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Claim No: CO/3119/2021
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Claim No: CO/2971/2022
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Claim No: CO/7/2023

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
TECHNOLOGY AND CONSTRUCTION COURT (KBD)

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

Date: 06/11/2023

Before :

MRS JUSTICE O'FARRELL DBE

- -

Between :

SIEMENS MOBILITY LIMITED	**Claimant**
- and -	
HIGH SPEED TWO (HS2) LIMITED	**Defendant**
- and -	
(1) BOMBARDIER TRANSPORTATION UK LIMITED **(2) HITACHI RAIL LIMITED**	**Interested Parties**

- -
- -

Fionnuala McCredie KC, Ewan West, Fiona Banks, Alex Littlewood & John Steel (instructed by **Osborne Clarke LLP**) for the **Claimant**
Sarah Hannaford KC, Simon Taylor, Ben Graff & Tom Walker (instructed by **Herbert Smith Freehills LLP**) for the **Defendant**
Azeem Suterwalla (instructed by **Allen & Overy LLP**) for the **Interested Parties**

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- -

Approved Judgment

This judgment was handed down remotely at 10.30am on Monday 6th November 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives

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MRS JUSTICE O'FARRELL DBE

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Mrs Justice O'Farrell:

Introduction

1. These proceedings concern a challenge by the claimant ("Siemens") in respect of a procurement exercise ("the Procurement") carried out by the defendant ("HS2") under the Utilities Contracts Regulations 2016 ("the UCR"), relating to: (i) a manufacture and supply agreement for a minimum fleet of 54 rolling stock units for the HS2 rail project ("the MSA"); and (ii) a train maintenance and services agreement ("the TSA") for a minimum period of 12 years with optional extensions over the life of the rolling stock (together referred to as "the Contract").

2. The Procurement was commenced on 21 April 2017 by a notice published in the Official Journal of the European Union, stating that the value of the proposed Contract was estimated at £2.75 billion and would be conducted using the negotiated procedure in regulation 47 of the UCR.

3. Following pre-qualification, there were five stages of evaluation to identify the lead tenderer:

    i) Stage 1 comprised the submission of the tender, including a declaration that the bid complied with the mandatory Train Technical Specifications ("the TTS").

    ii) Stage 2 comprised three scored elements: Stage 2.1 – levels of compliance with the TTS; Stage 2.2 – deliverability of the trains to the stated TTS; and Stage 2.3 – the maintenance technical plan response.

    iii) Stage 3 concerned assessment of three delivery plans: DP1 – train design, manufacture and acceptance; DP2 – responsible procurement; and DP3 – train service and whole life performance.

    iv) Stage 4 concerned assessment of the deliverability of DP4 – benefits realisation (skills, employment and education, and supply chain strategy).

    v) Stage 5 comprised evaluation of the whole life value ("WLV") of the bids and determination of the 'Assessed Price'.

4. At the end of Stage 4, the scored elements of the components in Stages 2 to 4 were used to calculate an overall classification and evaluation rating for each tenderer. In order to proceed to Stage 5, it was necessary for the tenderers to meet the defined evaluation threshold for each component; alternatively, if any tenderer failed to meet the threshold (a 'Shortfall Tender'), to be deemed to meet the threshold by HS2's exercise of discretion.

5. Siemens met the evaluation threshold for each component. A joint venture ("the JV"), comprising Bombardier Transportation UK Limited ("Bombardier") and Hitachi Rail Limited ("Hitachi"), failed to meet the evaluation threshold in respect of one component, DP1.5, but was deemed to meet the evaluation threshold as a Shortfall Tender. Accordingly, Siemens and the JV proceeded to Stage 5 of the competition.

6. On 31 March 2021 HS2 approved the JV as lead tenderer, on the basis that the JV's Assessed Price was substantially lower than Siemens' Assessed Price. On 21 May 2021 HS2 informed the tenderers of that the JV was the lead tenderer.

7. On 29 October 2021 HS2 notified Siemens that it had decided to award the contract to the JV ("the Contract Award Decision").

8. On 30 November 2021 HS2 entered into the Contract with the JV.

9. Siemens seeks to challenge the lawfulness of the procurement process and the award of the Contract to the JV on the following grounds:

    i) HS2 took into account undisclosed matters and there were manifest errors in its assessment of the bids at Stages 2 and 3;

    ii) HS2 wrongly exercised its discretion in permitting the JV to continue to Stage 5 of the procurement exercise despite submitting a Shortfall Tender;

    iii) HS2 wrongly consented to a change of control of the JV, following Alstom's acquisition of Bombardier, permitting a change of circumstances, sharing confidential and commercially sensitive information with Alstom and the JV, and giving them an unfair advantage;

    iv) the Stage 5 WLV evaluation was flawed in that: (a) there were manifest errors and HS2 failed to take into account the impact of modifications necessary to rectify the JV design issues concerning dwell time; and (b) HS2 wrongly concluded, following an abnormally low tender review, that the JV's pricing was explained and justified;

    v) the decision by HS2 to award the Contract to the JV was manifestly erroneous because: (a) HS2 wrongly failed to verify whether the JV met the relevant mandatory TTS requirements and/or other threshold requirements; and (b) HS2 failed to carry out adequate pre-contract checks as to the JV's ability, resources and financial standing to perform the contract;

    vi) a conflict of interest arose by reason of membership of a Bombardier pension scheme by Mr Sterry (Lead Technical Assessor) and Mr Williamson (member of a review panel), both of HS2; further, during the procurement Mr Sterry had informal contact with ex-colleagues at Bombardier.

10. HS2 disputes the allegations on the following grounds:

    i) the evaluation process was thorough and there was no manifest error in HS2's assessment of Stages 2 or 3;

    ii) the JV met the overall DP1 evaluation threshold and HS2 was entitled to exercise its discretion under the ITT conditions to deem the JV's Shortfall Tender as meeting the evaluation threshold for testing;

    iii) following the acquisition by Alstom of Bombardier, Alstom and the JV were obliged to notify HS2 of the change in circumstances, including which tenderer

would continue in the procurement exercise; there was no improper sharing of information;

iv) the Stage 5 assessment was properly carried out in accordance with the ITT: (a) although modelling was carried out to consider potential improvements to dwell time and accessibility, no decision was made and no technical or commercial change process was initiated with the JV prior to contract; and (b) HS2 carried out an abnormally low tender review on both Siemens' tender and the JV's tender, and concluded that the pricing in both was explained and justified;

v) HS2 acted properly and within its margin of discretion in deciding to award the Contract to the JV: (a) the JV's Stage 2.2 scores supported its stated compliance with mandatory TTSs; and (b) HS2 carried out pre-contract award checks which did not give rise to any grounds to reconsider the status of the JV as lead tenderer or the decision to recommend Contract Award;

vi) the facts and matters relied on by Siemens did not give rise to any conflict of interest and the conflict of interest claims are time-barred.

11. The relief sought by Siemens is declaratory relief in respect of key decisions, including the Contract Award Decision, together with damages. The scope of this trial is limited to the issues of liability, causation and whether any breach is sufficiently serious to give rise to an award of damages.

The Procurement

12. The Procurement was conducted using the negotiated procedure with prior call for competition.

PQP

13. The purpose of the pre-qualification process was to allow HS2 to assess the eligibility, economic and financial capacity, and technical and professional ability of applicants expressing an interest in bidding for the Contract.

14. The Pre-Qualification Pack (the "PQP") was issued on 21 April 2017 and included the following requirements for bidders:

i) to confirm the accuracy of their expressions of interest ("EOI"), to identify any actual or perceived conflicts of interest, and to enter into a confidentiality agreement with HS2;

ii) to identify any grounds for mandatory or discretionary exclusion, such as whether there were deficiencies in the performance of a substantive requirement under a prior public contract which led to early termination of that prior contract, damages or other comparable sanctions;

iii) to demonstrate that they had sufficient economic and financial resilience to supply the rolling stock and whole-life fleet maintenance required under the Contract, including requirements to meet various financial thresholds in respect of net assets, liquidity, gearing and interest cover;

iv) to provide relevant evidence of rolling stock manufacture and maintenance experience by reference to up to twelve case studies; and

v) to provide evidence of delivering new trains, detailing how timely deployment of reliable products would be ensured by reference to up to three case studies (including one case study focusing on rolling stock routinely operated at a service speed greater than 250km/h).

15. Under the terms of the PQP, HS2 reserved the right to exclude a bidder at any stage of the Procurement up to the award of the Contract if it failed to satisfy any of the requirements of Stages 1 to 3 of the PQP, or its circumstances changed so that it no longer satisfied any of those requirements. Further, bidders were required to notify HS2 if any of the information provided in their EOI changed at any subsequent stage in the procurement process and HS2 reserved the right to re-assess such EOI where it became aware of any change in circumstances.

16. Following the PQP stage, five bidders, including Siemens, Alstom and the JV, were invited to tender.

The ITT

17. On 26 July 2018 the invitation to tender ("the ITT") and the TTS were issued. Following the initial issue, there were revisions to the documents and the final version of the ITT (Version 6) was published on 24 May 2019. The ITT consisted of three volumes, namely, the instructions for tenders ("the IfT"), the MSA and the TSA.

18. The IfT included the following introduction:

> "1.1.1 This Rolling Stock Manufacture and Maintenance Services Invitation to Tender (ITT) relates to a procurement using the negotiated procedure with prior call for competition, pursuant to the Utilities Contracts Regulations 2016 …
>
> 1.1.2 HS2 Ltd intends to procure a fleet of Conventional Compatible Trains (hereinafter referred to as the Rolling Stock) on a 'Design-Build-Maintain' basis.
>
> 1.1.3 The procurement seeks to ensure that the Rolling Stock provides the best whole life value to the HS2 Programme, to taxpayers, to future HS2 Train Operators, and ultimately to the travelling customer.
>
> …
>
> 1.1.5 This ITT, the structure of which is set out below in Section 1.2, sets out the requirements of the Contracts, the Procurement timetable, instructions for submitting a compliant Tender, and the processes for tender evaluation, negotiation and contract award.
>
> 1.1.6 The successful Tenderer will be required simultaneously to enter into the following Contracts at Contract Award:

> a. Manufacture and Supply Agreement ('MSA') of a minimum fleet of 54 Units; and
>
> b. Train Services Agreement ('TSA') for a minimum period of 12 years with optional extensions over the life of the Rolling Stock."

19. Section 1.3 of the IfT stated that the purpose of volume one of the ITT was to explain the scope of the Procurement, including an overview of the Contract that HS2 was seeking to procure, and to provide tenderers with guidance and instructions on (i) how to prepare and submit their tenders, (ii) how HS2 would evaluate the tenders, and (iii) the process for Contract Award.

20. Section 2 of the IfT explained that volume 2, the MSA, would define the commercial relationship between HS2 ('the Purchaser') and the successful tenderer (the train manufacturer and maintainer or 'TMM') for the design, build and supply of the train units and equipment. Highlighted features of the MSA included the following:

    i) Section 2.4.1 informed the tenderers that the TMM would be required to demonstrate compliance of the units with the TTS requirements through a series of design, assurance, compatibility, testing and acceptance mechanisms set out in the MSA.

    ii) Section 2.6 provided that, as part of Stage 3 of the tender process (DP 1.2), the tenderers were required to supply a project programme in line with the requirements of the MSA, including the contract programme dates specified in the MSA. From Contract Award, the TMM would be required to maintain the project programme in accordance with the terms of the MSA.

    iii) Section 2.8 provided that within three months of the commencement date of the MSA, the TMM would be required to produce a design plan, setting out how it would develop the design of the units and equipment.

    iv) Section 2.10 provided that the TMM would be required to work collaboratively with other rail system suppliers to integrate their respective systems with each other, and must provide assistance in HS2's development of a systems integration ('SI') laboratory.

21. Section 3 of the IfT explained that volume 3, the TSA, would define the commercial relationship between HS2 ('the Operator') and the TMM for the maintenance and whole life care of the fleet.

22. Section 4 of the IfT informed the tenderers that a train operating company ('the West Coast Partner'), would be engaged as shadow operator for the commencement of HS2 services. The West Coast Partner would have responsibility for developing the train services as a joint operation between HS2 and existing West Coast services, and was expected to become the Operator under the TSA, or the prime beneficiary of such services under an alternative commercial model. As such, the West Coast Partner would work with HS2 under the MSA and TSA as the 'Operator's Representative'.

23. Section 6 of the IfT set out the process by which HS2 would evaluate the tenders, through five stages of evaluation.

24. Stage 1: 'Mandatory Compliance' required submission of:

    i) a form of tender and certificate of bona fide tender, including written confirmation that there was no undisclosed change in circumstances since the expression of interest;

    ii) letters of support regarding bonds, guarantees and insurance; and

    iii) a declaration of compliance with the 'Mandatory TTS Requirements'.

25. Stage 1 would be assessed on a compliant/non-compliant basis by a review of the submitted documentation. Any non-compliant bids would be disqualified. Further, section 7.3.3 of the ITT stated that HS2 would also disqualify any tender where the tenderer subsequently disclosed within its tender or following a request for clarification that it did not comply with any one of the Mandatory TTS Requirements.

26. Stage 2: 'Technical Compliance' comprised three scored elements, each of which had its own evaluation threshold:

    i) TTS Compliance (Stage 2.1) required tenderers to confirm their level of compliance with each requirement of the TTS by completing the TTS response spreadsheet, indicating whether their proposal was compliant or non-compliant with each TTS requirement. Any non-compliance in respect of a Mandatory TTS Requirement would result in disqualification. Other requirements were scored.

    ii) TTS Deliverability (Stage 2.2) assessed the tenderer's response to the TTS deliverability questions, requiring supporting evidence to demonstrate the feasibility and justification for the tenderer's design proposal.

    iii) Maintenance Technical Plan (Stage 2.3) comprised an assessment of the tenderer's maintenance technical plan.

27. Stages 3 and 4 comprised the assessment of four delivery plans:

    i) DP1: Train Design, Manufacture and Acceptance, comprising 5 sub-plans, including DP1.5 Testing Sub-Plan;

    ii) DP2: Responsible Procurement;

    iii) DP3: Train Service Delivery and Whole Life Performance;

    iv) DP4: Benefits Realisation.

