS describes in some detail the requirement for wide-area networking services and additional services for SWAN Members. Following some prior formalities, the procedure consisted of three phases: Initial Bids; Negotiation, including Interim Bids; and Final Bids. At the Initial Bids Phase, the Bidders received an Invitation to Negotiate (ITN) (described by Mr Hislop as the anchor document which applied throughout the process) along with an Invitation to Submit Initial Bid (ITSIB); at the Negotiation Phase, they received an Invitation to Submit Interim Bid (ITSIntB); and at the Final Bid Phase, an Invitation to Submit Final Bid (ITSFB).

The ITN – key provisions

[25] The ITN comprised two volumes. Volume 1 contained Instructions to Bidders, and Volume 2 a glossary of terms. Volume 1 described the proposed procurement process and timetable. It stated that the SWAN services would fall under four service categories, although five are listed: Shared Services (which all participating authorities would purchase): Catalogue Access Services (those services outlined in a catalogue which would be selectively purchased by participating authorities but which were not subject to customisation); Catalogue Additional Services (complementary services which could be selectively purchased but which were not subject to any customisation); Bespoke Services

(services which authorities may request on a case-by-case basis); and Transition Services (those services required during transition not otherwise captured in the foregoing four).

[26] Paragraph 1.5.2 described the Negotiation Phase and Interim Bids, and included the following statement:

> "Bidders may be invited to submit Interim Bids during the Negotiation Phase. This is an opportunity for Bidders to present an updated proposed Solution in response to negotiations."

As denoted by the capitalisation, "Solution" is a defined term, the definition in the Glossary in Volume 2 being: "… any service, hardware, software and infrastructure proposed by the Bidder".

[27] Paragraph 1.5.3 described the Final Bids phase and stated that:

> "Following submission of Final Bids, NSS will ensure it has a clear understanding of the terms of all Final Bids. Any necessary further clarification of Final Bids may be carried out with Bidders as part of the final evaluation process.
>
> Final Bids will be evaluated against the Contract Award Criteria ..."

[28] The section headed "Instructions to Bidders" included the following:

> "2. Clarification Requests
>
> Clarification questions, and/or requests for clarification or interpretation must be submitted to NSS via the message board facility on the PCS-T website.[2]
>
> …
>
> 4 Important Notices
>
> …
>
> 4.8.1 NSS reserves the right to reject or disqualify a Bidder where:
>
> (a) a Bid is submitted late, is completed incorrectly, *is materially incomplete* or fails to meet NSS' submission requirements which have been notified to Bidders (emphasis added);

[2] The Public Contracts Scotland-Tender website

…

(d) the Bidder contravenes any of the terms and conditions of this ITN or any other Contract Document."

[29] Section 3 stated, in 3.1, that the Framework Agreement would be awarded to the Bidder who submitted the most economically advantageous tender in the Final Bid Phase. The detailed evaluation of the Initial, Interim and Final Bids to determine which were the most economically advantageous was to be conducted using the Contract Award Criteria set out in Table 2 and further detailed in the ITSIB, ITSIntB and the ITSFB. The weighting at each stage was different. Relevant for present purposes is that at the Final Bid stage, Financial had a weighting of 35% of which 20% was attributable to price, 8% to value for money, 5% to economies of scale and 1% to each of payment mechanism and Financial Model Completeness. As Mr Hislop pointed out, there is a difference between qualitative and quantitative scoring. Whereas price was evaluated on a quantitative basis, the other financial criteria were evaluated qualitatively, using a 0, 1, 3 and 5 scoring based approach.

Initial Bid stage – the ITSIB

[30] The Invitation to Submit Initial Bids (ITSIB) was issued to shortlisted Bidders on 22 November 2021 through the PCS-T website. It consisted of Volumes 1 to 4. The same suite of documents was reproduced throughout all phases, albeit updated in certain respects within the parameters of what Bidders had been told in the ITN, for example in relation to the weightings to be attached to different elements of the Bid. Thus, the description which follows applies also to the ITSIntB and the ITSFB. Volume 1 comprised Instructions to Bidders; Volume 2 was the Technical Response Document together with the associated OBS;

Volume 3 was the Commercial/Legal Response Document together with the associated terms and conditions for both the Framework Agreement and the model Call-Off Contract; and Volume 4 was the Pricing Response Document together with the associated Pricing Submission Spreadsheet. During the procurement, Bidders and NSS were able to exchange clarification requests and responses using the message board facility on the PCS-T website.

[31] The pricing submission spreadsheet included Table 1a (also referred to as the asset register) which is of particular importance. It requested catalogue costs and, at Initial Bid stage, listed 5,642 sites. For each site, Table 1a provided various information, including: the service level required per the OBS; R100 programme information; and (critically), the Customer Requested Transformation Date, that is, the date when the service was required by the SWAN Member. The spreadsheet contained cells for Bidders to complete by stating, for each site, a summary of their proposed technical solution (such as FTTP, or 4G/5G). There were also cells for Bidders to provide pricing information. The table divided the pricing into years. Within the first three years, prices were divided into "CPE Set Up", "Set Up", "ECCs," and "Rental". For years four to six, only the price for rental had to be provided. When these figures were added together they provided a total 6-year figure.

[32] Of note at this stage are the following provisions of the ITSIB which carried all the way through to Final Bid stage:

Vol 2, OBS 10.3.4.1, which invited Bidders to:

> "[d]etail your Implementation plan covering all SWAN Partners, including key transition milestones and tasks, making clear the key assumptions and constraints".

Vol 2, OBS 10.3.6.1, which invited Bidders to:

> "[d]escribe what impact if any the NGB (Next Generation Broadband) timetable has on your ability to deliver any of the catalogue services detailed

> in the section covering the SWAN INITIAL PORTFOLIO OF SERVICES of this OBS."

Vol 3, Commercial and Legal 2.2, which, under the heading Risk Management, asked:

> "Question 4: How would you mitigate the risk of existing infrastructure not being suitable or available for the new technologies or services?
>
> …
>
> Question 6: What is your plan to minimise the risk of Excess Construction Charges?"

Vol 4 Pricing, where, under the heading Introduction, the following was stated:

> "This document provides instructions to Bidders on how to prepare and submit their Pricing Submission. This document must be read in conjunction with the OBS. The SWAN Members are seeking prices for [the five services listed above].
>
> The SWAN Members also wish to understand:
>
> - The cost of optional services such as consultancy;
> - The key assumptions underpinning bids; and
> - Any additional information that is relevant and relates to the ITSIB Responses and may impact on pricing or pricing assumptions".

It may be noted that at the stage of Initial, and subsequently Interim Bid, where assumptions were permissible, the instruction to Bidders was to state those assumptions in order that SWAN Members might understand them.

[33] There then followed a description of how the Overall Pricing Summary was calculated, being the total of the prices in Tables 1a, 1c, 2, 3.1, 3.2 and 4 of the pricing spreadsheet. Since the defender's position is that it was this instruction which was not followed at Final Bid Stage, the detailed provisions are more conveniently set out below, at paragraphs [57] to [63].

[34] Finally, the pricing spreadsheet included a Table 6, for Bidders to list Key Bidder Assumptions. It is interesting to chart the evolution of Table 6. In the ITSIB the instruction was merely that "This should set out the Bidder's key assumptions". In the ITSIntB, those words were repeated, to which were added "… in columns highlighted in yellow although, as has been discussed, at the point of Final Bids no assumptions should exist". By Final Bid stage the instruction reflected the fact that Table 6 was no longer able to be completed and was succinct: "At the point of Final Bids no assumptions should exist." Several points fall to be made. First, the change at Interim Bid Stage clearly referenced discussions which had taken place with Bidders, and with the pursuer in particular. Second, although Table 6 appears within Volume 4 (the pricing volume), the instruction, at least in that table, is not confined to pricing assumptions. Third, it was reinforced to Bidders at Interim Bid stage that although assumptions remained permissible, these would require to be removed by the time of the Final Bid (from which it must follow that where an Initial, or Interim Bid was predicated on an assumption, a different approach would necessarily be required at Final Bid stage).

The pursuer's approach

[35] The pursuer's approach to the procurement was explained by Mr McLaughlin. As a Solutions Director, he was the ultimate decision maker as to what the pursuer offered to provide. He said it was unclear from the outset whether or not infrastructure build costs were within the scope of the procurement. In its Initial Bid, the pursuer *had* included in its price the cost of providing infrastructure build. It had obtained, from BT Openreach, the quote referred to above, for what was described in court as a "very large" but confidential

sum, which I will refer to as £X. The pursuer had allocated this equally among the number of sites covered by the quote (approximately 2,600) in its pricing submission. The quotients thus arrived at were placed in the column headed ECC, because there was nowhere else to put them, but they were not strictly ECCs. The pursuer did not propose to charge SWAN Members any ECCs, since the costs were so minimal that where they were incurred the pursuer would not have passed them on. Thus the whole of £X related to infrastructure build and not to ECCs as that term was properly understood.

[36] The pursuer gave the following response to 10.3.4.1 regarding "Key Constraints":

> "National network infrastructure programmes, particularly the Scottish Government's R100 Programme, deliver in line with SWAN requirements."

[37] In response to questions 4 and 6 of the Commercial/Legal submission, the pursuer submitted lengthy answers setting out how it would deliver infrastructure build, and mitigate the costs which might arise, including the following passage:

> "At this stage, we have included costs for a Full Fibre Infrastructure Build (FFIB) to provide the underlying fibre infrastructure for the SWAN Replacement Service. FFIB is an infrastructure build product which provides the infrastructure necessary to deliver fibre services without additional ECCs."

[38] In Table 6 of the Pricing Submission, the pursuer detailed as its second "key Bidder assumption", the following, beside a reference to "Table 1a and 1c – Excess Construction Charges (ECC) and Full Fibre Infrastructure Build":

> "Customer to fund all ECC and FFIB costs – to include those identified in our Initial Bid and any not yet identified by the parties.
>
> The basis of the ECC/FFIB quote is the fibre infrastructure works to build out new fibre infrastructure to circa 2,600 new fibre sites. The ECC columns in Tables 1a and 1c identifies (*sic*) the sites which attract a fibre build charge. The fibre infrastructure quote does not identify the costs associated with each specific site, therefore the total quote value has been evenly spread over all affected sites".

I note in parenthesis that despite the distinction between ECCs and FFIB costs, the pursuer itself bracketed those terms together, in particular by referring to the "ECC/FFIB quote", and did not seem to be taking any issue, at least in that part of its pricing submission, with the distinction between the two terms.

The negotiation phase

[39] A number of meetings were held between the parties following the submission of the Initial Bid. During those meetings, the pursuer explained that the constraints on the quotes from network carriers meant that for the pursuer to proceed with the approach taken at Initial Bid whereby it would procure infrastructure build, SWAN Member sites requiring infrastructure build would require to submit orders in an agreed sequence or by way of a single order. The pursuer argued that if the SWAN Members could not commit to submitting a single order or sequence of orders, the SWAN Member sites which commissioned infrastructure build first would pay the largest proportion of the infrastructure build costs, while the remaining sites would have to make no or minimal contribution to those costs. Further, as the quotes were only valid for 30 days, there was no certainty that network carriers would honour the delivery time and the price of the infrastructure build if orders were not submitted in advance.

[40] On 6 April 2022, the defender posted a "Clarification to Bidders" on PCS-T, inviting Bidders to identify up to 50 sites where changing customer requirements for Transformation Date, Availability and/or Bandwidth would have the greatest potential to reduce the price.

[41] In its response the pursuer highlighted three sites where savings could be made, commenting that:

> "It should be noted that for sites where FTTP is part of the solution and part of our submitted FFIB proposal at Initial Bid, the saving shown [above] is scalable to provide a saving opportunity across a further circa 2400 sites."

The pursuer went on to state:

> "Through provider engagement we understand the commercial FTTP rollout from Openreach will not reach some areas until 2026 with limited certainty of availability 6-12 months ahead. Similarly, R100 is not expected to complete until 2027 with an expected coverage of 176 SWAN sites.
>
> …
>
> Sites with a 'must have' requirement for higher bandwidth can be addressed through the provision of ethernet fibre products and where commercial FTTP builds are not planned or have planned dates beyond the customers business needs, and we can offer fibre build such as FFIB or alt. net providers (*sic*).
>
> Where we offer a fibre infrastructure build, customers should consider an aggregation of demand, placing a single order for multiple sites to maximise ROI. Order can be placed for FTTP or EAD services once the build is complete, generally without ECCs, but there is limited control over site-by-site rollout schedule."

[42] The pursuer posted a further message on 25 April 2022, referring to the defender's requirement in discussions for "price certainty", pursuing the suggestion that a single inclusive initial order be placed for the sites identified in the tender submission, and asking the defender to confirm that this approach was acceptable.

[43] The defender replied in the following terms on 13 May 2022:

> "Yes we are looking for guaranteed maximum price that is inclusive of Infrastructure build/EECs (sic) predicated upon an inclusive initial order for the sites identified in the tender submission.
>
> However your suggestion that 'This single order would have to be placed within a defined period following Framework award' goes against our approach of seeking an offer capable of acceptance without time limit. There of course should be no assumptions as discussed in our negotiation meetings."

In Mr McLaughlin's view, this approach posed a problem for SWAN Members rather than for the pursuer itself, since it would result in an unfair allocation of costs. However, the first

paragraph of the response confirmed that the defender was looking for a guaranteed minimum price inclusive of both infrastructure build costs and ECCs. The following paragraph perhaps posed a challenge for the pursuer as to how that was to be achieved, but it cannot be said that the response, read as a whole, lacked clarity.

Interim Bid

[44] In light of its concerns about the difficulties it saw as being posed for price certainty by including infrastructure build in its tender, at Interim Bid stage the pursuer adopted a different approach from that taken at Initial Bid stage. While it continued to offer to provide FTTP for all the sites for which it had previously offered to provide FFIB, its Bid was now predicated on the basis that infrastructure build costs were not within the scope of the project. This was made clear in its executive summary in which the pursuer, after referring to its "50 Site Value Improvement" paper, stated:

> "The paper … followed the principle of identifying sites that had the greatest potential to reduce price, and while the paper focussed on 50 sites we believe that to meet the 'price certainty' challenge, discussed in the commercial and finance dialogue sessions, significant savings and price certainty can be found if the principle is applied across the full SWAN estate and we reuse services that exist, or are available now.
>
> In this Interim response we have followed that principle and have pulled back from offering, at this stage, a full fibre infrastructure build (FFIB) in our costed submission and will follow the Openreach and R100 commercial build programs as for many locations, where feasible, remaining on current services and waiting for the commercial builds makes sense."