28. The questions for Stages 2.2, 2.3, 3 and 4 were divided into a number of components, each of which would be assessed as 'Not addressed'; 'Weak'; 'Reasonable'; 'Strong' or 'Not Applicable'. On the basis of the scores awarded for each component, tenderers would be awarded an overall 'Classification' and 'Evaluation Rating' for each question.

29. Only tenderers meeting or exceeding all of the relevant mandatory requirements and evaluation thresholds for Stages 2 to 4 would proceed to Stage 5. At Stage 5, none of the scores achieved in Stages 2 to 4 would be carried forward for inclusion in the assessment (save for resolving any tie-break in the Stage 5 Assessed Price).

30. Stage 5 assessed whole life value, WLV, and calculated the Assessed Price of a tender as the net present value for a series of life-cycle costs and monetised benefits over the period from the commencement date of the MSA to the presumed end of the operating life of the units (assumed for evaluation purposes to be 31 March 2062). The tenderer with the lowest Assessed Price would be identified as the lead tenderer.

31. The life cycle costs included: (a) the capital costs of the original 54 trains/units; (b) the maintenance costs over the 35 year life of the initial units; (c) energy consumption for operating the 54 units over the HS2 and conventional rail network ("the CRN") over their 35 year life; (d) the track access charges for operating the initial units on the CRN; and (e) the capital and maintenance costs of providing certain additional units if the option were exercised by HS2.

32. The monetised benefits related to (a) the number of seats ('Value of Incremental Capacity') and (b) the level of pass-by (external) noise ('Value of External Noise Level'). The monetised benefits operated to reduce the Assessed Price for any increase in the number of seats above the benchmark of 554 seats and for a lower noise level than 96dB(A).

33. The Assessed Price was calculated using the Whole Life Value Model ("the WLVM") as follows:

    i) Tenderers were required to complete the input worksheets in the financial pro forma by entering the relevant figures in relation to the life cycle costs and monetised benefits, including the number of seats on the train, the energy consumption rate and a breakdown of the MSA total contract price.

    ii) On the basis of the tenderers' inputs, the financial pro forma automatically carried out calculations and generated outputs, by way of calculation worksheets and output worksheets.

    iii) The outputs from the financial pro forma were inputted by HS2 into the WLVM and the model generated the Assessed Price.

34. The tenderer with the lowest Assessed Price would be identified as the interim lead tenderer. If no other tenderer's Assessed Price was less than 103% of the interim lead tenderer's Assessed Price, the interim lead tenderer would be confirmed as the lead tenderer.

35. Following identification of the lead tenderer, the Contract Award process would take place, including:

    i) 'contractualisation' of the tenderer's delivery plan commitments, train proposal, financial information and commercial proposal template;

ii) negotiations with the lead tenderer to improve the acceptability of any matters identified as being less than fully satisfactory to HS2 against the requirements set out in the ITT;

iii) issue of the award decision notices to all tenderers notifying them of the outcome of the Procurement and the name of the tenderer to whom HS2 intended to award the Contract; and

iv) contract execution following expiry of the standstill period.

36. Section 14.1 of the IfT provided that HS2 would award the Contract on the basis of the most economically advantageous tender from the point of view of HS2, that is (subject to a tie-break or disqualification in accordance with the terms of the ITT) the tender which offered the lowest Assessed Price of all tenders remaining in the evaluation after Stage 5.

37. Section 15.3.2 of the IfT provided that HS2 reserved the right at its sole and absolute discretion, at any time and without cost to HS2, to the extent permitted by law to terminate, cancel, postpone or suspend, for any reason any part of or the whole of the Procurement and to reject all or any proposals and to terminate discussions with all or any tenderers at any time.

38. Section 15.3.3 provided that neither the issue of the ITT nor any related procurement process committed HS2 at any time to award the whole or part of the Contract to any party.

Tender evaluation

39. The Tender Opening and Evaluation Procedure ("TOEP") set out the process by which the tenders were evaluated, with the stated aim of ensuring that the evaluation process was compliant with legal requirements, applied consistently, planned effectively, open, fair and transparent, non-discriminatory, and managed securely.

40. Operational day to day management of the evaluation was led by the 'Procurement Lead', whose role was to ensure that the opening and evaluation of the bids were in compliance with the TOEP. Berni van Haeften was the Procurement Lead until July 2019 when he was succeeded by Krunal Sharma.

41. Stage 1 was assessed on a pass/fail basis. Any tender that failed to meet the Stage 1 requirements resulted in that tender being treated as non-compliant and mandatory disqualification. The Procurement Lead verified with the commercial advisors (Chris Warren and Mike O'Hare), senior legal counsel and with the Lead Technical Assessor (Tim Sterry) that each tender complied with the Stage 1 mandatory criteria, following which a Stage 1 compliance report was produced.

42. At Stage 2, any tender that failed to meet the Stage 2.1 TTS compliance evaluation thresholds resulted in that tender being treated as non-compliant and being mandatorily disqualified. Prior to the commencement of the evaluation of Stages 2.2 and 2.3, technical assessors carried out initial compliance checks to verify that the TTS response spreadsheet had been properly completed, including verification that the train proposal

and layout drawings submitted were consistent with the TTS response spreadsheet, by providing for the systems required to deliver the Mandatory TTS Requirements.

43. Initial evaluation of the bids at Stages 2.2, 2.3, 3 and 4 was conducted by three technical assessors assigned to each question. Each assessor allocated the tenderer a score for each component of the question being assessed and provided reasons for such score, as set out in Section 6.5.4 of the ITT:

> "Assessors will assess each Component, and record the degree to which each Component has been addressed using the following categories:
>
> a. **Not addressed** (no response received, or the response received is not in English, or the response received is irrelevant to the Component);
>
> b. **Weak**;
>
> c. **Reasonable**;
>
> d. **Strong**; or
>
> e. **Not Applicable** (Note: Stage 2.2 contains a limited number of questions which contain "If Applicable" Components …)."

44. That was followed by a process of moderation, whereby the three assessors for each question met together with a moderator to discuss their initial assessments and accompanying reasons. The outcome of their discussions was a consensus view on the scores to be awarded to each tenderer for each component and the agreed rationale for each consensus score. The reasons for any changes between the individual scores and final scores agreed in moderation were recorded in the moderation minutes.

45. The evaluation rating scoring matrix at Appendix P to the ITT was used to convert the scores for each component into an overall 'Classification' and 'Evaluation Rating' for each question as set out in Table 6 in the ITT:

Table 6: Evaluation Scale		
Classification	**Evaluation Rating**	**Definition**
Unacceptable	0%	A response in which all of the Components[1] are "Not addressed".
Very Low Confidence	10%	A response in which one or more of the Components of the question have been addressed to a Weak level, but in which none of the Components of the question are addressed to a Reasonable or Strong level.
Low Confidence	25%	A response which addresses at least one but no more than half of the Components of the question to at least a Reasonable level.
Moderate Confidence	55%	A response which addresses more than half but not all of the Components of the question to at least a Reasonable level.
Good Confidence	75%	A response which addresses all of the Components of the question to at least a Reasonable level and none, or not more than half, to a Strong level.
Very Good Confidence	90%	A response which addresses more than half of the Components of the question to a Strong level, with all remaining Components addressed to at least a Reasonable level.
Excellent Confidence	100%	A response which addresses all Components of the question to a Strong level.

46. If the response to any Stage 2.2 question received a score of 55% (Moderate Confidence) or lower, an investigation was conducted by Mr Sterry as the Head of Rolling Stock Engineering to identify any impact on: (a) Stage 1.3 Mandatory TTS Requirements compliance; (b) Stage 2.1 TTS evaluation thresholds compliance; and (c) Stage 5 WLVM evaluation inputs. Such investigation could involve requests to tenderers for clarification in respect of the relevant parts of the tender and could lead to disqualification.

47. The ITT specified a maximum possible score for each question, together with an 'Evaluation Threshold' score, as set out below.

Stage	**Maximum Possible Score (points)**	**Evaluation Threshold (points)**
Stage 2.2		
TTS Deliverability	17,900	13,425
Stage 2.3		
Maintenance Technical Plan	100	55
Stage 3		
DP1 Train Design, Manufacture and Acceptance Delivery Plan	4500	3150
DP1.1 – Project Management Sub-Plan	600	330
DP1.2 – Project Programme Sub-Plan	600	330
DP1.3 – Design and Development Sub-Plan	2300	1610

DP1.4 – Manufacturing and Assembly Sub-Plan	400	220
DP1.5 – Testing Sub-Plan	600	330
DP2 Responsible Procurement Delivery Plan	1000	550
DP3 Train Service Delivery and Whole Life Performance Delivery Plan	2000	1300
DP3.1 – Maintenance Delivery Sub-Plan	500	275
DP3.2 – Contact Mobilisation and Management Sub-Plan	400	220
DP3.3 – Trial Operations and Service Introduction Sub-Plan	300	165
DP3.4 – Reliability and Whole Life Management Sub-Plan	300	165
DP3.5 – Depot Design and Acceptance Sub-Plan	500	275
Stage 4		
Benefits Realisation Delivery Plan	1000	500

48. The Evaluation Rating percentage for each question (in accordance with the definitions in Appendix P) was applied to the maximum possible score for that question, resulting in a total score for the question and giving a cumulative total for evaluation Stages 2 to 4.

49. If a tender failed to meet any of the above Evaluation Thresholds, it would be treated as a Shortfall Tender. HS2 reserved the right to deem any Shortfall Tender as having met the Evaluation Thresholds, as set out in section 6.4 of the IfT. Any tenders that met, or were deemed to have met, the Evaluation Thresholds, would proceed to Stage 5.

50. At Stage 5, the Stage 5 assessors and commercial advisors reviewed the financial pro forma submitted by each tenderer remaining in the competition to ensure that: (a) the maintenance model was complete and consistent with the Stage 2.3 Maintenance Technical Plan; (b) the financial pro forma was complete and consistent with other aspects of the tender (and any authorised actions arising from any Stage 2.2 post evaluation check were implemented); and (c) the impact of any amended or withdrawn qualifications had been taken into account.

51. Initially, each tender was reviewed independently by two Stage 5 assessors and two commercial advisors. The Stage 5 assessors were permitted to consult with the technical assessors to verify, where necessary, that the data provided in the financial pro-forma was consistent with other aspects of the tender.

52. There followed a meeting attended by the Procurement Lead, the Lead Stage 5 Assessor, the Lead Technical Assessor, the Stage 5 assessors, commercial advisors and any technical assessors consulted, to review the outcome of the assessments and any issues raised. In respect of any issues raised, the Procurement Lead and the Lead Stage 5 Assessor could consult with the Head of Rolling Stock Procurement, or nominated delegate, to agree an appropriate course of action.

53. After completion of the financial pro forma review, the Stage 5 assessors transferred the information in the financial pro forma output sheets to the WLVM input sheets and the Assessed Price for each tender was generated. The transfer of data and the

evaluation assumptions were reviewed, and the Procurement Lead and Lead Stage 5 Assessor carried out a review of the Assessed Price for each tender to ensure consistency between each Stage 5 assessor.

Review Panels

54. At the end of each stage of the tender evaluation process, including the contract negotiation stage and at Contract Award, the evaluations were subject to review and governance by three review panels.

55. Review Panel 1 ("RP1") was the group responsible for ensuring that the evaluation was conducted in accordance with the ITT, the TOEP was adhered to and any issues arising during the evaluation were addressed. The members of RP1 were Mr Ariba (Head of Rolling Stock Procurement), Mr Williamson (Rails Systems Engineering Director), Ms Anna Lee (now Whittingham, Head Counsel) and Mr Rowell (Head of Delivery – Rolling Stock Project). The duties of RP1 included a requirement to review and, as appropriate, endorse the evaluation of each stage, identify any review actions required, and recommend to RP2 the re-evaluation of any particular stage, adjustment of any assessment or disqualification of a tenderer.

56. The role of Review Panel 2 ("RP2") was to review the recommendations from RP1 and, if satisfied, to endorse such recommendations to RP3. The RP2 members were Andy Cross (Rail Systems Procurement Director) and Iain Smith (Systems Delivery Director).

57. The role of Review Panel 3 ("RP3") was to review and, if appropriate, endorse the recommendations, actions and reports submitted by RP2, for onward submission to governance. The RP3 members were Richard Mould (Chair and Corporate Procurement Director), Nicole Geoghegan (General Counsel), Chris Rayner (Director of Infrastructure, Infrastructure Directorate) and Mark Howard (Chief Engineer, Infrastructure Directorate).

58. The TOEP required the production of governance reports. After conclusion of Stages 1 to 4 of the evaluation, the Procurement Lead prepared a report ("Tender Evaluation Report (1)") setting out the conclusions of those stages. The draft report was reviewed by RP1, RP2 and RP3; when approved, the Procurement Lead commenced Stage 5 of the evaluation.

59. At the end of Stage 5, the Procurement Lead prepared a further report ("Tender Evaluation Report (2)"), setting out the conclusions of Stages 1-5 and the initial ranking of tenderers, identifying the lead tenderer and the negotiation plan. That draft report was reviewed by RP1, RP2 and RP3 before submission to HS2 and the Department for Transport ("DfT") governance.

60. Following the negotiation process, the Procurement Lead drafted a final report ("the Award Recommendation Report"), which was reviewed by RP1, RP2 and RP3 before issue to HS2 and DfT for governance purposes.

Progress of the Procurement

61. The tender return date was 5 June 2019. Following revisions to the programme dates, re-stated tenders were submitted by 7 July 2020.

62. On 17 February 2020, Alstom's proposed acquisition of Bombardier was announced. On 31 July 2020, it was given clearance by the European Commission, subject to certain conditions.

63. On 1 December 2020, Alstom and Bombardier published statements confirming that all regulatory approvals had been received and the scheduled completion date of the acquisition was 29 January 2021.

64. On 21 December 2020, bidders were informed that the evaluation of Stages 2 to 4 had been completed. As a result of that evaluation, the JV was identified as a Shortfall Tender.

65. The RP1 meeting to consider Shortfall Tenders was held on 7 January 2021, followed by a second meeting on 15 January 2021.

66. On 19 January 2021, RP1 recommended to RP2 the Shortfall Tender Report and Tender Evaluation Report 1. On 19 January 2021, RP2 endorsed both reports. On 22 January 2021, RP3 approved the Shortfall Tender Report and on 26 January 2021 it approved Tender Evaluation Report 1.