Thus, the pursuer's Interim Bid (the approach of which was repeated at Final Bid stage) proceeded on the basis that infrastructure build would be provided either by the Scottish Government as part of its R100 programme, or by Openreach as part of its commercial build program. In completing Table 6 of the pricing spreadsheet, the pursuer stated:

> "It is assumed all new fibre infrastructure build activity required to meet Capita's proposed SWAN 2.0 fibre rollout program will be undertaken by either Scottish Government and/or other private sector led fibre infrastructure build programs, and Capita hereby excludes all such fibre infrastructure build activity from its Interim Bid price.
>
> The ECC/FFIB costs Capita has included in C4 of its Volume 3 submission are the indicative cost of fibre infrastructure works required to build out new fibre infrastructure to circa 2,300 new fibre sites should it not be made available in a timely fashion either by Scottish Government or Private Sector fibre build initiatives."

It is noteworthy that, as before, the pursuer bracketed ECCs and FFIB costs together.

[45] The pursuer's response to question C4 of the Technical and Legal submission, repeated some of the foregoing, and included some additional price information:

> "…
>
> Where new fibre infrastructure is required, it is assumed that this will be made available in a timely fashion either by Scottish Government fibre infrastructure build programs, eg 'R100' and/or by other similar private sector-led initiatives.
>
> Where the required fibre is not available by these methods in time to meet the Authority's stated requirements or is unlikely to be available, Capita can, at the Authority's request, provide a number of potential fibre infrastructure build options including Full Fibre Infrastructure Build (FFIB); a fixed-price 'passive' fibre offering from Openreach (OR) supplied on their standard terms and conditions … quoted on a per-site (or group of sites) basis and contracted under change control.
>
> While Capita has specifically excluded all fibre infrastructure build costs from our Interim Bid price on the basis fibre will be made available via the previously stipulated methods, we have obtained an updated indicative FFIB quotation from OR for 1942 sites, the cost of which is £Y, reduced rom £X in our Initial Bid price.
>
> This reduction reflects changes in scope and the addition of certain sites to OR's planned build programmes since then…
>
> Other fibre infrastructure delivery methods are available and we would strive to offer the best value-for-money solution for each site … Any SWAN-funded infrastructure build costs that were agreed between the parties would be re-charged without the addition of Capita mark-up.

> As discussed during dialogue, Capita believe SWAN-funded infrastructure build costs could be reduced significantly by:
>
> (i) considering the approach to 'outlier' sites –… and alternative connectivity could be considered here e.g. microwave/satellite;
>
> (ii) extension of existing SWAN (largely copper-based) service for longer e.g. until fibre is made available by Government/Commercial build programs;
>
> (iii) reduced resilience at certain sites."

The figure of £Y, which is also confidential, although less than £X, was nonetheless a substantial figure in its own right.

[46] In cross-examination, Mr McLaughlin steadfastly adhered to the view that the assumption made by the pursuer as to the provision of infrastructure by others was a technical, not a pricing, assumption. He defined a pricing assumption as one which, if it turned out to be wrong, would necessarily lead to a different price (such as an assumption regarding exchange rates). A technical assumption was one which, if wrong, meant that the solution itself was wrong. Removing an element from the scope, resulting in a removal from the price was not an assumption but a change in price. The figures mentioned in C4 were not prices, but had been included merely to show the pursuer's efforts in reducing the infrastructure costs, if they fell to be included after all.

[47] The pursuer's approach did not find favour with the defender. Mr Hislop and Mr McSherry explained that the defender's procurement team had noted that the costs of £X, which had appeared in the Initial Bid pricing submission, no longer featured in the Interim Bid, and that although it was stated in Volume 3 that they would amount to £Y, that was the wrong section in which to include a pricing submission (as they viewed it). The pricing evaluation team was supposed to have no visibility of the costs, and should not have seen them. This view was imparted to the pursuer in a clarification PCS-T message dated

16 June 2022, in which the defender told the pursuer that pricing should be included only in the Volume 4 response, and that while a concession had been made on this occasion to allow the questions in Volume 3 to be evaluated, should this happen again at Final Bid stage answers would be "disqualified and scored as '0'". As Mr McSherry also pointed out in his evidence, the pursuer's proposed technical solution continued to indicate that 2,282 SWAN Member sites required FTTP, as had the pursuer's Initial Bid.

[48] Following that concession, the pursuer received a score of 1 for "Financial Model Completeness", from which Mr McLaughlin inferred, having regard to the scoring criteria, that the pursuer's submission had posed *a* difficulty but not an extreme difficulty (which would have resulted in a score of 0).

[49] There followed a series of communications and meetings between the parties in the course of which the defender repeated that no pricing information should be included in Volume 3 (which Mr McLaughlin interpreted as meaning that anything with a £ sign should appear only in Volume 4), and the pursuer repeated its quest to persuade the defender to tell Bidders either that infrastructure build was within the scope of the project (and that it should therefore be priced for) or that it lay outwith scope (and did not have to be priced). At least some of these discussions included the need for "price certainty" as had been raised previously, a concept which Mr McLaughlin, at least, understood, as the pursuer's messages, and slide decks make clear.

[50] On 28 June 2022, the defender sent the following message to the pursuer, which appears clear enough in its terms:

> "At Final Bid stage we require a firm price with no assumptions. Capita must exercise judgement on whether these costs will materialise and whether liability for same will be passed to the customer. If these will be passed to the customer, they MUST be included in your pricing submission."

[51] A negotiation meeting then took place between the pursuer and the defender's financial evaluation team on 6 July 2022 at which, as the pursuer's note of the meeting shows, price certainty was again discussed. Mr McLaughlin and Mr Crawford explained the difficulty in achieving price certainty if infrastructure build costs had to be included and priced for. They presented slides outlining three options. Options 1 and 2 were to fix and mandate infrastructure build in the price evaluation (the difference between them being that in option 2, the price evaluation marks would be treated differently). Option 3 was to remove infrastructure build costs from the evaluation.

[52] Mr McLaughlin said that the pursuer did not favour either approach, but that it was simply trying to achieve certainty for all Bidders as to whether infrastructure build was in or out. The defender's witnesses painted a different picture, namely that the pursuer was pressing the defender to change its approach, which it could not do at that stage in the procurement process. On this, I prefer the defender's evidence, which found some support (eventually) from Mr Crawford, who came to accept that the pursuer's preferred approach was option 3, which is also consistent with the pursuer's response to the "50 Sites" question. However, I also find that if the defender had mandated option 1, the pursuer, whatever the difficulties, would have been able to assemble a Final Bid on that basis (as it had at Initial Bid stage).

[53] There was a conflict on the evidence as to whether the defender ever told the pursuer, in terms, that the approach taken in its Interim Bid was unacceptable and should not be maintained at Final Bid. I find that the defender's concerns about the pursuer's Interim Bid were never expressed in that way. I base this on several factors. First, that is not to be found in any of the written clarifications, and if it had been said orally, one would

expect it to have been repeated in writing. Second, none of the defender's witnesses volunteered in their evidence-in-chief that this had ever been said in terms. Mr McSherry did say in re-examination that it had repeatedly been communicated to the pursuer that its approach was unacceptable but in the context of his evidence as a whole, and the written material, I find that what was communicated was the unacceptability of the inclusion of an indicative price in the Commercial and Legal Response. Third, it was not in dispute that the defender did not respond at the meeting of 6 July 2022 to the questions posed by the pursuer in its slide deck but had undertaken to clarify the defender's position at or before Final Bid phase, which is not an approach they would have had to adopt had the pursuer been told its approach was unacceptable. It was however a matter of agreement that the pursuer was not told at the meeting (nor at any other time) that a similar approach at Final Bid as at Interim might result in disqualification.

[54] The pursuer next prepared a table of outstanding issues which it sent to the defender on or about 14 July 2022. The defender returned it to the pursuer on or about 2 August 2022, with its response marked in the final column. Insofar as material, the table is as follows:

Subject	Outstanding Issues	Raised	Impact	NSS Response
Price Scoring Mechanism	Maintaining the Price Scoring Mechanism used at Initial and Interim Bid stages in the Final Bid encourages Bidders to focus upon Price over Quality	6 July 2022	(N/A for present purposes)	The contract award criteria and weightings at each stage of the process were set out in the ITN document issued to all Bidders. There should be no "disconnect" between the proposed Solutions and the Financial/ Price evaluation. Bidders will be expected to submit the Solution they proposed at Interim Bids stage. Any reduction in the

				quality of the proposed Solution at Final Bids Phase may result in disqualification. As with Initial Bids Phase, NSS also intends to apply a minimum Quality/Technical score.
Cost of change included in the Whole Life Cost	How is the cost of change being addressed in the Price Evaluation? The cost of change includes the cost of running two Frameworks, two shared services, dual running costs for 6,000 Catalogue Services etc	13 July 2022	N/A	Pricing submissions will be evaluated on the basis of whole life costs over six years, which will include the total costs from the customer requested transformation date. This ensures a level playing field for all Bidders…
Infrastructure Build	Unclear whether or not Infrastructure Build costs for all sites in scope for the full contract term will be mandated as part of Bidders submitted solution	Interim Bid	There may be significant variation in the Bidders' price submissions based purely on whether or not Infrastructure Build costs are included	All SWAN Members are being asked to confirm the sites that need to be priced for the Final Build and the services that should apply at those sites. *What is asked for is what should be priced* (emphasis added).
Infrastructure Build	Bidders have no visibility of OpenReach fibre rollout programmes beyond 9-12 months. Neither do OpenReach because the information does not exist. Beyond this window Bidders have no ability to accurately predict when	6 July 2022	Without clear instruction on how Infrastructure Build costs should be included in the Final Bid, and where	The Authority will not compare Bids. As in every other phase of the procurement, in the Final Bids Phase each Bid will be evaluated on its own merits applying the published evaluation criteria.

	infrastructure will be made available. There is a disconnect between Contract Schedules that envisage milestones and delivery delay penalties that require the availability of infrastructure and the absence of that infrastructure.		Bidders are required to provide Price Certainty against an uncertain infrastructur e roll out programme, differing assumptions will be made by each Bidder. This will prevent the Authority from making a like-for-like comparison during the evaluation process.	All Bidders are being provided with the same information. In addition, it has been made clear to Bidders repeatedly that assumptions will not be permitted in the contractual documents. Capita is a commercial business and it, and other Bidders, are being asked to assume a degree of risk on whether fibre will be available at the time customers need it. As mentioned above, customers are being asked to confirm what services they need and when. It is then open to Bidders to decide if that is a rollout they can support, what level of risk it exposes to them and how they price the services accordingly based on that risk profile.
Infrastructure Build	R100 and other fibre infrastructure programmes are in the process of delivering appropriate infrastructure across Scotland. Including Infrastructure Build costs within SWAN2 will result in the Scottish Public Sector further subsidising these Private Sector Build programmes	Interim Bid	Poor use of the public purse	As mentioned above, all Members are being asked to confirm the sites that need to be priced for the Final Bid and the services that should apply at those sites. That reflects what customer believe they need. For those Members, SWAN will support delivery of their needs.

[55] The key messages from the defender's responses in the foregoing table were the need to provide total costs as at the Transformation Date; the need to price what was asked for (that is, by SWAN Members); and the desire on the part of the defender that Bidders assume an element of risk (which Mr McLaughlin said that the pursuer had decided against, at least when it came to the provision of infrastructure build).

The ITSFB

[56] The suite of documents comprised within the ITSFB was issued to Bidders on 16 August 2022. One significant change from the ITSIB and the ITSIntB was that Table 6 (pricing assumptions) was now headed "TABLE 6 – NO LONGER USED". It included a series of rows and columns marked N/A, under which appeared the words: "As has been discussed, at the point of Final Bids no assumptions should exist".

[57] Otherwise, the information supplied, and the contents of the Volumes, were substantially the same as at the previous stages. The tables in the pricing spreadsheet which Bidders were required to complete were in all material respects the same as they had been at Initial and Interim Bid stage. Section 10.3.4.1 of the OBS continued to invite Bidders to detail their Implementation Plan, including key transitions, milestones and tasks, making clear assumptions and constraints; 10.3.6.1 of the OBS asked Bidders to describe what impact the NGB timetable had on their ability to deliver any of the catalogue services; and Questions C4 and C6 of Volume 3 continued to ask Bidders how they would mitigate the risk of existing infrastructure not being suitable, and what was the plan to minimise the risk of ECCS. Table 1a contained details of the SWAN Member sites (which now numbered 5,802), the service required for each site, and the date at which it was required. As had previously been made clear, Bidders were expected to price for providing the

required service at the required date. Mr McSherry explained that in some instances, the precise requirements for each site had changed from Initial and Interim Bid stage, as a result of the procurement team reverting to SWAN Members to ask them to confirm their requirements. To that extent, the defender had taken on board the pursuer's concerns expressed during the negotiation meetings.

[58] One change which did feature in the ITSFB was to Table 16 (previously Table 14) – which set out Financial Model Completeness scoring criteria. This now stated that a score of 0 would be awarded where: "The Financial Model is incomplete to an extent that makes it very difficult to use in a comparison *and/or the Response includes pricing assumption(s)*" (the words in italics being new). Underneath the table appeared the instruction: "Bidders must not include within their Response any pricing assumption(s)."

[59] That was not the only instruction not to include assumptions. Section 2 of Volume 4, headed "Instructions to Bidders", began (as it had done since the ITSIB) by stating:

> "This document provides instructions to Bidders on how to prepare and submit their Pricing Submission. This document must be read in conjunction with the OBS. The SWAN Members are seeking prices for [the five services listed above]

It continued (now somewhat ungrammatically in relation to the second bullet point):

> "The SWAN Members also wish to understand:
>
> - The cost of optional services such as consultancy;
> - At the point of final bids no assumptions should exist;[3] and
> - Any additional information that is relevant and relates to the ITSFB Responses and may impact on pricing.
>
> As set out in the Instructions to Bidders …, the Pricing Submissions at the ITSFB stage will be evaluated on the basis of whole life costs over 6 years."

[3] This had previously read: "The key assumptions underpinning Bids". The change was necessary because of the requirement not to include assumptions at Final Bid stage.

Section 2 then set out detailed instructions as to how to complete each of the tables in the pricing spreadsheet. It went on to state, in bold, "**Prices should not include any assumption for CPI or other index rises.**" A few lines further on, under the heading "**In pricing for this ITSFB Phase, Bidders must:**"; the first instruction which followed was: "not include any assumptions".

[60] Paragraph 2.1.4 provided:

> **"2.1.4 Table 4 Transition Charges**
>
> Bidders must provide costs over 6 years of any additional cost not covered in any of the previous tables which would be chargeable to SWAN Members for the Implementation, Transition and Transformation Services described in OBS Section 10.
>
> In Table 4 you should stipulate any other charges that you would expect to be paid during the 6-year contract term and which are not otherwise captured in your pricing submission, including Excess Construction Charges and upgrades.
>
> Prices should be entered for each SWAN Member with any costs that bidders propose are shared provided in 'Other (Non-Member Specific Costs)'."

Mr McLaughlin took from this that Bidders should include only the costs that "would" or were "expected" to be charged. Since the pursuer did not "expect" to charge SWAN Members for infrastructure build costs, such costs did not require to be provided.