67. In consequence, the JV's Shortfall Tender was deemed to meet the Evaluation Threshold and permitted to progress to Stage 5, with the result that only the JV and Siemens remained in the competition.

68. On 29 January 2021, tenderers were informed of the outcome of Stages 1 to 4 of the evaluation and were provided with details of their scores. Siemens was told that its bid had passed Stages 1 to 4 of the evaluation and would proceed to Stage 5. The JV was told that it failed to meet one evaluation threshold in Stage 3, DP1.5, but that HS2 had exercised its discretion under Section 6.4 of the information for tenderers in the ITT to deem the Shortfall Tender as meeting the threshold. Further, Siemens was told that HS2 had exercised its discretion to deem a shortfall tender of another tenderer as having met an evaluation threshold but was not told the identity of that tenderer.

69. On 29 January 2021, the completion of the acquisition of Bombardier by Alstom was announced.

70. On 8 March 2021, HS2 gave consent to the change of control arising as a result of Alstom's acquisition of Bombardier and on 12 March 2021, HS2 confirmed to bidders that the Alstom group did not have two tenders in the Procurement.

71. On 22 March 2021, RP1 recommended to RP2 Tender Evaluation Report 2. That report was endorsed by RP2 on 24 March 2021 and approved by RP3 on 25 March 2021.

72. On 26 March 2021, HS2 notified all tenderers that the JV and Siemens were the only tenderers in Stage 5 of the Procurement.

73. On 31 March 2021, the HS2 Board resolved to appoint the JV as Lead Tenderer.

74. On 21 May 2021, Siemens was informed that its bid was not the lowest Assessed Price and, therefore, the JV had been identified as the Lead Tenderer.

75. On 21 July 2021, RP1 recommended to RP2 the Rolling Stock Contractualisation and Negotiation Report. That report was endorsed by RP2 on 1 September 2021 and approved by RP3 on 13 September 2021.

76. On 8 September 2021, RP1 submitted to RP2 the Award Recommendation Report. That report was endorsed by RP2 on 10 September 2021 and approved by RP3 on 20 September 2021.

77. On 28 September 2021, the HS2 Board decided to recommend to the DfT the award of the Contract to the JV (the "Award Recommendation Decision").

78. By letter dated 29 October 2021, HS2 informed Siemens that it had decided to award the Contract to the JV (the "Contract Award Decision").

79. On 23 November 2021, the automatic suspension, imposed on the issue of Siemens' claim raising a challenge to the Contract Award Decision, was lifted by consent.

80. On 30 November 2021, HS2 entered into the Contract with the JV.

The proceedings

81. On 18 June 2021, Siemens issued proceedings in the TCC by way of a Part 7 claim under the UCR. Subsequently, additional Part 7 claims and claims for judicial review were issued and there are now 17 claims before this court.

82. Claim HT-2021-000231 was issued on 18 June 2021, alleging that HS2 failed to provide adequate reasons and/or sufficient documentation in respect of the decision to appoint the JV as lead tenderer; such decision was unlawful on the grounds that the JV no longer had the ability, resources, or economic or financial standing to perform the Contract; there were manifest errors in the Stage 5 evaluation of the JV's bid and/or HS2 failed to properly investigate whether the JV's bid was abnormally low (Claim 1).

83. On 24 June 2021 a judicial review claim, Claim CO/2193/2021 (now Claim HT-2021-000391), was issued on the same grounds as Claim 1.

84. Claim HT-2021-000344 was issued on 9 September 2021, alleging that HS2's decision to permit the JV's Shortfall Tender to remain in the Procurement was unlawful and challenging HS2's consent to the change of circumstances occasioned by Alstom's acquisition of Bombardier (Claim 2).

85. On 10 September 2021 a judicial review claim, Claim CO/3119/2021, was issued on the same grounds as Claim 2.

86. Claim HT-2021-000399 was issued on 15 October 2021, challenging HS2's decision to recommend to the Secretary of State for Transport that the Contract should be awarded to the JV, relying on the breaches set out in Claims 1 and 2 (Claim 3).

87. On 18 October 2021 a judicial review claim, Claim CO/3523/2021, was issued on the same grounds as Claim 3.

88. Claim HT-2021-000424 was issued on 29 October 2021, challenging the evaluation and conduct of Stage 5 of the procurement, alleging manifest errors in assessment and unlawful permission to the JV to change its bid (Claim 4).

89. Claim HT-2021-000434 was issued on 12 November 2021, challenging the Contract Award Decision based on alleged breaches of the pre-contract checks on the JV's bid and proposals to make substantial changes to the Contract post-award (Claim 5).

90. On 15 November 2021 a judicial review claim, Claim CO/3897/2021, was issued on the same grounds as Claims 4 and 5.

91. Claim HT-2022-000168 was issued on 13 May 2022, challenging the Contract Award Decision, alleging manifest errors in assessment, failure of the JV's bid to comply with mandatory TTS requirements and unlawfully allowing the JV to make substantial modifications to its tender after Contract Award (Claim 6).

92. On 16 May 2022 a judicial review claim, Claim CO/1729/2022, was issued on the same grounds as Claim 6.

93. By Order dated 17 June 2022, Claims 1 to 6 were consolidated and consolidated pleadings were served.

94. Claim HT-2022-000281 was issued on 15 August 2022, alleging that HS2 was in breach of its obligations to prevent, identify and/or manage the risk of conflicts of interest in respect of key individuals in the procurement team (Claim 7).

95. On 16 August 2022 a judicial review claim, Claim CO/2971/2022, was issued on the same grounds as Claim 7.

96. Claim HT-2022-000350 was issued on 16 September 2022, alleging that HS2 was in breach of its obligations in erroneously failing to recognise and/or take steps to remedy conflicts of interest in respect of key individuals in the procurement team (Claim 8).

97. On 22 September 2022 a judicial review claim, Claim CO/3470/2022, was issued on the same grounds as Claim 8.

98. By Order dated 1 November 2022, Claims 7 and 8 were consolidated with each other, ordered to be tried at the same time as Claims 1 to 6 and consolidated pleadings were served.

99. Following conclusion of the evidence in the hearing, on 29 December 2022 Claim HT-2022-000466 was issued, alleging that HS2 was in breach of its obligations in failing to identify, prevent or remedy a conflict of interest arising out of Mr Sterry's contacts with his former colleagues at Bombardier during the procurement (Claim 9).

100. On 3 January 2023 a judicial review claim, Claim CO/7/2023, was issued on the same grounds as Claim 9.

101. On 12 January 2023 Siemens issued an application for disclosure and on 8 February 2023 a further application was issued, seeking an order that Claim 9 be jointly managed with Claims 1 to 8.

102. On 20 January 2023 HS2 issued an application, seeking to strike out Claim 9 and/or for reverse summary judgement in respect of Claim 9. The Claim 9 applications were heard by this Court on 14 March 2023 and judgment reserved.

103. The grounds of challenge in respect of Claims 1-6 include the following material pleaded allegations in the Consolidated Re-re-re-re-re-amended Particulars of Claim ("POC") served on 29 November 2022 and the Re-re-amended Consolidated Reply ("Reply"):

    i) there were manifest errors in HS2's assessment of the bids at Stages 2 and 3 (paragraph 70I POC, paragraph 27H Reply);

    ii) the JV was permitted to continue to Stage 5 of the procurement exercise despite its failure to satisfy the evaluation threshold for testing set out in DP1.5 and therefore submitting a Shortfall Tender (paragraphs 58A-B POC, paragraph 20A Reply);

    iii) HS2 consented to a change of control of the JV, following Alstom's acquisition of Bombardier, permitting a change of circumstances and sharing confidential and commercially sensitive information with Alstom and the JV, giving them an unfair advantage (paragraphs 58D-F POC, paragraph 20E Reply);

    iv) the Stage 5 WLV evaluation was flawed in that HS2 identified an operational problem in respect of the JV's train design regarding dwell time but decided to permit a substantial modification to the JV design to be made post contract and/or the differential between the Assessed Price of Siemens and that of the JV failed to take into account the impact of such necessary modifications; together with other manifest errors (paragraphs 67-69 POC, paragraphs 25-26 Reply);

    v) HS2 wrongly concluded, following an abnormally low tender review, that the JV's pricing was explained and justified (paragraph 69 POC);

    vi) HS2 acted in manifest error in its decision to make the JV lead tenderer without verifying whether it continued to satisfy Stages 1 to 3 of the PQP and met the relevant mandatory TTS requirements and tender evaluation thresholds for Stages 1 to 4 (paragraphs 60-64 POC, paragraphs 22-25 Reply);

    vii) the decision by HS2 to award the contract to the JV was manifestly erroneous because the JV no longer had the ability, resources or financial standing to perform the contract (paragraphs 59-65 & 70 POC, paragraphs 22-27 Reply);

    viii) the Award Recommendation Decision was unlawful on the basis that the JV would be permitted to change material aspects of its tender post Contract Award to address the West Coast Partner's concerns as to the number of doors and internal layout of the JV's train design, without taking into account the impact of these decisions as part of the JV's Assessed Price and/or a substantial change at a later date to the TSA (paragraph 70 POC).

104. The additional grounds of challenge raised in the Consolidated Particulars of Claim in respect of Claims 7 and 8 served on 28 October 2022 and in the Particulars of Claim in respect of Claim 9 served on 29 December 2022 include:

i) in breach of Regulation 42 and its obligations of equal treatment, HS2 appointed two individuals, Mr Sterry as Lead Technical Assessor and Mr Williamson as a member of a review panel, for the Procurement, despite a conflict of interest by reason of their continuing membership of a Bombardier pension scheme (paragraph 30 of Claims 7&8 POC);

ii) in a further conflict of interest, during the Procurement Mr Sterry had informal contact with ex-colleagues at Bombardier (paragraph 46 of Claim 9 POC).

105. HS2's Re-re-re-Amended Consolidated Defence to Claims 1-6 served on 26 October 2022 includes the following key grounds of defence:

i) the allegations raised represent no more than Siemens' subjective opinion and/or a selective summary of the consensus rationales and do not establish any manifest errors or irrationality; HS2 lawfully applied the published award criteria, acted within its margin of discretion in awarding the scores given and provided sufficient reasons for those scores (paragraph 47K);

ii) the JV met the overall DP1 evaluation threshold; HS2 exercised its discretion in accordance with the tender conditions to deem the JV's Shortfall Tender as meeting the evaluation threshold for testing, as confirmed to Siemens on 29 January 2021 (paragraph 37A);

iii) following the merger, Alstom and the JV were obliged to notify HS2 of the change in circumstances, including which tenderer would continue in the procurement exercise; there was no improper sharing of information (paragraph 37E-G);

iv) there were no manifest errors in the Stage 5 evaluation, which consisted of the application of a disclosed formula to the two Stage 5 tenders; and the Stage 5 evaluation was not made on the basis of any unlawful change to the JV's bid or planned subsequent modification (paragraphs 44-46);

v) HS2 carried out an abnormally low tender review on both Siemens' tender and the JV tender, and concluded that the pricing in both was explained and justified (paragraph 45);

vi) HS2 was not obliged to carry out verification of the PQP or tender assessments and there were no grounds to reconsider the status of the JV as lead tenderer (paragraphs 39-40);

vii) HS2 acted properly and within its margin of discretion in finding that none of the issues considered in the pre-contract checks presented grounds to re-consider the award of the contract to the JV (paragraphs 41-43 & 47);

viii) the mandatory dwell time was based on a model designed to assess compliance on a station on the HS2 network, rather than conventional rail network stations; the JV's stage 2.2 scores supported its stated compliance with mandatory TTSs, including TTS-94, which contained the two-minute dwell time as a fixed parameter; although modelling was carried out to consider potential improvements to dwell time and accessibility, no decision was made and no

technical or commercial change process was initiated with the JV prior to contract; in any event, the differential between the Assessed Price of Siemens and that of the JV would not have been material to the tender outcome (paragraphs 44-46).

106. HS2's Consolidated Defence to Claims 7 and 8 served on 14 October 2023 asserts that the facts and matters relied on by Siemens did not give rise to any conflict of interest. In any event, the claims are time-barred.

107. Despite the evolving nature of the allegations during the course of these proceedings and the plethora of claims issued, the dispute has been manageable because the parties have co-operated at all stages (albeit at times through gritted teeth) to ensure that the matter could be brought to trial within a sensible timescale. I am particularly grateful to counsel, for their presentation of the myriad of issues arising, demonstrating an impressive grasp of the detail, and for their very clear and comprehensive written submissions.

The issues

108. The parties have largely agreed the issues that arise for determination, although there is no final agreed list of issues. I have had regard to the draft as a useful checklist when considering the claims but my findings do not necessitate a response to each of the sub-questions posed.

109. The material issues are addressed in this judgment in the following order:

i) the scoring challenges to Stages 2 and 3;

ii) the Shortfall Tender decision;

iii) consent to change of control;

iv) Stage 5 evaluation;

v) the abnormally low tender review;

vi) verification prior to negotiation;

vii) pre-contract checks;

viii) modifications;

ix) conflict of interest – Claims 7 and 8;

x) conflict of interest – Claim 9;

xi) other breach issues;

xii) Judicial Review claims.

Evidence

110. Siemens relied on the following witness evidence at trial:

i) Robert Bennett, Head of Pensions, Great Britain and Ireland (Siemens plc): Bennett 1 dated 4 November 2022 and Bennett 2 dated 10 November 2022;

ii) Giles Haley, Head of UK Rolling Stock Approvals, Siemens: Haley 1 dated 13 September 2022 and Haley 2 dated 4 November 2022;

iii) Joanne Hensher, Head of Siemens' Electrification & Automation Services business (GB & Ireland), Siemens: Hensher 2 dated 26 July 2022, Hensher 5 dated 13 September 2022 and Hensher 6 dated 4 November 2022;

iv) Steven Scrimshaw, Vice President of Siemens Energy Ltd, (GB & Ireland), Siemens, witness statement dated 4 November 2022;

v) Florian Stoesser, Finance Director for Rolling Stock and Customer Services, Siemens: Stoesser 1 dated 9 September 2022, Stoesser 2 dated 4 November 2022 and Stoesser 3 dated 4 November 2022.

111. HS2 relied on the following witness evidence at trial:

i) Olumide Ariba, Head of Rolling Stock Procurement – Station Common Components at HS2 (up to April 2022): Ariba 1 dated 22 July 2022 and Ariba 2 dated 4 November 2022;

ii) Jeremy Chapman, Head of Financial Governance and Treasury at HS2, statement dated 20 July 2022;

iii) James Dawson, Senior Rolling Stock Engineer at HS2, statement dated 14 July 2022;

iv) Richard Elliott, Associate Consultant – Rolling Stock for WSP, statement dated 19 July 2022;

v) Terry Hamilton-Jenkins, Associate Director at Arup, statement dated 21 July 2022;

vi) Caspar Lucas, Technical Director within the Rolling Stock Strategic Services team of Rail Consulting within SNC-Lavalin Atkins, statement dated 20 July 2022;

vii) Chris Rayner, Delivery Director Systems & Stations at HS2: Rayner 1 dated 22 July 2022 and Rayner 2 dated 11 November 2022;

viii) Bernard John Rowell, Head of Delivery for Rolling Stock Projects at HS2, statement dated 26 July 2022;

ix) Iain Smith, Systems Delivery Director at HS2: Smith 3 dated 22 July 2022, Smith 4 dated 13 September 2022 and Smith 5 dated 11 November 2022;

x) Timothy Sterry, Head of Rolling Stock Engineering at HS2: Sterry 1 dated 26 July 2022, Sterry 2 dated 4 November 2022 and Sterry 3 dated 11 November 2022;

xi) Christopher Alan Warren, director at Walker Warren Associates Limited, statement dated 26 July 2022;

xii) Thomas Williamson, Engineering Director for Operational Railway at HS2, statement dated 4 November 2022;

xiii) Aram Zagikyan, Senior Rolling Stock Engineer at HS2, statement dated 21 July 2022.

The UCR

112. It is common ground that for the purpose of the UCR, HS2 is a utility within the meaning of regulation 5 and Siemens is an economic operator.

113. The following regulations are material to the issues in this case.

114. Regulation 36 sets out the fundamental principles of equal treatment, transparency, non-discrimination and proportionality with which utilities must comply:

> "(1) Utilities shall treat economic operators equally and without discrimination and shall act in a transparent and proportionate manner."

115. Regulation 39 provides that a utility should not disclose information which has been forwarded to it by an economic operator and designated by that economic operator as confidential, including, but not limited to, technical or trade secrets and the confidential aspects of tenders. Exceptions to that provision include disclosure ordered by the court.

116. Regulation 42 obliges utilities to take appropriate measures to effectively prevent, identify and remedy conflicts of interest arising in the conduct of procurement procedures so as to avoid any distortion of competition and to ensure equal treatment of all economic operators.

117. Regulation 47 sets out the requirements of the negotiated procedure with prior call for competition, applicable to the Procurement:

> "(1) In negotiated procedures with prior call for competition, any economic operator may submit a request to participate in response to a call for competition by providing the information for qualitative selection that is requested by the utility.
>
> (2) The minimum time limit for the receipt of requests to participate shall, in general, be fixed at no less than 30 days—
>
> > (a) from the date on which the contract notice is sent; or
> >
> > (b) where a periodic indicative notice is used as a means of calling for competition, from the date on which the invitation to confirm interest is sent, and shall in any event not be less than 15 days.

> (3) Only those economic operators invited by the utility following its assessment of the information provided may participate in the negotiations.
>
> (4) Utilities may limit the number of suitable candidates to be invited to participate in the procedure in accordance with regulation 78(3) and (4).
>
> (5) The time limit for the receipt of tenders may be set by mutual agreement between the utility and the selected candidates, provided that they all have the same time to prepare and submit their tenders.
>
> (6) In the absence of such an agreement on the time limit for the receipt of tenders, the time limit shall be at least 10 days from the date on which the invitation to tender is sent."

118. Regulation 76 provides that utilities must select tenderers and candidates in accordance with objective rules and criteria.

119. Regulation 82 provides that utilities shall base the award of contracts on the most economically advantageous tender assessed from the point of view of the utility. Utilities have a wide discretion as to the criteria to be used in such assessment, including technical merit, aesthetic and functional characteristics, accessibility, design for all users, social, environmental and innovative characteristics.

120. Regulation 84 provides that a utility shall require a tenderer to explain a price or costs proposed if a bid appears to be abnormally low; save for limited exceptions, a utility may only reject the tender where the evidence supplied does not satisfactorily account for the low level of price or costs proposed.

121. Regulation 88 sets out the limited circumstances in which modifications to a contract may be made during its term without requiring a fresh procurement:

> "(1) Contracts and framework agreements may be modified without a new procurement procedure in accordance with these Regulations in any of the following cases—
>
> (a) where the modifications, irrespective of their monetary value, have been provided for in the initial procurement documents in clear, precise and unequivocal review clauses, which may include price revision clauses, or options, provided that such clauses—
>
> (i) state the scope and nature of possible modifications or options as well as the conditions under which they may be used; and
>
> (ii) do not provide for modifications or options that would alter the overall nature of the contract or the framework agreement;
>
> (b) for additional works, services or supplies by the original contractor, irrespective of their value, that have become

necessary and were not included in the initial procurement where a change of contractor—

(i) cannot be made for economic or technical reasons such as requirements of interchangeability or interoperability with existing equipment, software, services or installations procured under the initial procurement; and

(ii) would cause significant inconvenience or substantial duplication of costs for the utility;

(c) where both of the following conditions are fulfilled—

(i) the need for modification has been brought about by circumstances which a diligent utility could not have foreseen;

(ii) the modification does not alter the overall nature of the contract;

(d) where a new contractor replaces the one to which the utility had initially awarded the contract as a consequence of—

(i) an unequivocal review clause or option in conformity with sub-paragraph (a); or

(ii) universal or partial succession into the position of the initial contractor, following corporate restructuring, including takeover, merger, acquisition or insolvency, of another economic operator that fulfils the criteria for qualitative selection initially established, provided that this does not entail other substantial modifications to the contract and is not aimed at circumventing the application of these Regulations;

(e) where the modifications, irrespective of their value, are not substantial within the meaning of paragraph (7) …

…

(7) A modification of a contract or a framework agreement during its term shall be considered to be substantial within the meaning of paragraph (1)(e) where one or more of the following conditions is met—

(a) the modification renders the contract or the framework agreement materially different in character from the one initially concluded;

(b) the modification introduces conditions which, had they been part of the initial procurement procedure, would have—

(i) allowed for the admission of other candidates than those initially selected;

(ii) allowed for the acceptance of a tender other than that originally accepted; or

(iii) attracted additional participants in the procurement procedure;

(c) the modification changes the economic balance of the contract or the framework agreement in favour of the contractor in a manner which was not provided for in the initial contract or framework agreement;

(d) the modification extends the scope of the contract or framework agreement considerably;

(e) a new contractor replaces the one to which the utility had initially awarded the contract in cases other than those provided for in paragraph (1)(d).

(8) A new procurement procedure in accordance with these Regulations shall be required for modifications of the provisions of a contract or a framework agreement during its term other than those provided for in this regulation."

122. Regulation 101 sets out the requirements that must be followed when issuing contract award decision notices and, in particular, the obligation to provide the unsuccessful tenderer with the reasons for the decision, including the characteristics and relative advantages of the successful tender.

123. Regulation 104 provides that utilities owe economic operators duties to comply with the Regulations and any enforceable EU obligations in the field of public procurement.

124. Regulation 106 provides that a breach of the duty owed in accordance with Regulation 104 is actionable by any economic operator which, in consequence, suffers or risks suffering loss or damage.

125. Regulation 107 stipulates that proceedings must be started within 30 days beginning with the date on which the economic operator first knew or ought to have known that grounds for starting the proceedings had arisen. The Court has power to extend time, up to a maximum of 3 months, for good reason.

126. Regulation 113 provides that, where the contract has been entered into and there is no claim for ineffectiveness, the court may award damages to a tenderer which has suffered loss or damage as a consequence of the breach, subject to the requirement that the breach is sufficiently serious to give rise to damages.

127. Siemens' case is that, in addition to its UCR obligations, HS2 owed it a public law duty to act in accordance with Siemens' legitimate expectations. Initially, Siemens also advanced an argument that a duty of good administration was owed but that is not pursued. Its position is that public law duties may be assertable under the UCR, or may apply as separate free-standing public law duties, where there is a gap in the public law protections afforded to claimants by the regulations. HS2 disputes that public law duties

have any application to this procurement given that it is common ground that the UCR apply in this case.

128. I reject the argument that HS2 owed any public law duty to act in accordance with the bidders' legitimate expectations for the following reasons.

129. Firstly, there is no reference to any such obligation in the UCR. I accept Siemens' argument that the absence of an explicit reference to legitimate expectations is not conclusive, and the UCR must be applied in accordance with relevant domestic and EU law principles, but it does not follow that general and nebulous concepts should be introduced to expand the scope of the regulations. Unlike the obligation to avoid manifest error, which is directly derived from regulation 36, the principles of equal treatment, transparency non-discrimination and proportionality, together with regulation 76, requiring utilities to select tenderers and candidates in accordance with objective rules and criteria, there is no obvious regulation from which a general duty to act in accordance with legitimate expectations could be inferred.

130. Secondly, no authority has been identified in which general public law obligations have been used to supplement an applicable procurement regulations regime. Although that would not preclude the court from considering an extension based on first principles, such power must be exercised with great caution. A persuasive argument that the court should not exercise such power in this case can be found in *Bechtel Limited v High Speed 2 (HS2) Limited* [2021] EWHC 458 (TCC), where Fraser J (as he then was) at [283] to [298] considered and rejected the imposition of a duty of good administration in similar circumstances.

131. Thirdly, the obligation contended for is not necessary. The principles of transparency and equal treatment, which constrain the exercise of any discretion of the contracting utility by application of the tender rules, apply, as recognised in *Stagecoach East Midlands Trains Ltd v Secretary of State for Transport* [2020] EWHC 1568 per Stuart-Smith J (as he then was) at [41]-[46]. Siemens' response is that the duty to act in accordance with legitimate expectation is not co-extensive with the principles of transparency and equal treatment. That is correct but it does not provide persuasive justification, on grounds of principle or necessity, for importing an additional obligation to act in accordance with legitimate expectations.

132. In this case, Siemens' legitimate expectations are encompassed by the terms of the ITT and the express provisions of the UCR, including those set out above. Accordingly, there is no gap in the protection afforded to Siemens that needs to be filled by any public law obligations and they are not relevant to the Part 7 challenges under the UCR.

Issue 1 – Scoring Challenge to Stages 2-3

133. Siemens' case is that HS2 took into account undisclosed criteria in breach of the principles of transparency and equal treatment, and made manifest errors, in its assessment of the JV's tender at Stages 2 and 3 of the Procurement. Twenty-six errors are identified by Siemens across assessments made in respect of Stage 2.2 and Stage 3 (DP1 and DP3).

134. HS2's case is that the Procurement was extremely thorough, with multiple layers of approval, including RP1, RP2 and RP3, as well as the HS2 board and ultimately the

DfT. Further, in accordance with established legal principles, HS2 had a margin of appreciation in relation to the methods of evaluation, assessment and exercise of discretion. Its decisions fell within that margin.

Legal principles

135. Regulation 36 of the UCR imposes on utilities obligations of equal treatment and transparency:

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

136. The principle of equal treatment was set out by the ECJ in *Cases C-21/03, C-34/03 Fabricom v Belgium* [2005] ECR I-01559:

> "[26]… the duty to observe the principle of equal treatment lies at the very heart of the public procurement directives, which are intended in particular to promote the development of effective competition in the fields to which they apply and which lay down criteria for the award of contracts which are intended to ensure such competition.
>
> [27] Furthermore, it is settled case law that the principle of equal treatment requires that comparable situations must not be treated differently and that different situations must not be treated in the same way unless such treatment is objectively justified."

137. The application of the equal treatment obligation was summarised by Coulson J (as he then was) in *Woods Building Services v Milton Keynes Council* [2015] EWHC 2011 (TCC) at [9]:

> "The duty of equal treatment requires that the contracting authority must treat both parties in the same way. Thus 'comparable situations must not be treated differently' and 'different situations must not be treated in the same way unless such treatment is objectively justified': see Fabricon v Belgium [2005] ECR1-01559 at paragraph 27. Thus the contracting authority must adopt the same approach to similar bids unless there is an objective justification for a difference in approach."

138. The principle of equal treatment gives rise to an obligation of transparency, as summarised by the ECJ in Case C-19/19/00 *SIAC Construction Limited v County Council of the County of Mayo* [2001] ECR 1-07725:

> "[41] … the principle of equal treatment implies an obligation of transparency in order to enable compliance with it to be verified … .
>
> [42] More specifically, this means that the award criteria must be formulated, in the contract documents or the contract notice, in such a way as to allow all reasonably well-informed and normally diligent tenderers to interpret them in the same way.
>
> [43] This obligation of transparency also means that the adjudicating authority must interpret the award criteria in the same way throughout the entire procedure …
>
> [44] Finally, when tenders are being assessed, the award criteria must be applied objectively and uniformly to all tenderers ..."

139. Contracting authorities are afforded a wide margin of discretion in designing and setting award criteria: *Stagecoach* (above) at [26]. However, once a contracting authority identifies the terms on which bidders are required to tender, it is obliged to follow those rules: *Commission v Denmark* (ECLI:EU:C-1993:257) at [37] and [40]. A contracting authority is not permitted to change any of the essential conditions, or the criteria against which the bids will be assessed, during the course of the procurement exercise without a formal amendment notified to all potential tenderers: *Case C-496/99P Commission v CAS Succhi di Frutta* [2004] ECR I-3801 at [116] and [117].

140. These rules were summarised succinctly in *Energy Solutions EU Ltd v Nuclear Decommissioning Authority* [2016] EWHC 1988 (TCC) by Fraser J at [255]:

> "The principles of equal treatment, non-discrimination and transparency require a contracting authority that has adopted a decision-making procedure for assessing bids to comply with it once it has begun to do so. A different way of expressing the same principle is to state that a contracting authority that has set rules for that procedure must follow them, applying those rules in the same way to the different bidders. Changing the decision-making procedure during the process of assessment risks arbitrariness and favouritism, a risk that it is the purpose of such requirements to avoid ..."