[61] In relation to how the pricing submission was to be evaluated, Volume 1, section 3.4.1, could not have been any clearer: "Each Bidder's Pricing Submission will be evaluated on the basis of whole life cost over six (6) years."

[62] Volume 4 of the ITSFB also contained detailed instructions about completion of the Pricing Submission Spreadsheet.

> (a) Section 2, **Instructions to Bidders**: "Bidders **must** complete all aspects of the SWAN Pricing Submission spreadsheet …

(b) Section 2.1.1 – "The pricing is to be based on the list of circuits which have been provided to you as per the asset registers in the OBS and as set out in the pricing spreadsheet Table 1a and 1c. All of these circuits must be priced over 6 years with the key assumption that there will be no termination or similar break charges after 3 years. Set-up charges can be included in any of the first three years (to the extent applicable).

The price for evaluation will be calculated as the total cost of services (set up, CPE set up, ECCs and rental) proposed by Bidders from the Customer transformation date requested …

…

Set up charges should include all one-off costs associated with the installation of the requested service to each of the locations. Costs should include, but not be limited to, the cost of installing the connection to the Customer premises but **should not** include the cost of the supply and installation of your Customer Premises Equipment (CPE).

….

Please note that you are pricing against a model requirement, designed to enable a like for like comparison between the Bidders and provide a sound basis for determining the most economically advantageous solution for the SWAN Members. The model requirement may differ from the actual requirement at call-off in terms of bandwidths, service levels or number of circuits."

(c) Section 2.1.4 (headed '**TABLE 4 TRANSITION CHARGES**': "Bidders must provide costs over 6 years of any additional cost not covered in any of the previous tables which would be chargeable to SWAN Members for the Implementation, Transition and Transformation Services described in OBS Section 10.

In Table 4 you should stipulate any other charges that you would expect to be paid during the 6-year contract term and which are not otherwise captured in your pricing submission, including Excess Construction Charges and upgrades.

Prices should be entered for each SWAN Member with any costs that bidders propose are shared provided in 'Other (Non-Member Specific Costs)'."

(d) Section 2.1.7, headed '**TABLE 7 FURTHER BIDDER INFORMATION'**: This is an opportunity for Bidders to supply any additional relevant information related to their pricing submission and which is not captured in any of the previous tables. **Any further charges should however be captured in Table 4.**"

(e) Section 2.2 headed '**OVERALL PRICE**': "Bidders are requested to confirm the total price for the 6-year contract period as part of their Pricing Response

> Submission. This will be the sum of the 6-year totals for Tables 1, 1c, 2, 3.1, 3.2 or 3.2a, 3.3 and 4 and will be summarised in the Overall Pricing Summary (Table A) of the pricing spreadsheet through links to the detailed worksheets.
>
> As set out in the Instructions to Bidders (ITSFB Volume 1) the Pricing Submissions at the ITSFB stage will be evaluated on the basis of whole life costs over 6 years. The lowest priced tender will receive full points for Price, with other Bidders receiving a score based on the price disparity from the lowest priced tender."
>
> (f) Section 3.1.7 headed '**FINANCIAL MODEL COMPLETENESS**': "The final factor included in the pricing evaluation is the extent to which each Bidder completes the financial model accurately and in accordance with instructions. It is expected that no pricing will be missing from the constituent parts that make up the total price. *A bid that does not contain full pricing will be considered non-compliant* (emphasis added). Bidders are asked to price against the OBS requirements. NSS reserves the right to adjust the submitted bid price with any OBS requirement costs which have not been included."

[63] Insofar as the defender's right to disqualify a non-compliant Bid was concerned, in addition to paragraph 4.8 of the ITN, the ITSFB stated at Volume 1 section 2:

> "When preparing and submitting their Final Bids, Bidders must comply with the Instructions to Bidders contained in Volume 1 of the ITN. Failure to comply with the Instructions to Bidders may result in a Bidder being disqualified from this procurement process."

The pursuer's approach to Final Bid

[64] The pursuer adopted the same approach to its Final Bid as at the Interim Bid phase. It continued to offer FTTP technology to a significant number of the sites to which it had allocated the costs of infrastructure build in its Initial Bid; in other words, sites which neither had the necessary infrastructure build in place nor were projected to have infrastructure build by the Transformation Date. Further, as with the Interim Bid, the tender was predicated on the following basis, in the pursuer's response to Volume 3, question C4:

> "Where new fibre infrastructure is required, it is assumed that this will be made available in a timely fashion either by Scottish Government fibre infrastructure build programs e.g., 'R100', and/or by other similar private sector-led initiatives. This has the significant benefit of avoiding duplication of costs to the public sector. We

> understand that 174 proposed SWAN services are directly related to the R100 programme. A further 90 SWAN services are likely to become available as a result of R100 infrastructure investment. An example of this is provision of a new subsea fibre cable to an island with no existing fibre infrastructure allowing subsequent fibre service orders.
>
> Where the required fibre is not, or is unlikely to be available by these methods in time to meet the SWAN Customer's stated requirements, Capita can, at the Customer's request provide a number of potential fibre infrastructure build options including Full Fibre Infrastructure Build (FFIB), which is a fixed-price 'passive' fibre offering from Openreach, supplied on Openreach's standard terms and conditions: … which Openreach will quote on a per-site (or group of sites) basis.
>
> In addition to FFIB other fibre infrastructure build routes are available, and we would strive to offer the best value-for-money solution for each site. We will maximise utilisation of reactive infrastructure build options provided by other operators including Cityfibre, NEOS networks and alternative network providers.
>
> Once the customer has selected its preferred fibre infrastructure build option, it will be contracted between the Customer and Capita via the change control process.
>
> Any 3rd party SWAN-funded infrastructure build costs that were agreed would be recharged by Capita to the applicable SWAN customer without the addition of Capita mark-up."

This was substantially the answer given to the same question at Interim Bid stage, but without any reference to costings, indicative or otherwise, despite the fact that the text envisaged the possibility of a SWAN Member having to meet infrastructure build costs. This turned out to be the fatal omission from the pursuer's Bid.

[65] In submitting the Final Bid in these terms, the pursuer's rationale was broadly as follows. It remained unclear whether infrastructure build was within the scope of the project or not but the pursuer took the view that it was not. It was therefore entitled not to offer infrastructure build. While there was a requirement to offer a fully priced Bid, the Bid was fully priced since the pursuer had fully priced the catalogue. The pursuer did not make any pricing assumptions, since such assumptions as were made were technical ones. In any

event, even if an assumption had been made, the Bid ought to have been scored in accordance with Table 16.

[66] Upon receipt of the Final Bid, the defender took a somewhat different view. The pursuer's Final Bid was not fully priced. In Mr Hislop's words, it was "glaringly obvious" that the pursuer's pricing did not add up. The figure of £X in the Initial Bid, reduced to £Y in the Interim Bid, had been dramatically reduced to an ECC figure of a different scale of magnitude (also confidential). The assumptions made appeared to qualify the pricing, leaving it open to the pursuer to charge additional costs for sites where the necessary infrastructure was not in place by the Transformation Date. As Mr McSherry explained it, the pursuer had not changed its solution – FTTP – but was asking SWAN Members to change their requirements (as it had been doing since Interim Bid stage), either by waiting until such time as infrastructure build was provided by another programme, or by choosing another service, the cost of which was not included in Table 1a (and so, was absent from the total price of the Bid).

Disqualification

[67] Having formed an initial view that the pursuer's Bid might not be compliant, the defender submitted a clarification request to the pursuer on 6 September 2022 to test whether their initial interpretation of the pursuer's Final Bid was correct. It asked for an explanation of how the Final Bid was consistent with the feedback given on pricing for whole-life costs over 6 years including ECCs and no assumptions. The pursuer's response was to confirm the approach which had been taken.