141. The test is an objective one, based on an interpretation of the relevant tender documents against the standard of the reasonably well informed and normally diligent ("RWIND") tenderer, as explained by the Supreme Court in *Healthcare at Home Ltd v The Common Services Agency (Scotland)* [2014] UKSC 49:

> "[8]… [In the Mayo case] the Court explained what the legal principle of transparency meant in the context of invitations to tender for public contracts: the award criteria must be formulated

> in such a way as to allow all RWIND tenderers to interpret them in the same way. That requirement set a legal standard: the question was not whether it had been proved that all actual or potential tenderers had in fact interpreted the criteria in the same way, but whether the court considered that the criteria were sufficiently clear to permit of uniform interpretation by all RWIND tenderers.
>
> …
>
> [12]… the yardstick of the RWIND tenderer is an objective standard applied by the court.
>
> …
>
> [14] The rationale of the standard of the RWIND tenderer is thus 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. The application of the standard involves the making of a factual assessment by the national court, taking account of all the circumstances of the particular case.
>
> [27] … The court has to be able to put itself into the position of the RWIND tenderer, and evidence may be necessary for that purpose: for example, so as to understand any technical terms, and the context in which the document has to be construed. But the question cannot be determined by evidence, as it depends on the application of a legal test, rather than being a purely empirical enquiry. Although, as counsel for the appellants emphasised, the question is not one of contractual interpretation – the issue is not what the invitation to tender meant, but whether its meaning would be clear to any RWIND tenderer – it is equally suitable for objective determination."

142. In matters of evaluative judgment, the authority has a margin of appreciation and the court will only interfere with the decision of a contracting authority where there has been a manifest error: *Lion Apparel Systems v Firebuy* [2007] EWHC 2179 (Ch) per Morgan J at [34]-[38]; *Woods Building Services* (above) at [11]-[17]; *Energy Solutions* (above) at [274]-[276]; *Stagecoach* (above) at [42]-[44].

143. In *Lion Apparel* (above) Morgan J clarified:

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

144. The requirement to act without manifest error is applicable even where decisions are based upon complex assessments: *Gibraltar Gaming and Betting Association Ltd v Secretary of State for Culture, Media and Sport and others* [2015] 1 CMLR 28 at [100]. However, in a case concerning decisions made by a contracting utility where it is

required to make a complex evaluation of a wide range of criteria, all of which involve difficult and technical judgments, the court must accord proper respect to the fact that the decision-maker is much better placed to carry out the assessment than the court: *R (Lumsdon and others) v Legal Services Board* [2015] UKSC 41 at [40]; *R (Rotherham Metropolitan BC) v Secretary of State for Business, Innovation and Skills* [2015] UKSC 6, per Lord Sumption at [22]-[23]; per Lord Neuberger at [62]-[63].

145. As noted by Fraser J in *Bechtel* (above) at [19] and [256]-[258], the manifest error bar is a high one; it is not sufficient to identify subjective disagreements with the scores awarded to a bidder:

> "… the Court should always resist the temptation simply to substitute its view for that of a contracting authority and should only intervene where sufficiently material breaches of obligation are shown…
>
> There is, however, no judicial remedy for subjective dissatisfaction at losing a procurement competition."

146. Applying the above legal principles, the approach adopted in respect of the scoring challenge in this case is as follows:

i) The tender documents must be construed objectively on the basis of the standard of the RWIND tenderer.

ii) The court must consider whether the assessment criteria and tender process set out in the tender documents were applied objectively, uniformly, without discrimination or consideration of undisclosed criteria, and in a proportionate manner to all tenderers.

iii) The court must consider whether there was any manifest error in the tender evaluation exercise, such as a failure to consider all relevant matters, consideration of irrelevant matters, or a decision that is irrational in that it is outside the range of reasonable conclusions open to the utility.

iv) The court must not substitute its own assessment for that of the contracting utility. Its role is limited to a review of the process to determine whether the published rules of the procurement were followed in compliance with the regulations.

ID 2.2.6 C2 – Pantograph

147. The pantograph is the device on the roof of the train that collects power from the high-voltage overhead line and delivers it to a main transformer on the train and on to the traction system. Modern pantographs typically comprise two arms joined at an acute angle. The connection between the two arms is the 'knuckle'. Depending on the direction of the train, and the position of the pantograph on the roof, the pantograph may travel with the knuckle towards the front ('knuckle-leading') or the knuckle towards the rear ('knuckle-trailing'). The pantograph is highly affected by aerodynamics, which tend to apply a lift (vertical upwards) force on to the pantograph. The pantograph contacts the overhead wire. If the upward force is too high, it can

damage the wire. Therefore, during design development and testing, this upward force must be calculated and tested. A 'tether-test' involves operation of a train with the pantograph raised but not in contact with the overhead line and measures the upward force.

148. The relevant question for component C2 was:

> "Provide calculations and/or comparisons between the Train Proposal and existing designs to demonstrate that the HS2 contact quality requirements (TTS-401 and standards), will be complied with by the pantograph(s) on the Unit when operating on the HS2 Network as defined in TTS-401."

149. The JV's bid stated:

> "The dynamic contact forces will be controlled and managed using aerodynamic augmentation and pressure regulation. The contact quality will be assessed in accordance with the requirements of the ENE TSI and LOC & PAS TSI, relevant NNTRs and any referenced normative standards.
>
> The HS2 pantograph contact quality has been assessed using modelling, simulation, wind tunnel testing … and tether testing on HS1 infrastructure … and found to be within limits set by the ENE TSI and LOC & PAS TSI, and relevant at 360km/h."

150. The simulation results showed full compliance with the requirements of ENE TSI and EN 50367. Tether testing using the JV's prototype pantograph showed that in the knuckle leading configuration the mean contact force was within the limit specified by EN 50367 but in the knuckle trailing configuration the main contact force exceeded the limit. The JV stated that the knuckle trailing configuration would require an alternative aerodynamic augmentation plate to bring the mean force into line and that the solution was easily achievable by swapping the leading edge plate.

151. The individual technical assessments marked this component as (i) 'Strong', (ii) 'Reasonable' and (iii) 'Reasonable'. This was moderated to a consensus score of 'Reasonable'. The rationale for the consensus score was that the JV did not provide comparisons to existing designs but relied on calculations to demonstrate that the pantograph contact quality requirements would achieve compliance with TTS 401; additionally, further work was required to optimise the prototype to an operational product.

152. Siemens' case is that the score of 'Reasonable' was irrational given that the results of the testing demonstrated that the JV's prototype configuration did not comply with the requirements in the knuckle trailing position.

153. That criticism misconstrues the question. Contrary to Siemens' position, the question did not ask for evidence of compliance against TTS-401; it asked for calculations and/or comparisons to demonstrate that TTS-401 would be complied with when operating on the HS2 network. Notwithstanding the exceedance of the requirements for the prototype in the knuckle trailing position, it was open to the technical assessors to decide that the

simulation results together with the tether testing and proposed adjustments provided reasonable assurance that the contact quality requirements would be achieved.

ID 2.2.7 C1 - Energy consumption

154. Energy consumption requirements were specified to manage the long-term cost and environmental impact of operating the units. The tenderers were required to provide a completed version of the energy assessment tool in accordance with Appendix C of the TTS.

155. The relevant question for component C1 was:

> "For the 'in-service' energy consumption figures entered into the Energy Assessment Tool, describe how the figures were calculated and provide assurance for the validity of the analysis methodology that was used."

156. The JV's bid explained the basis of its calculation of train resistance, losses in the propulsion auxiliary system and auxiliary energy consumption to produce figures for total energy consumption, using a bespoke model replicating HS2's requirements, developed by the JV and verified through independent parallel teams and a process of peer review. It described how the figures were calculated, explaining that numerical models were used to calculate train resistance that had been validated by wind tunnel testing.

157. The individual technical assessments marked this component as (i) 'Reasonable', (ii) 'Strong', and (iii) 'Reasonable'. This was moderated to a consensus score of 'Strong'. The minutes of the moderation meeting recorded:

> "Assessor 1 … noted elements of the Tenderer's modelling tool were new developments and there was insufficient benchmarking against existing tools. The Assessors discussed this further, by reviewing the Tenderer's submission and discussing section 1.38. Assessor 2 pointed out section 1.37 of the Tenderer's submission. This was discussed by all Assessors and they all agreed it showed assurance of the new post processing elements of the model.
>
> The Assessors agreed the information provided by this section gave them sufficient confidence regarding the assurance for the validity of the analysis methodology.
>
> On this basis, Assessors 1 and 3 agreed to a consensus score of Strong."

158. The consensus rationale reflected that discussion, stating that the tenderer provided a strong response, evidencing experience in the completion of energy assessments. It noted the absence of previous usage of the tool but referred to the use of two independent teams working in parallel to improve its validity. It concluded that, with a strong process in place, the JV demonstrated a well-developed assessment of energy consumption.

159. Siemens' case is that it was irrational to award a score of 'Strong' because there was no convincing evidence demonstrating the validity of the modelling. Reliance is placed on Mr Zagikyan's acceptance in cross examination that no details were provided as to the teams put in place, the peer review carried out or the comparison of model results. On that basis it is said that the only rational score which could have been awarded was 'Weak'.

160. Siemens has failed to establish any error in the evaluation exercise. It is not sufficient to set out a subjective disagreement by reference to details that it considers should have been given greater weight. The technical assessors considered the contents of the JV's submission against the C1 question and provided clear and coherent reasons for their consensus score.

ID 2.2.21 C1 – Platform Train Interface ("PTI") Dimensions

161. TTS-1324 provided that each train unit should have a moveable step at every exterior door, which could be automatically deployed when the door was released, and fully retracted whenever the unit was in motion.

162. TTS-153 provided that, except under abnormal PTI conditions, the maximum vertical distance between the deployed moveable step and an HS2 Platform must not exceed +30/-0mm (and preferably no more than +20/-0mm).

163. TTS-154 provided that, under all conditions, including abnormal PTI conditions, the maximum vertical distance between the deployed moveable step and an HS2 Platform must not exceed +40/-10mm (and preferably no more than +30/-5mm).

164. The relevant question for component C1 was:

> "With reference to the Train Proposal, show the degree to which the design of the unit complies with requirements for vertical step-to-platform alignment (TTS-153, TTS-154 and TTS-151). Explain the design features that contribute to achievement of these requirements and feasibility of these features. Your response should include a calculation that justifies the range of vertical offset for normal and abnormal states (TTS-153, TTS-154)."

165. The JV's bid stated that, under the most common average operational conditions, the vertical distance would remain within the preferred target of +20/-0mm. In respect of abnormal PTI conditions, mainly caused by operations or maintenance, the vertical distance would remain within the preferred range of between +30mm and -5mm for the combinations of considered factors, namely:

i) increase vehicle load up to design mass exceptional payload ('DMEP');

ii) abnormal uncompensated radial wheel wear; and

iii) abnormal levelling tolerance.

166. The individual technical assessments marked this component as (i) 'Reasonable', (ii) 'Strong', and (iii) 'Reasonable'. This was moderated to a consensus score of 'Reasonable'. The minutes of the moderation meeting recorded:

> "During the Moderation the Assessors reviewed the Tenderer's submission to establish the degree to which the design of the Unit complies with requirements for vertical step-to-platform.
>
> Additionally, the Assessors reviewed Tenderer's explanation / feasibility study of the design features which contribute to achievement of the requirements of the TTS (including supporting drawings).
>
> The Assessors also reviewed Tenderer's submission against: The TTS (noting that the Tenderer declared that their proposal is 'Compliant' with the 'Mandatory' requirements of TTS-151, TTS-153 & TTS-154, 'Compliant' with the 'Preferred' requirement of TTS-154, but 'Non-Compliant' with the 'Preferred' requirement of TTS-153); …
>
> …

167. The assessors produced the following consensus rationale:

> "The Tenderer has provided evidence that gives confidence that their proposal will comply with TTS-153, Mandatory.
>
> There is a lack of rationale regarding the combinations of 'worst case' parameters leading to the Tenderer's statement of compliance to TTS-154, Preferred. For example, the application of the DMEP condition in combination with exceptional uncompensated radial wheel wear would appear to exceed the Preferred level of compliance to TTS-154 and the omission of this scenario is not explained.
>
> The Tenderer has provided evidence that gives confidence that their proposal will comply with TTS-151."
>
> The Assessors agreed a consensus score of Reasonable."

168. Siemens' case is that it was irrational to award a score of 'Reasonable' on the following grounds:

    i) The JV failed to demonstrate that the design of the unit complied with TTS-154 in all conditions, even if very unlikely. The lack of rationale and justification regarding the combinations of worst-case parameters considered by the JV meant that the evaluators could not rationally have concluded that it had demonstrated that TTS-154 mandatory would be met in all conditions.

    ii) The JV failed to explain its design development activities so as to demonstrate the feasibility of any of the design features contributing to satisfaction of the relevant TTS requirements.

On that basis it is said that the only rational score which could have been awarded was 'Weak'.

169. Siemens has failed to establish any error in the evaluation exercise. Contrary to Siemens' submission, this question did not require tenderers to explain their design development activities. What was required was for the JV to explain the design features that would enable it to meet the TTS requirements, together with calculations justifying the range of vertical offset for normal and abnormal states. The technical assessors agreed that the JV submitted a detailed assessment demonstrating compliance through figures in the submission and drawings provided as supporting evidence. Mr Lucas, one of the technical assessors, accepted in cross examination that there was a lack of rationale in the JV's bid regarding the combinations of worst case parameters as against TTS-154. The technical assessors identified that deficiency in the JV's response, leading to the consensus in the moderation meeting that this component should be marked 'Reasonable' rather than 'Strong'. Given that the worst case parameters were considered to be unlikely events, this approach was within the range of options open to them.

ID 2.2.21 C2 – PTI Dimensions

170. TTS-151 provided that for the step position for vehicle access and egress, the unit should comply with the requirements for a 915mm height platform at a platform offset as defined in GIRT7073.