[68] After further exchanges between the parties, the defender issued its Disqualification Notice of 7 October 2022. After a section headed "Requirement for Price Certainty", the Notice referred to the relevant provisions of the Procurement Documentation under the headings "Right to Disqualify" and "Instructions at Final Bids Phase". Paragraph 4.1 of the Notice referred to the figures of £X and £Y, and the dramatic reduction at Final Bid, stating that this "raised serious compliance concerns" for the defender. After referring to the pursuer's response at C4 (above) the Notice went on to state, accurately, at 4.4:

> "This response indicates that Capita may intend to charge SWAN Members infrastructure build costs over and above the ECCs and other related charges it has priced for in its Pricing Submission. It also indicates that SWAN Members cannot rely on Capita to deliver the Services that they had asked for and which had been priced by Capita from the applicable Customer transformation dates."

At 4.5 the Notice referred to the assumption in response to C4 and made the (correct) observation that if R100 and other programmes did not deliver on time, and if SWAN Members still wanted their services by the Customer Transformation Dates specified in the Pricing Spreadsheet, the pursuer would charge them any additional infrastructure build costs (including ECCs). The Notice went on, at paragraph 4.6:

> "This assumption and position submitted in response to Question C4 on additional charges demonstrates to NSS that Capita's Final Bid submission is incorrect, materially incomplete, and fails to meet NSS's submission requirements as set out in Volume 4 of the ITSFN. Further, Capita's Final Bid submission contravened the terms and conditions of the ITN".

The Notice went on to make reference to the pursuer's approach to Remote Service Charge Premiums and Wayleave charges. Since it was conceded at the proof by senior counsel for the defender that the approach to those would not, in isolation, have justified disqualification, I do not propose to rehearse this in detail. Suffice to say, that the defender

considered that the pursuer's approach in this regard was also contrary to the terms of the procurement.

[69] In paragraph 6.1, headed Non-Compliance, the Notice referred to the requirement to submit a fully-priced six-year whole life cost for SWAN Members with no assumptions. The pricing assumptions made in Volume 3 were said to have materially qualified the pricing submitted in Volume 4. The Notice stated at paragraph 6.6 that the pursuers Final Bid submission was non-compliant in terms of:

> "(i) being completed incorrectly;
> (ii) being materially incomplete;
> (iii) failing to meet NSS' submission requirements; and
> (iv) contravening the terms and conditions of the ITN …"

[70] Section 7, headed Decision to Disqualify, set out a number of distinct reasons for the decision to disqualify. Paragraph 7.6 stated that the defenders considered the non-compliance issues to be fundamental to the principle of price certainty for SWAN Members, and for the defender's ability to evaluate the Final Bids. Thereafter, the pursuer's Bid was disqualified, first, on the basis of the failures set out above: paragraph 7.7 of the Disqualification Notice; second, on the basis that the pursuer's responses to the clarification issues raised post-Bid were materially incorrect and misrepresented the position: paragraph 7.8; and third, on the basis that the pursuer had not responded adequately to the clarification questions posed which was a further basis for the disqualification having regard to paragraph 4.9.1(c) of the ITN: paragraph 7.9.

Submissions for the pursuer

[71] Senior counsel for the pursuer submitted that the defender's decision to disqualify was unlawful as it breached the duties of transparency and equality owed under

regulation 19. The exclusion of infrastructure build and the pricing of that was compliant with the ITN and ITSFB. If, contrary to that submission, the exclusion of infrastructure build had amounted to an assumption, that sounded in scoring under the financial model completeness criterion (Table 16) and not in disqualification. If the defender was entitled to disqualify, its decision to do so was irrational, in that (a) the pursuer's Bid remained the same at the Final Stage as at Interim and (b) the pursuer was not disqualified in respect of an equivalent failure to provide and price infrastructure build for the 4G/5G services it had offered. Counsel focussed the main branch of her submission on whether the defender had clearly and transparently communicated to the RWIND tenderer both that infrastructure build must be included and priced for, and that a failure to do so would lead to disqualification. Under reference to specific provisions of the OBS and the ITSFB, she argued that there was no requirement anywhere in the OBS for a Bidder to propose its own infrastructure build; the pursuer had fully priced all items in the catalogue, such that SWAN Members knew what they would have to pay if they ordered a particular service; it was not known, anyway, what catalogue service may be sought, nor when; Table 4 merely required Bidders to detail costs which they "expected" to charge SWAN Members, and the pursuer had made it clear it did not "expect" to charge infrastructure build costs; it was impossible to foretell when infrastructure build might be in place, and on the defender's approach there was a risk that the SWAN Members might be charged for infrastructure costs only to find out, when the requirement for the service materialised, that another programme had delivered it after all, this against a background where Bidders were encouraged to use public and third-party funded infrastructure build projects; one of the questions asked of Bidders (C4 in volume 3) was how they would mitigate the risk of

infrastructure not being available to meet a proposed roll out schedule – there would be little point in that question if Bidders had to carry out their own infrastructure build; risk was to be evaluated and scored per Table 3, part of volume 3; 10.3.4.1 of the OBS specifically required technical assumptions, and asked Bidders to set out the key constraints; the pursuer's assumption was a technical, not a pricing, one; Bidders were asked to describe the impact, if any of the NGB timetable on their ability to deliver any of the catalogue services; and, from all the foregoing, infrastructure build was not within the scope of the procurement, just as the provision of 4G/5G infrastructure was not within its scope. Further, the RWIND tenderer would *not* understand: that infrastructure build must be priced and offered if offering FTTP as a solution on the basis that infrastructure build would be available at the time an order was placed; that infrastructure build must be priced in Table 1a; that the terms ECCs and infrastructure build costs were used interchangeably by the defender; that if infrastructure build costs did not fall to be included in Table 1a, they must be included in Table 4; that price certainty was a requirement (or what that term even meant), or how it was to be evaluated and scored; that a technical solution based on the availability of infrastructure amounted to a pricing assumption, rendering a Bid non-compliant; that inclusion of a pricing assumption could lead to disqualification; or that the Bidder must take all the risk that infrastructure build would in fact be available at a requested call-off date and price for it in the event that it was not. The defender had failed to clarify the ambiguities in the procurement documentation at the negotiation meetings. The defender had at no time said that the pursuer's approach was unacceptable and that if it were maintained, the pursuer was liable to be disqualified.

Submissions for the defender

[72] Senior counsel for the defender submitted that the Bid was non-compliant because it was materially incomplete, in that it omitted infrastructure build costs which had been part of the Initial Bid (and had been referred to in the Interim Bid), which SWAN Members might have to pay. Because the Bid was materially incomplete, the defender was entitled to disqualify it, rather than score it. The defender would be in a very difficult position if it was bound to score a materially incomplete Bid, particularly where scoring was qualitative and did not go to pricing. Section 3.1.7 of the ITSFB stated in terms that a Bid which did not contain full pricing would be considered non-compliant. It was plain to the RWIND tenderer that a total price (or a whole life price or a fixed price: these terms all amounted to the same as price certainty) had to be provided, and this the pursuer had not done. The model catalogue prices did not form part of the total price, as the instructions to Bidders made clear. The purpose of the OBS was to leave it to Bidders to propose their own solutions: it was not for the defender to prescribe either that infrastructure build must be offered or that it must not. The pursuer had embarked upon a misguided campaign to try to persuade the defender to change its approach, but the defender's response had been clear: read the instructions, they are not going to change and you must take some risk. True it was that the pursuer did not get its own way, but it had no entitlement to get its own way. While it was the case that the solution at Interim Bid stage was not to change at Final Bid, the pursuer's solution was, as Mr McSherry had observed, the use of FTTP, not how it proposed to treat infrastructure build costs. The problem for the pursuer was that although it had removed infrastructure build from its pricing it had retained FTTP. On the pursuer's approach a SWAN Member who wished FTTP, in an area where there was no existing

infrastructure build, would either have to accept there would be no delivery of that service (and wait until there was infrastructure build) or would have to pay a cost which had not been priced – either for infrastructure build, or for a catalogue service. The assumption made by the pursuer was clearly a pricing assumption and would be understood as such by the RWIND tenderer. As for irrationality, it was difficult to see how if the defender's position that the pursuer's Bid was materially incomplete and non-compliant was correct, the decision to disqualify could be irrational.