171. TTS-156 provided that the maximum horizontal gap between a deployed moveable step and the HS2 Platform should be 20mm to the furthest point of the step where the HS2 Platform is straight; and 20mm to the nearest point where the HS2 Platform is curved.

172. The relevant question for component C2 was:

> "With reference to the Train Proposal, show the degree to which the design of the Unit complies with requirements for horizontal step-to-platform alignment (TTS-156, TTS-151). Explain the design features that contribute to achievement of these requirements and the feasibility of these features."

173. The JV's bid stated that the horizontal gap would not exceed 20mm at the points defined in TTS-156 for both curved and straight track, and that the horizontal gaps determined for each door type under various cant angles, offset values and track radii would not exceed the maximum defined horizontal gap specified in TTS-151, as set out in illustrative figures.

174. The individual technical assessments marked this component as (i) 'Strong', (ii) 'Reasonable' and (iii) 'Strong'. This was moderated to a consensus score of 'Reasonable'. The minutes of the moderation meeting recorded:

> "During the Moderation the Assessors reviewed the Tenderer's submission, including their Train Proposal, to establish the degree to which the design of the Unit complies with requirements for horizontal step-to-platform alignment.

> Additionally, the Assessors reviewed Tenderer's explanation / feasibility study of the design features which contribute to achievement of the requirements of the TTS (including supporting drawings), noting that the tender declared that their proposal is 'Compliant' with the 'Mandatory' requirements of TTS-151 and TTS-156.
>
> The Tenderer's submission lacked sufficient proof of concept technical information to provide confidence of the feasibility of the moving step design proposed for HS2 Network (TTS-156), e.g. neither their 2.2.21 response, or their Train Proposal, provided a detailed technical description, or referenced case studies that demonstrated where similar solutions have been delivered. On this basis, Assessors One and Three agreed with Assessor Two that a consensus score of Reasonable was more appropriate than Strong."

175. The assessors produced the following consensus rationale:

> "The Tenderer has provided evidence that their proposal will comply with TTS-156.
>
> The Tenderer has provided evidence that their proposal will comply with TTS-151.
>
> However, the Tenderer has not clearly demonstrated the feasibility of their proposal, e.g. evidence of where a similar solution has been implemented on other projects. A more comprehensive technical description of the proposed system would have given more confidence as to the deliverability of the Moveable Step system."
>
> The Assessors agreed a consensus score of Reasonable."

176. Siemens' case is that it was irrational to award a score of 'Reasonable' given that the JV failed to provide a description of the technical features contributing to compliance with the TTS requirements and an explanation of the feasibility of those features so as to demonstrate the feasibility of their proposal. On that basis it is said that the only rational score which could have been awarded was 'Weak'.

177. Siemens has failed to establish any error in the evaluation exercise. The technical assessors agreed that the JV submitted text, illustrations and drawings providing evidence that compliance with TTS-156 and TTS-151 could be achieved. However, they also agreed that the JV failed to provide evidence of previous applications of the type of movable step system proposed and, as a result, the consensus in the moderation meeting was that this component should be marked 'Reasonable' rather than 'Strong'. Thus, the assessors recognised the deficiency relied on by Siemens but applied their technical judgment to arrive at their final score. There is no evidence that they applied undisclosed criteria or failed to apply the terms of the ITT. Their approach was within the range of options open to them.

ID 2.2.21 C3 – PTI Dimensions

178. TTS-158 provided that the vertical (threshold-step) distance between the moveable step and the floor of the vestibule immediately inside the exterior door ('V2') must not exceed: (i) 20mm (Preferred 1); (ii) 30mm (Preferred 2); or (iii) 40mm (Mandatory).

179. TTS-2705 was a conditional requirement which provided that if the vertical threshold-step distance was greater than 20mm, there must be an infill slope at the threshold of no greater than 20° to the horizontal and such infill slope should cover at least 80% of the vertical height.

180. The relevant question for component C3 was:

> "With reference to the Train Proposal, show the degree to which the design of the Unit complies with the step and door threshold requirements (TTS-1949, TTS-158, TTS-2705, TTS-264 …). Explain the design features that contribute to achievement of these requirements and the feasibility of these features."

181. The JV's bid stated that the specified requirements would be met as evidenced in the referenced drawings and its train proposal. In particular, it stated that the preferred threshold-step distance of 20mm would be met as required by TTS-158; therefore, TTS-2705 was not applicable. It relied on a drawing entitled 'Verification of TTS-158 and TTS-2705' showing the movable step deployed from the centre line, resulting in a threshold-step distance of 20mm.

182. Paragraph 2.3 of its submission for ID 2.2.21 stated that:

> "At CRN platforms the ramp will extend … from centreline, which may cause the ramp to oversail the platform in compliance with TTS-159 rationale…
>
> Step extends to … from centreline for CRN platforms to ensure compliance to TTS-151 (TP_3.2.1)".

183. TP_3.2.1 was part of the JV's train proposal and stated at paragraph 3.2.1.7:

> "For CRN platforms, the movable step will be designed to reach a distance of … from the Vehicle centreline (see Figure 3.5)".

184. The individual technical assessments marked this component as (i) 'Reasonable', (ii) 'Reasonable' and (iii) 'Strong'. This was moderated to a consensus score of 'Reasonable'.

185. The minutes of the moderation meeting recorded:

> "During the Moderation the Assessors reviewed the Tenderer's submission to establish the degree to which the design of their Unit complies with step and door threshold requirements.
>
> …

> The Assessors agreed that there was a lack of clarity regarding the level of compliance to TTS-158 and therefore the applicability of TTS-2705 in the Tenderer's response in some cases at curved HS2 platforms. On this basis, Assessor Three agreed to change their score from Strong to Reasonable.
>
> In consideration of the above, the Assessors agreed that score of Reasonable was appropriate ..."

186. The resulting consensus rationale stated:

> "…The Tenderer has provided evidence that their proposal will comply with TTS-1949.
>
> The Tenderer states that their proposal is compliant to TTS-158, Preferred 1 ($\leq$20mm). However, in the drawings provided as part of this submission, the Tenderer shows the Moveable Step being partially deployed at some platform locations… Therefore, at certain curved HS2 platforms, the V2 gap would seem to be larger than 20mm and therefore the stated level of compliance would not be achieved.
>
> At CRN platforms the Tenderer shows in figure 3.5 of the Train Proposal that the moveable step will be deployed to …, which is less than … apparently required to achieve a V2 dimension of 20mm. However, the "Rationale" text to TTS-159 states that "HS2's proposal is that the preferred condition is for the step to fully deploy and oversail CRN platforms" and so it is accepted that the CRN case does not constitute a non-compliance.
>
> In the TTS Response Spreadsheet, the Tenderer states that TTS-2705 is Not Applicable. In the HS2 platform case where the Moveable Step is deployed to a distance of less than … (as identified above) the V2 dimension appears to exceed 20mm, in which case TTS-2705 would be applicable to this Tenderer's design. This issue is not addressed; therefore, compliance cannot be definitively determined.
>
> The Tenderer has provided evidence that their proposal will comply with TTS-264.
>
> A score of Reasonable is attributed taking into account the uncertainty in relation to achieving the stated level of compliance to TTS-158 and therefore the applicability of TTS-2705."

187. Siemens' case is that it was irrational to award a score of 'Reasonable' on the grounds that: (i) the JV failed to demonstrate that the mandatory V2 dimension would be met across the range of step deployments on the HS2 network at curved platforms; (ii) it failed to explain any of the design features contributing to the achievement of the TTS requirements, save for producing a series of drawings; and (iii) failed to address TTS-

2705, which was applicable because the V2 dimension would exceed 20mm for certain platforms, as identified by the evaluators. On that basis it is said that the only rational score which could have been awarded was 'Weak'.

188. Siemens has failed to establish any error in the evaluation exercise. The technical assessors noted that the JV provided evidence of compliance with TTS-1949 and TTS-264 but identified that the JV failed to provide evidence of compliance that the required TTS-158 vertical step dimension would be met at curved platforms. This noted deficiency led to the consensus that this component should be marked 'Reasonable' rather than 'Strong'. In cross-examination, Mr Lucas maintained that the relevant design features were depicted in the drawings but accepted that feasibility of the design features was not demonstrated by the JV. He explained in his witness statement that the assessors had concerns about the JV's stated compliance with TTS-158 and TTS-2705 but they did not consider that those concerns justified a score of 'Weak' because they were satisfied that the JV's proposal complied with TTS-1949 and TTS-264 that were of equal importance in the evaluation. Given that the JV's bid demonstrated full compliance with the Preferred 1 dimension for all HS2 straight platforms, the uncertainty was limited to curved platforms and the other TTS requirements were met, their approach was within the range of options open to them.

189. In its closing submissions, Siemens seeks to raise a new allegation, namely, that on the express wording of the ITT, the RWIND tenderer would have considered that TTS-158 was applicable across all CRN platforms, it was irrational and erroneous of Mr Sterry to instruct the evaluators to assume that the step would oversail at the CRN, and the JV failed to demonstrate that the mandatory V2 dimension would be met across the range of step deployments on the CRN. That allegation is not pleaded and HS2 has not had an opportunity to plead a defence or adduce evidence in response from the relevant assessors and/or panel review members. On that basis, it would be unfair for the court to determine the new point.

ID 2.2.22 C1 & C2 – Design Challenge 1 (PTI)

190. TTS-2635 provided that the platform train interface ('PTI') between the unit and all stations on the HS2 Network and CRN should enable the widest range of passengers, including those with limited mobility, to board and disembark unaided and with confidence.

191. TTS-1963 provided that the PTI between the unit and all stations on the HS2 Network and CRN should minimise the time taken for all passengers to board.

192. Document HS2-HS2-RR-REP-000-000052 P01 was entitled 'Optimising the Platform Train Interface on HS2' and contained the results of research carried out by HS2 to understand how to maximise independent accessibility, particularly for those with reduced mobility. It was recognised that the new trains would be required to be fitted with a train-mounted moveable step to fill the gap between the platform and the train and that this would create vertical gaps between the platform and the step ('V1') and between the step and the train vestibule ('V2'). The conclusions were as follows:

> "4.1 The following conclusions were drawn from the test scenarios attempted, noting that these were undertaken by a wide cross-section of users but with relatively small user group sizes.

4.2 A train-mounted Moveable Step creates a boarding issue for wheeled mobility aids when its depth causes both front and rear wheels of the device to engage both vertical rises at the same time.

4.3 A train-mounted Moveable Step creates a trough when the plate is too far below the level of the platform. This may generate boarding and/or alighting issues, depending on the vertical heights, V1 and V2.

4.4 The greatest and most reliable independent boarding and alighting success is achieved with minimal vertical dimensions at V1 and V2.

4.5 An infill ramp at the V2 position increases boarding success, especially for unpowered wheeled mobility aids; it also generally improves comfort, both boarding and alighting for all wheeled mobility aid users – a long, shallow infill is preferred.

4.6 An infill ramp at the V2 position reduces the flat part of Moveable Step and this presents an increased challenge for PRMs that do not use a wheeled mobility aid – a short infill ramp is preferred.

4.7 An infill ramp that covers the entire boarding plate (i.e. the infill ramp and the plate are one and the same) provides significant improvement in boarding and alighting success (subject to an acceptable V1 dimension and infill ramp gradient).

4.8 A tapered PTI (i.e. where V1 and V2 are not parallel or very close to parallel) produces a marked decrease in boarding and alighting performance for wheeled mobility aid users.

4.9 A tapered PTI creates a negative qualitative reaction from wheeled mobility aid users – both before and after experiencing it – such an interface would also require further testing with user groups especially those that have not been included in HS2's testing to date.

4.10 It should be noted that these results were created with relatively small user groups in a 'sterile' lab environment and that broadening to a wider user population, coupled with introducing 'real world' effects such as the presence of other passengers, the actual station environment, weather conditions and dwell time pressures are all likely to impact on the results recorded to date."

193. The relevant question for components C1 and C2 were:

"C1) Provide a description of how TTS-2635 and TTS-1963 have been understood and interpreted and how this has

> influenced the design to facilitate efficient movement of passengers of all abilities on to or off of the Units at both HS2 and CRN platforms while minimising hazards.
>
> C2) Describe how the findings of HS2-HS2-RR-REP-000-000052 P01 have been considered and addressed in the development of the PTI arrangement. Where any of the findings have not been addressed, explain why it is not considered practicable."

194. In response to C1, the JV's bid set out the methodology adopted to identify, understand and address the PTI issues for all train users, including those with reduced mobility. An audit was conducted, with the assistance of experts, to identify the cognitive and physical challenges faced by train users, which was then considered against the TTS requirements to define opportunities to improve their travel experience. A design mock-up was created, to test accessibility by a range of participants using different ramp arrangements and to receive feedback from them. Boarding and disembarking times were recorded for different arrangements to identify the impact of an infill ramp and various ramp positions. The JV stated at section 1.2.5:

> "While meeting the TSI and TTS requirements appropriate to the PTI design, the following changes and design concepts have been identified to enable the widest range of users under varying circumstances to board/disembark confidently and enable necessary passenger flow to meet dwell-time expectations over the Unit design life: …"

195. In response to C2, the JV responded to each of the conclusions set out in paragraphs 4.2 to 4.10 of the report 'Optimising the Platform Train Interface on HS2'.

196. The individual technical assessments marked component C1 as (i) 'Reasonable', (ii) 'Strong' and (iii) 'Strong'. The marks were moderated to a consensus score of 'Strong' and the minutes of the moderation meeting recorded that the JV had gone over and above the design challenge brief.

197. The consensus rationale for C1 stated:

> "The Tenderer has provided strong evidence that they have understood and embraced the spirit of the design challenge. Strong evidence has been provided that the Tenderer made full and thorough use of the Double Diamond approach to design thinking, and conducted a full assessment of the PTI using this method.
>
> The Tenderer and their design and human factors teams have also been supported by specialist consultants to develop an exhaustive design thinking, human factors and scientific approach.
>
> The Tenderer has provided evidence that they have employed physical mock ups of their proposed PTI vestibule solution at the

> HS2 platform. This has been tested with a wide demographic of both able bodied passengers and passengers of reduced mobility. The Tenderer has employed mathematical models and specialist equipment to analyse the likely ability of their design to enable a wide demographic of users to independently board and alight the train. This is strong evidence of the Tenderer's ability to understand and interpret the requirements of TTS-2635. The Tenderer makes some reference to the impact of the PTI design on dwell time, having measured the time it takes for wheelchair users to board/alight the Unit with different movable step designs at HS2 stations but not at CRN platforms.
>
> During the design process, user trials were undertaken with a wide range of participants to demonstrate their understanding of TTS-1963. It is understood that the boarding/disembarking times were recorded for the different users (including wheelchair participants) to navigate different step configurations to identify the impact on dwell times.
>
> A number of design changes were identified to enable the widest range of users under varying circumstances to board/disembark confidently and enable necessary passenger flow to meet dwell-time expectations over the unit life."

198. The individual technical assessments marked component C2 as (i) 'Reasonable', (ii) 'Strong' and (iii) 'Strong'. The marks were moderated to a consensus score of 'Strong'.

199. The consensus rationale for C2 stated:

> "The Tenderer has provided strong evidence that they have considered and complied with the requirements derived from the findings of HS2-HS2-RR-REP-000-000052 with care and have been considered throughout their design process. The Tenderer provides a comprehensive commentary to explain where the inherent differences in their train design led to findings that differed from those found in the HS2 report (notably in … the tendered design compared to the HS2 tests). The Tenderer conducted their own trials, with some differing results to those found in HS2-HS2-RR-SPE-000-000052, but the findings seem reasonable and have been applied logically to the design. The Tenderer has carried out user testing on their proposed design using their physical mock-up with a representative sample user group. Further, they have identified pinch points and areas subject to high levels of wear and tear. This demonstrates the Tenderer's good understanding of how best to optimise the movement of a customer from the platform into the saloon."

200. Siemens' case is that it was manifestly erroneous to award scores of 'Strong' for C1 and C2, leading to an overall evaluation of 'Very Good Confidence'. The design mock-up relied upon by the JV for C1 only tested the PTI with the movable step fully extended. Therefore it failed to demonstrate any consideration of the position at CRN

platforms where the movable step would not be fully deployed. Further, the JV failed to demonstrate compliance with TTS-154 and TTS-158, and failed to describe how it minimised tripping hazards. The evaluators should have awarded a score of 'Weak' for both C1 and C2.

201. Siemens' criticisms amount to subjective arguments on the substantive quality of the bid and misconstrue the questions in C1 and C2. This part of the design challenge did not require the tenderers to demonstrate compliance with specific TTS requirements; rather it required them to describe how they understood, considered and addressed the issues of PTI accessibility in the development of their design. As set out above, in its response to the questions in components C1 and C2, the JV provided ample evidence on which it was open to the assessors to award a score of 'Strong'.

ID 2.2.23 C3 – Dwell Time

202. Dwell Time is the time that elapses between a train stopping at a station to allow passengers to board and alight and starting again on departure. It is defined in the TTS as:

> "the time taken for a Unit to perform all normal aspects of station operations from wheels-stop to wheels-start including alighting and boarding of passengers."

203. Mandatory TTS-161 provided that:

> "The Unit shall deliver 95% confidence of achieving a Dwell Time of 2 minutes at intermediate stations, calculated in accordance with the Static Dwell Time Model in Appendix I using the 1SL.
>
> Rationale: Achievement of a two-minute Dwell Time is key to achievement of HS2 railway capacity and journey times. The Static Dwell Time Model evaluates the key architectural elements of the interior layout that impact the Passenger exchange part of the Dwell Time."

204. ID 2.2.23 required tenderers to provide a completed version of the Static Dwell Time Model ("the SDTM"), completed in accordance with TTS Appendix I using the one space layout ('1SL') interior layout drawings in the Train Proposal (based on a single class of seating throughout the train).

205. The SDTM was a spreadsheet provided by HS2 with the information for tenderers that modelled a specific scenario (based on defined numbers of passengers boarding and their characteristics, such as the proportion of commuters/leisure travellers) at a specific station on the HS2 network (East Midlands Interchange). Tenderers were required to complete the spreadsheet in accordance with the instructions set out in section I.3 of the TTS. Entries onto the spreadsheet included: (a) details from the tenderer's train proposal, including dimensions of the aisles, free flow areas and vestibules, the number of doors on each side of each vehicle and the number of seats to the left and right of each door; and (b) a duration in seconds for the operational component of dwell time. Other elements of the dwell time calculation, such as assumptions about passenger

behaviour, were fixed by HS2. On the basis of these inputs, the SDTM generated an output of the proportion of compliant dwell times for each vehicle and a 'Unit Summary', which was the proportion of compliant dwell times for the worst-case vehicle.

206. The operational component of dwell time is the time it takes for certain procedural and technical steps to take place at stations, including the time it takes for the train doors to be released, the moveable step to be deployed and the doors to fully open, together with the time it takes to close the doors and retract the moveable step.

207. Section I.4 of the TTS stated that the operational component should include the following stages:

i) time from wheel stop to exterior doors fully open and moveable steps fully deployed, including any processing time and warning alarms;

ii) five seconds for platform staff to check that passengers have stopped boarding the train and that doors can now be closed;

iii) time from a train-wide door close command being given (from a location on the train) to exterior doors being closed and locked and moveable steps retracted and locked, including any processing time and warning alarms;

iv) four seconds for platform staff to check the PTI and transmit a 'right away' signal;

v) one second for the train captain to respond to the 'right away' signal and press 'ATO Start'; and

vi) time from the 'ATO Start' button being pressed to the wheels starting to move.

208. The JV declared that it complied with TTS-161 in the TTS response spreadsheet and its SDTM generated a Unit Summary of 95.5%.

209. The relevant question for component C3 was:

> "Provide assurance that the maximum time for the operational component of dwell time is feasible.
>
> Your response should reference the key elements of the Train Proposal that contribute to achievement of the dwell time requirement."

210. Feasibility was defined in the ITT at section B2.2 of Appendix B:

> "Feasibility - evidence that your Train Proposal is feasible and can realistically be developed during the timescales of the project.
>
> Your response should give confidence of feasibility by explaining where components and designs have previously been

> used or, for new designs, explaining the design development activities."

211. The JV bid included in response to C3 a breakdown of its operational component in Table 2 of the response, together with an explanation of the calculation of the duration for each stage entered by the JV, stating that the feasibility of door and deployable step operating times were validated by figures provided by the suppliers of those equipment systems.

212. The individual technical assessments marked this component as (i) 'Reasonable', (ii) 'Strong' and (iii) 'Strong'. This was moderated to a consensus score of 'Strong' on the basis that the JV proposal was considered to be technically robust and presented in sufficiently clear terms to support a 'Strong' score.

213. The consensus rationale stated:

> "The Tenderer supports the value entered into the static dwell time model with a breakdown of the Operational Component supported by text and illustrations. The Tenderer states that the derivation of the Operational Component time is based on supplier experience and knowledge of product performance from both testing and service validation. Operating times have been provided by the door system supplier. The breakdown of the opening and closing sequences is clear."

214. Siemens' case is that it was irrational to award a score of 'Strong' in respect of C3 on the grounds that (i) the JV had not clearly demonstrated the feasibility of its proposal; (ii) no provision was made for any signal propagation time or contingency in its time calculation; and (iii) Mr Sterry suggested in a WhatsApp message that that compliance with TTS-161 could only be achieved with a shorter operational component.

215. As to the first allegation, the JV's response to component C3 included a breakdown of its operational time but it did not simply identify the duration of each stage of the operational component; it explained the basis on which each stage was calculated. Stage i) included an explanation as to the total time allowed to achieve a fully opened door and deployed step. Stage iii) included an explanation as to the sequential operation of door and step closing, with an additional allowance for the mandatory warning time. The assumptions made in the calculations were set out in notes to Table 2. The door and step operating times were provided by the JV's proposed suppliers.

216. The JV's notes explained that its calculation of the doors opening sequence was based on the start of release of the doors when the train slowed to below 3km/h, so that processing could start before wheel stop. The JV stated that its assumption was in accordance with the TSI Loc&Pas 4.2.5.5.2. That TSI contains the following provisions:

> 4.2.5.5.2(5)
>
> "For the purpose of this clause, a train is assumed to be at a standstill when the speed has decreased to 3km/h or less."

> 4.2.5.5.6(1)
>
> "A train shall be provided with door release controls, which allow the train crew or an automatic device associated with the stop at a platform, to control the release of doors separately on each side, allowing them to be opened by passengers or, if available, by a central opening command when the train is at a standstill."
>
> 4.2.5.5.6(4)
>
> "Where a movable step has to be deployed, the opening sequence shall include the movement of the step to the deployed position."

217. Siemens rely on the PRM TSI at 4.2.2.12.1, which provides:

> "In the case of the moveable step or bridging plate extending beyond that permitted by the gauging rules, the train shall be immobilised whilst the step or plate is extended."

218. Siemens' case is that the effect of the PRM TSI is that the moveable step cannot extend at all until the train is stationary in instances where, as on the HS2 network, the step when fully deployed will extend beyond that permitted by the gauging rules. That argument was rejected by Mr Dawson, Mr Lucas and Mr Sterry, who each explained in cross-examination that as the step started to extend, it would not immediately infringe the limits permitted by the gauging rules.

219. Thus, the JV explained the basis on which it assumed that the releasing of the doors and processing time could start before the wheels were stopped, to optimise and improve the dwell time. It was a matter for the assessors to consider this explanation and determine whether it provided the required degree of assurance as to the feasibility of the proposal. On its face, this material was capable of amounting to assurance that the operational component of dwell time was feasible.

220. As to the allegation that no allowance was made for signal propagation time for stage i) the doors opening sequence, and stage iii) the doors closing sequence, the durations in Table 2 for those stages expressly stated: "including any processing time and warning alarms". It was a matter for the assessors to decide the weight to give to those statements but, on their face, they indicated that allowance was made for signal propagation time. The mere omission of any separate value allowed for signal processing time is not sufficient to identify an error in HS2's assessment; certainly, not any manifest error.

221. Absent any evidence that the bids were treated differently, such as by the application of different criteria, a comparison between the JV's explanation and the explanation in Siemens' bid is impermissible. HS2 was required to assess the content of each bid separately against the specifications and criteria in the ITT.

222. As to the allegation that no contingency was allowed, the operational component instructions did not stipulate that a contingency should be included as a separate value. The JV stated that its calculation of the duration of stage i) for the doors to open and

steps to be deployed was based on the worst-case scenario, with the steps fully deployed which, by implication, would include a contingency for all other cases.

223. As to the concern raised by Mr Sterry, in his WhatsApp messages sent on 4 July 2019, he stated:

> "So I tried to run the dwell calculator based on the drawings and the Tenderer needs an operational time of … to comply.
>
> That's pretty optimistic for step in and out and door open/close …"

224. Mr Williamson responded:

> "Hmmm. Doesn't sound good. But sounds like it comes down to the stage 2.2 eval proper as the next step? They are not obviously NC."

225. Mr Williamson was correct; Mr Sterry's use of the STDM is not material to this part of the scoring exercise. He was not one of the assessors who carried out the evaluation of this question and the question did not require the assessors to assess compliance with TTS-161. His view was based on his attempt to use the SDTM but he accepted in his oral evidence that he might not have entered all relevant inputs correctly and that his calculation might not be correct. The material entries were the inputs by the JV into the model which generated a Unit Summary of 95.5%, demonstrating compliance with TTS-161.

226. For the above reasons, Siemens has not established any manifest error in respect of C3 of ID 2.2.23.

ID 2.2.30 C2 – Pass-by noise

227. TTS-178 required tenderers to include a value in decibels (dB) for 'pass by noise' for the A-weighted equivalent continuous sound pressure level (the noise made by the train as perceived by others) at a speed of 360km/h measured in accordance with EN ISO 3095 on a track at the limits defined in EN ISO 3095 Section 6.2, 3.5m above rail level, 25m from the track. The value provided was used as an input to the WLVM as part of the calculation of the Assessed Price. Component C1 required tenderers to provide analysis to support such value.

228. The relevant question for component C2 was:

> "Provide assurance for the validity of the noise modelling that has been used for part C1, including the applicability for speeds up to 360km/h."

229. The JV bid stated in response to C2 that the calculation method of the rolling noise by the 'TWINS' model relied on had been validated successfully against pass-by noise measurements of numerous vehicles, referring to published research and wind tunnel modelling.

230. The individual technical assessments marked this component as (i) 'Weak', (ii) 'Weak' and (iii) 'Strong'. This was moderated to a consensus score of 'Reasonable'.

231. At the moderation meeting there was considerable discussion as to the merits of this part of the JV's bid. Initially consensus could not be achieved and the assessors adjourned so that further consideration could be given to the issue. At the reconvened meeting, a consensus was reached, as set out in the minutes:

> "Following a lengthy discussion around the application of a pragmatic approach to validation of the tenderer's analysis, all the Assessors liked the approach with testing and modelling, but felt the results were expressed poorly. On reflection of these poorly expressed results Assessor 3 moved their position to Reasonable. Assessors 1 and 2 also agreed that the elements of their concern was addressed in the tenderer's submission but poorly expressed and agreed to a consensus position of Reasonable."

232. The consensus rationale stated:

> "The analysis within C1 is based upon modelling rolling noise and wind tunnel testing to derive aerodynamic noise. C2 seeks to assure both of these elements.
>
> Rolling noise - It is accepted that the model has been successfully validated (first sentence in p 2.1) but the remaining text in p 2.1 and 2.2, and tables 3 and 4 do not clearly provide validation of the modelling in C1.
>
> Aerodynamic noise model - This validation has taken two approaches. The first is by reference to published research which produced a formula to be applied to the result of small scale wind tunnel testing in order to determine noise effects of a real scale (1/1) model.
>
> The second approach aims to validate the noise measurements of the HS2 pantograph in a wind tunnel at 360 km/h against a prediction derived from the results of on train testing of the same pantograph type … The approaches to validation of both rolling and aerodynamic noise are not expressed clearly in the Tenderer's response e.g. the use of equation within p2.3 in C1 has been inferred but is not detailed. However, there is merit in an approach which includes wind tunnel testing to derive aerodynamic noise performance.
>
> Overall, it is considered that the tenderer has applied a pragmatic approach to validation of its analysis but poor explanation has reduced confidence. Hence a reasonable score has been awarded."