Decision

[73] Before returning to the three questions I posed earlier, I will make some general observations. First, it is important to bear in mind that the principal reason founded upon for the disqualification of the pursuer's Final Bid was that it was materially incomplete rather than that it contained an assumption. It was the assumption which led to the Bid being deemed by the defender to be materially incomplete; but if the Bid was materially incomplete, then whether that was as a result of a pricing assumption or a technical one is largely beside the point.

[74] Second, and a related point, is that it became plain, particularly from Mr McSherry's evidence, that the defender's objection was not so much to the fact that an assumption had been made, as to the nature of that assumption. This also relates to the pursuer's argument that the defender adopted an inconsistent approach to FFIB on the one hand, and the necessary infrastructure for 4G/5G technology on the other. Mr McSherry said that even for the latter, the defender would expect that if 4G/5G were offered, the pursuer would have satisfied itself that the necessary infrastructure either was, or would be, in place for the

Transformation Date. I take from that evidence that the defender would not have objected to an assumption (if it truly be an assumption) that infrastructure would be in place, if that assumption were based upon reliable information as to when it would be rolled out. The difficulty with the pursuer's assumption about infrastructure build was not only that it was not based upon such information, but that the pursuer's Initial Bid (and the "indicative" price given at Interim Bid Stage) appeared to acknowledge that for many sites, the required Infrastructure Bid would not be in place.

[75] Third, the submissions for the pursuer tended to focus (as the pursuer itself did throughout the process) on whether infrastructure build was or was not within the scope of the project, but the real issue is whether a Bid which offered FTTP had also to offer infrastructure build if that was not otherwise going to be available.

[76] Finally, the pursuer avers that by referring to price certainty in the Disqualification Notice, the defender had applied undisclosed evaluation criteria. However, as the narrative of the background reveals, and as Mr McLaughlin accepted, the pursuer was aware throughout that the defender required price certainty, which was no more than a shorthand means of referring to the stated requirement for a total price covering all the services requested.

Question (i) Were the defender's Instructions to Bidders sufficiently clear to permit of uniform interpretation by all RWIND tenderers?

[77] Under this heading I will consider in turn: the requirement not to make assumptions; the requirement to fully price the Bid; what was required of Bidders in relation to infrastructure build costs; the consequences of submitting a non-compliant Bid;

and those parts of the documentation founded on by the pursuer as giving rise to an ambiguity. All of these must be considered by reference to what would have been understood by the RWIND tenderer.

The requirement not to make assumptions

[78] While the OBS admittedly envisaged that certain assumptions might be made, the RWIND tenderer could have been in no doubt from the instructions in Volume 4 of the ITSFB that the Final Bid must not contain assumptions as to price. This was made clear in several places in the ITSFB, including the pricing spreadsheet; see paragraphs [57] to [63] above.

The requirement to fully price the Bid

[79] The RWIND tenderer could also have been in no doubt about the requirement to submit a fully priced Bid, or as to what that entailed. The ITSFB explicitly stated that the Pricing Submission would be evaluated on the basis of whole life costs over 6 years (Volume 1, section 3.4.1). Section 2 stated that Bidders must complete all aspects of the pricing spreadsheet. There were then detailed instructions as to how to complete that spreadsheet. It was also explicitly stated that the price to be evaluated was the total cost of services from the Transformation Date requested in the Asset Register – Table 1a. It was therefore imperative that a fully priced Bid be submitted, as the RWIND tenderer would have understood.

What was required of Bidders in respect of infrastructure build costs?

[80] The RWIND tenderer would therefore have understood (as did the pursuer when it made its Initial Bid) that if infrastructure build was proposed, the cost of that build would require to be included in the pricing spreadsheet: either in Table 1a, as a set-up charge or ECC, failing which in Table 4 as "an additional cost not covered in any of the previous tables". For this reason, the argument as to the distinction between ECCs and infrastructure build costs is essentially an arid one. The inclusion of a column headed ECCs in the pricing table could not have led the RWIND tenderer to understand that if an infrastructure build cost was to be charged to a SWAN Member, it did not require to be included somewhere in the table. Finally, the requirement to price for the requested service at the Transformation Date (and not at some unspecified later date) necessarily carried with it a requirement to price for infrastructure build costs if the necessary infrastructure for the service offered – in this case, FTTP – would not be in place by that date.

[81] In relation to Table 4, Mr McLaughlin placed some reliance upon the requirement to state charges that the Bidder would "expect" to be paid, arguing that since the SWAN Member would be presented with a range of options, the pursuer would not "expect" any infrastructure build costs to be paid. However, that is not what "expect" means in this context. On Mr McLaughlin's own account, the pursuer did expect the SWAN Member to pay for any other catalogue service selected, and those were not priced in Table 1a. The pursuer also expected the SWAN Member to pay for any infrastructure build costs which that SWAN Member elected to incur (however unlikely that might be).

The consequences of submitting a non-compliant Bid

[82] The short answer here is that the ITN – the anchor document, which applied throughout – stated at 4.8, under the heading "Important Notices", that the defender reserved the right to reject or disqualify a Bidder where (among other things) a Bid was materially incomplete. I consider that this instruction did have the necessary degree of transparency and clarity; indeed, it could scarcely have been any clearer. In *William Clinton*, above, the lack of clarity arose from an ambiguity in one of the demanded criteria, which referred to "outcomes", which was capable of being interpreted in different ways. In the present case, there is no ambiguity. (There might be room for debate as to whether a Bid is materially incomplete or not, but that is a separate issue which arises for consideration at a different stage). Likewise, the present case can be distinguished from *MLS (Overseas) Limited* v *Secretary of State for Defence* [2017] EWHC 3389 (TCC) where the documentation did not contain an express statement that a fail score against a particular question would result in automatic or potential rejection. Again, that is not the situation in the present case. If the pursuer's Bid is ultimately held to be materially incomplete, the pursuer cannot be heard to argue that it was unaware that disqualification was an option open to the defender.

Ambiguities

[83] The pursuer argues that an ambiguity arose from OBS 10.3.4.1, which invited Bidders to detail their implementation plan, making clear key assumptions and constraints; and, in a similar vein, from 10.3.6.1, inviting a description of what impact the NGB timetable had on the ability to deliver any of the catalogue services. However, neither of these is inconsistent with a requirement to submit a fully priced Bid, and I do not consider that they were such as

to cause doubt in the mind of the RWIND tenderer as to what was required when it came to completion of the pricing spreadsheet. It is also telling that the pursuer itself, among its plethora of other questions, did not ask the defender to clarify any ambiguity arising from these questions.

[84] The pursuer also founds upon the Financial Model Completeness Table, Table 16 in the ITSFB, which stated that a Bid which included pricing assumptions would receive a score of 0, which it argued was an indication to the RWIND tenderer that a non-compliant Bid which contained a pricing assumption would not be disqualified. However, as I have pointed out, the pursuer's Bid was not disqualified because of an assumption *per se* but because it was materially incomplete; and there was no ambiguity about the power to disqualify a materially incomplete Bid.

Conclusion on question (i)

[85] For all of these reasons, I conclude that the tender documentation did have the requisite degree of clarity and transparency to permit of uniform interpretation by all RWIND tenderers. As such, it is unnecessary in this context to consider the clarifications given by the defender in response to the pursuer's queries: there were no ambiguities which required clarification and the defender was entitled to say to the pursuer, in effect, that it should read the documentation. That said, the clarifications given were also clear and consistent with the wording of the documentation, in confirming that Bids must be fully priced. Accordingly, the wording of the documentation did not place the defender in breach of its regulation 19 obligations. I therefore turn to the next question.

Question (ii): was the pursuer's Final Bid compliant with the Instructions to Bidders?

[87] Under this heading I will consider: whether the pursuer's Final Bid contained a pricing assumption, much of the pursuer's case being predicated on the basis that it did not; and, whether it did or not, whether it was a fully priced Bid.

Did the pursuer's Final Bid contain a pricing assumption?

[88] Mr McLaughlin gave detailed evidence as to why he considered that the assumption which underpinned the pursuer's Bid – that FFIB would be provided by others – was a technical, not a pricing, assumption. Mr McLaughlin's definition of a pricing assumption as being one which, if wrong, means that the price is wrong, whereas a technical assumption is one which, if wrong, means that the solution is wrong, is superficially attractive, if only because it is easy to understand; although perhaps less so to apply in practice. However, on deeper analysis, I am not persuaded that the assumption underlying the pursuer's Bid can be swept aside as easily as Mr McLaughlin's approach would have it. In the first place, it depends on what is meant by "solution". Mr McLaughlin used that term to refer to the pursuer's decision not to offer infrastructure build, whereas I prefer Mr McSherry's narrower interpretation, that the pursuer's solution was the offer to provide FTTP connectivity which fits more closely the definition of "Solution" in the ITN Glossary (see above, paragraph [26]); and that what Mr McLaughlin described as a "solution" was no more than the pursuer's approach, which was not to offer, or price for, infrastructure build. On that interpretation it is difficult to categorise the pursuer's assumption as being a technical one. There is not necessarily such a neat dividing line between pricing and technical assumptions as Mr McLaughlin's categorisation would suggest. Perhaps a better

question is simply to ask whether the pursuer's assumption was one which had an impact on the price, rather than get embroiled in a detailed discussion as to what might be the precise definition of a pricing assumption (bearing in mind that the instruction in Volume 4 was simply not to include any assumptions). Indeed that was the very reason the pursuer made the assumption – to lower the cost of its Bid: see for example the pursuer's response in its "50 Site Value Improvement" paper (above, para [41]). It is difficult to argue otherwise when the cost of the pursuer's Bid was £X less than it would have been had the FFIB costs included at Initial Bid Stage been included in Table 1a; and £Y less than it would have been had the costs narrated in the Interim Bid been included. It was also telling (despite his valiant attempt to argue otherwise) that Mr McLaughlin included the pursuer's assumption in the pricing response at Interim Bid stage, rather than in the response to the OBS where (of necessity, because no pricing assumptions were by now permitted) it appeared at Final Bid stage.

[89] For these reasons, I conclude that the pursuer's Bid did include a pricing assumption. To that extent, it was not a fully compliant Bid.

Was the pursuer's Final Bid fully priced?

[90] This question is of fundamental importance, since it was the perceived failure to fully price the Bid which led to the defender's concluding that the Final Bid was materially incomplete (see Disqualification Notice paragraph 6.6, referred to at para [69] above). By focussing on whether infrastructure build was required or not, the pursuer omitted to notice (or at least to take into account) that the instructions required Bidders to provide a price for providing the service on the date requested. The pursuer meets this objection to its Bid by

pointing out that the Model Catalogue Services were all fully priced but that is, with respect, no answer. The Model Catalogue was not part of the Overall Price as that term is defined in Section 2.2 of the ITSFB. Thus, it is not enough for the pursuer to say, as it does, that a SWAN Member could have selected another fully priced service. The fundamental point is that neither that cost (let alone the cost of FFIB, should the SWAN Member decide to go down the privately funded route) was included in the pricing spreadsheet, with the inevitable consequence that the pursuer's Bid was not fully priced as at the Transformation Dates, as had been required. The fallacy in the pursuer's approach to its Bid was that if the necessary infrastructure build was not in place by the Transformation Date requested by a SWAN Member, it expected that SWAN Member to change its requirements, either by agreeing to wait until FFIB had been carried out by R100 or Openreach; or by selecting another (unpriced for) service. That was not an approach open to it in light of the instructions to Bidders.

[91] I therefore conclude that the pursuer's Bid was not fully priced, and in that material respect, it was not compliant with the Instructions to Bidders. This leads to the final question, that of proportionality and rationality.

Question (iii): did the defender act proportionately (and rationally) in deciding to disqualify the pursuer's Bid?

[92] The pursuer has two main points. First, that the defender ought not to have disqualified the Final Bid when the option of scoring it was available; and second, that it was disproportionate and irrational for the defender to disqualify its Final Bid when it did

not disqualify the Interim Bid, which in any event breached the obligation to act consistently throughout the process.

[93] The first point can be disposed of relatively swiftly, and to an extent has already been dealt with. The defender was entitled to disqualify a materially incomplete Bid. The pursuer's Bid was not only incomplete, it omitted costs of £Y (the indicative cost of FFIB in the Interim Bid). When regard is had to the amount of £Y, in the contest of the contract value, it cannot be maintained that such an omission was not material. Further, as Mr Hislop pointed out, the Financial Model Completeness table contained qualitative criteria. To have scored it would still have left the defender unable to score the price, which involved a quantitative evaluation. As senior counsel for the defender submitted, scoring the pursuer's Bid would have taken the defender nowhere.

[94] The second point requires greater consideration. The defender's short answer to it is that assumptions were permitted at Interim Bid stage but not at Final Bid; hence the pursuer's Interim Bid could not have been disqualified. That is true up to a point, but is not a complete answer, given that the pursuer's Final Bid was disqualified not because it contained an assumption but because it was not fully priced; and in that respect, it did not differ from the Interim Bid.

[95] However, the argument that a Bidder should not be disqualified because it should have been disqualified at an earlier stage is not a greatly attractive one. Besides, the other material difference between the Interim and Final Bids was that the former did contain pricing information, albeit not in the pricing spreadsheet. I do not consider that it was irrational to disqualify the pursuer's Final Bid, not having disqualified the Interim Bid. In no way could the decision be described as capricious or arbitrary.

[96] As for proportionality, it is difficult to see what measure short of disqualification the defender could have adopted. It had already given adequate responses to the clarification sought by the pursuer following submission of its Interim Bid. The pursuer's Final Bid omitted costs to a material extent. On no view can it be said that the decision to disqualify the pursuer's Bid was manifestly disproportionate, given the scale of the omission. Since the pursuer's Bid was not fully priced, it was, as Mr Hislop said, simply not possible for the defender to score it quantitatively. The decision to disqualify in these circumstances was virtually inevitable; certainly one the defender was entitled to reach.

[97] I therefore conclude that the defender's decision to disqualify the pursuer's Final Bid was neither irrational nor disproportionate.

Disposal

[98] For all of the foregoing reasons, I shall repel the pursuer's first and second pleas-in-law, sustain the defender's second plea-in-law and grant decree of absolvitor.