233. Siemens' case is that it was incumbent on the JV to express its response clearly so as to provide the necessary assurance required by the question. It submits that the assessors appear to have sought to rescue the JV's score by inferring that the JV had described how it would demonstrate the validity of the model. On that basis, it was irrational to award the JV a score of 'Reasonable'.

234. It is clear from the moderation meeting minutes and the evidence of Mr Lucas that there was very careful scrutiny of this component and much discussion between the assessors before they resolved their disparate views. Mr Rick Jones, who gave an initial score of 'Strong', was the noise subject matter expert and the court must exercise caution when considering the validity of a value judgment made by those with specialist knowledge in this field. The assessors identified their concerns and delayed their decision so that further consideration could be given to the detail of the bid before reaching a consensus score. There is no evidence that the assessors erroneously omitted to consider anything or took account of any material outside the bid. The consensus rationale set out clear and coherent reasons for their consensus score. Siemens have not identified any manifest error in the assessment.

ID2.3.36 C3 - Reliability

235. TTS-200 provided that the design should be capable of achieving a mean distance between service affecting failures of at least 300,000 km while operating on the HS2 Network, using the train operation parameters in Appendix A of the TTS.

236. TTS-3282 provided that the design should be capable of achieving a mean distance between service affecting failures of at least 160,000 km while operating on the CRN, using the train operation parameters in Appendix A of the TTS.

237. Components C1 and C2 required the tenderers to provide initial analyses to demonstrate that the design would be able to comply with the above reliability requirements.

238. The relevant question for component C3 was:

> "With reference to the relevant parts of the Train Proposal, explain the feasibility of the reliability levels required for key systems of the Unit."

239. The JV bid explained its design development activities, by selecting nine key systems in response to C3, against which it identified the gaps between targeted and predicted reliability, strengths and weaknesses of the systems, and improvements or other solutions to improve reliability levels.

240. The individual technical assessments marked this component as (i) 'Weak', (ii) 'Strong' and (iii) 'Reasonable'. This was moderated to a consensus score of 'Reasonable'.

241. The minutes of the moderation meeting recorded that, following discussion, Assessor 1 agreed to change his score from 'Weak' to 'Reasonable' on the basis that the materiality of the issues previously identified was insufficiently serious to warrant a score of 'Weak', and Assessor 2 agreed to change his score from 'Strong' to 'Reasonable' on the basis that there were omissions in the information provided.

242. The consensus rationale stated:

> "The Tenderer identifies and provides rationale for a number of key systems. The reliability targets have been derived from an existing, similar product, and where reliability issues have been identified, suitable solutions have been implemented, including improved design and maintenance procedure revisions. A testing strategy for other systems is also proposed. The Assessors noted discrepancies between the key systems identified in C3 and the Tenderer's own identification of systems contributing to reliability achievement in C1 & C2, and also the significant challenges required to achieve the necessary reliability improvements for certain key systems stated in C3."

243. Siemens' case is that the score of 'Reasonable' was irrational given that the question required tenderers to explain the feasibility of the reliability levels required for the key systems of the unit but the JV's response: (i) included discrepancies between the key systems identified in C3 and the JV's own identification of systems contributing to reliability achievement in C1 and C2; and (ii) the assessors recognised the significant challenges required to achieve the necessary reliability improvements in C3. Although in its response to C1 the JV identified 18 key systems for the purposes of demonstrating compliance of the design with TTS-200, only 9 of those systems were addressed in C3, so that the JV omitted to explain the feasibility of what it considered to be half of the key systems. Further, the JV's comparison of its reliability data disclosed significant discrepancies, some of which required a significant increase in reliability performance.

244. Siemens has failed to establish any manifest error in the assessment. It simply relies on the areas of concern identified by Mr Lucas in his initial assessment (as Assessor 1). However, Mr Lucas explains in his witness statement that, following discussion of these issues in the moderation meeting, the assessors agreed that the score for this component should be 'Reasonable' for the reasons set out in the consensus rationale. The assessors considered that the JV referred to a number of key systems, their targets had been derived from existing products and they had proposed suitable solutions for the reliability issues identified. In particular, the assessors considered that the JV had provided reasonable evidence as to how it would improve the reliability of multiple systems in its response to C3 giving them confidence that they could be achieved. It is not sufficient for Siemens to identify the initial score and comments produced by one out of three assessors without also taking into account the scores and comments produced by the other two assessors, the consensus score achieved and the consensus rationale relied on, all of which were capable of justifying the score of 'Reasonable'.

ID 2.2.39 C4 – Command, control and signalling (CCS)

245. The automatic train operation ('ATO') Stop function enables the train captain to command the train to make an unplanned but controlled stop at the next safe location, a pre-defined location on the HS2 Network where trains can wait safely, and evacuation can be carried out if necessary.

246. TTS-2356 provided that:

> "If the Train Captain presses the 'ATO Stop' control, the ATO On-board shall automatically stop the Train at the next Safe Location at which the Train can stop at full service brake deceleration."

247. The relevant question for component C4 was:

> "Provide a description of how the On-board CCS complies with the ATO Stop function (TTS-2356)."

248. In response to C4, the JV bid provided a general description of the operation of the ATO Stop function and identified potential changes/alignment that could be made to the draft standards but did not explain any details of its proposed solution.

249. The individual technical assessments marked this component as (i) 'Weak', (ii) 'Weak' and (iii) 'Reasonable'. This was moderated to a consensus score of 'Weak'.

250. The minutes of the moderation meeting recorded:

> "Assessors 1 and 2 noted the Tenderer provided a high level response with no clear or preferred solution. The Tenderers submission was reviewed again and discussed and it was agreed by all Assessors that whilst the Tenderer provided some elements of solutions, the Tenderer did not actually provide a specific solution to the ATO Stop function other than the need to collaborate with HS2 and UNISIG."

251. This view was reflected in the consensus rationale:

> "This component is weakly addressed. The Tenderer has provided some basic explanation of how ATO Stop could be achieved, but does not have a clear solution. The response is centred around the need to collaborate with HS2 and UNISIG to find an appropriate solution, rather than explaining a technical solution that the Tenderer proposes to take forward."

252. Siemens' case is that (i) the assessment of 'Weak' was irrational in that the JV did not provide a clear solution and this component should have been scored as 'Not addressed'; and (ii) in carrying out the subsequent 55% review, Mr Sterry acted irrationally and/or in manifest error in concluding that nothing in the response proved that the TTS-2356 requirement could not be met.

253. As to the first allegation, section 6.5.4 of the ITT provided that an assessment of 'Not addressed' would be awarded where (a) no response was received, (b) the response received was not in English, or (c) the response received was irrelevant to the component. The issue is whether it is clear that the response was irrelevant to the component. None of the assessors considered that a score of 'Not addressed' should be applied. Their initial and consensus comments identified aspects of the response that they considered were relevant to the component, albeit they agreed that the response did not provide details of the solution required for a higher score. On that basis, it is not established that the score was irrational.

254. As to the second allegation, section 8.3.3 of the ITT provided that if the response to any question received a score of 55% ('Moderate Confidence') or lower (where one or more components of the question were not addressed to a reasonable level), HS2 reserved the right to further investigate and clarify the reason for the score. The potential outcomes of such investigation were as follows:

   i) In the event that the investigation gave rise to legitimate concerns about the veracity of the tenderer's Stage 1.3 declaration of compliance with the Mandatory TTS Requirements, the response could be deemed to be non-compliant with Stage 1.3, leading to disqualification of the tender.

   ii) In the event that the investigation gave rise to legitimate concerns about the veracity of the tenderer's statement of compliance with a Stage 2.1 TTS requirement, adjustments could be made to the TTS response spreadsheet and the Stage 2.1 score; if that resulted in any Stage 2.1 evaluation thresholds not being met, the tender would be disqualified.

   iii) In the event that the investigation gave rise to legitimate concerns about the validity of an input value for the Stage 5 WLV Model, the value in the tenderer's TTS response spreadsheet could be adjusted or the tender could be disqualified.

255. Thus, HS2 was entitled, but not obliged, to carry out a further investigation ("a 55% review"). Such investigation did not amount to a fresh assessment or re-marking of the components and did not result in an automatic revision to the score. It was not intended to constitute a determinative evaluation of the proposal against the TTS requirements. However, if it raised legitimate concerns as to the validity of the tenderer's response, it could result in revisions to the relevant score and/or disqualification.

256. Pursuant to section 8.8.3 of the ITT, Mr Sterry carried out a review of the JV's 'Weak' Stage 2 components, including ID 2.2.39 C4. Mr Sterry stated in the review that TTS-2356 was a functionality requirement; as such, it could not be proven compliant or non-compliant at tender stage because the design to deliver the requirement would be developed later in the design process. He considered that there was no evidence that the JV would not comply with TTS-2356. It was not a mandatory requirement and, as noted by Mr Sterry, non-compliance would have no impact on evaluation thresholds, the Mandatory TTS Requirements or the Stage 5 WLVM. He concluded that there was no impact on the TTS compliance total score.

257. Siemens submits that in assessing the JV's compliance with TTS-2356, Mr Sterry failed to apply the ITT. However, as Mr Sterry explained in cross-examination, the purpose of the investigation was not to establish evidence of compliance with the relevant TTS, particularly in circumstances where the design was subject to future development; rather the purpose was to identify whether the low score gave rise to any evidence of non-compliance. His conclusion is coherent and logical. No irrationality has been established.

ID 2.2.41 C2 - coupling

258. Tenderers were required to provide a description and timing of the steps for the coupling and uncoupling process of train units as part of their response to component C1.

259. TTS-1627 provided that when coupling two train units, the maximum jerk and acceleration experienced on either unit must be low enough for passengers to be able to board and alight the stationary unit during the process.

260. The relevant question for component C2 was:

> "If applicable: If compliant with TTS-1627, describe how during coupling forces will be managed to enable Passengers to continue to board."

261. The JV declared itself to be compliant with TTS-1627 and stated in its bid in response to C2 that a limit on speed during coupling would be incorporated in the train control and traction systems proposed, achieving a coupling speed of 2-3 km/h, which would limit the acceleration and jerk experienced onboard during the coupling process, supporting passenger boarding.

262. The individual technical assessments marked this component as (i) 'Weak', (ii) 'Weak' and (iii) 'Reasonable'. This was moderated to a consensus score of 'Weak'.

263. The consensus rationale stated:

> "The Tenderer has not justified that passengers can board whilst coupling operations are undertaken.
>
> The tenderer has noted that coupling will take place at 2 to 3kph, and that this will limit the acceleration and jerk imposed on passengers. However they have not demonstrated that these levels are sufficiently low to allow passenger boarding to be unimpeded; indeed the tenderer notes that further testing and possibly operational mitigations will be required to understand if it is acceptable.
>
> Furthermore, there are no examples offered of similar solutions by the tenderer which validate their opinion that boarding during coupling is a practical venture.
>
> The tenderer has described their technical solution, but this alone does not demonstrate compliance to the stated requirements."

264. Siemens' case is that it was irrational to conclude that the JV score was 'Weak' rather than 'Not addressed', given that the JV had not addressed the question which was to describe how, during coupling, forces will be managed to enable passengers to continue to board, as recognised by Mr Sterry in his 55% review of this component.

265. Mr Sterry stated in his 55% review:

> "The Tenderer has described the energy absorbing elements of the coupler design within the Train Proposal. This shows the components and defines the movement that can occur during coupling, but does not give other data such as stiffness or damping. The Tenderer has not provided any explanation or analysis how this design results in acceptable jerk and

> acceleration limits. With no analysis, there is no methodology to be assessed."

266. Mr Sterry concluded that the concerns regarding methodology and feasibility indicated that the JV did not comply with TTS-1627. Although that would lower the TTS total compliance score, it was not a mandatory TTS and it did not affect the evaluation thresholds.

267. The criticisms relied on by Siemens were identified by the assessors and substantiated their assessment of the JV's response as 'Weak'. However, the assessors also identified material which was capable of amounting to a response and, therefore, they were entitled to decide that the score was 'Weak' rather than 'Not addressed'. Mr Sterry's subsequent review concluded that there was no compliance with TTS-1627. The outcome of the review was consistent with a score of 'Weak' as provided for in section 8.3.3 of the ITT. It did not follow that the assessors were wrong in their score and no irrationality has been established.

DP1.1 C1 – Project management sub-plan

268. The purpose of the project management sub-plan, DP1.1, was stated to be for the tenderer to set out how it would successfully project manage the delivery of the works and MSA services.

269. The relevant question for component C1 was:

> "The Tenderer shall provide a Project Management plan, which shall … explain how the Tenderer intends to mobilise and resource its project delivery team, including a timeline of start-up activities, an organisational structure for the TMM's project and engineering team(s) and an explanation of how that structure will be resourced within 12 months of the Commencement Date."

270. The JV bid included a timeline of start-up activities, organisational charts and explanations as to resourcing and recruitment strategies for the project.

271. The individual technical assessments marked this component as (i) 'Strong', (ii) 'Strong' and (iii) 'Strong'. At the moderation meeting, a consensus score of 'Strong' was recorded.

272. The consensus rationale stated:

> "The Tenderer provides details of the project organisation structure detailing a project delivery team, also noting Project Management and Engineering Management Offices. The Tenderer describes a Project Launch Process including start up activities and a detailed timeline for mobilisation. Mobilisation of the core team and extended team is anticipated to be completed within the 60 – 90 day time frame from the Commencement Date. The Tenderer notes a plan to redeploy

> resources coming free from other projects to HS2 which will ensure the Tenderer has sufficient capacity."

273. Siemens' case is that score of 'Strong' was irrational given the inherent weakness in the structure of how the JV planned to resource its mobilisation activities, namely, by redeploying resources coming free from other projects in circumstances in which HS2 was aware of significant delays to other Bombardier projects. Reliance is placed on Mr Hamilton-Jenkins' acceptance during cross-examination that the assessors did not take into account the risk that might arise as a result of delays on other projects.

274. As submitted by HS2, the pleaded challenge is misconceived. Section 6.1.2 of the ITT expressly provided that the tenders would be evaluated based solely on the information provided within the tender. Therefore, it would be in breach of the ITT for HS2 to consider extraneous information as to actual or potential delays on other projects. Although Mr Hamilton-Jenkins agreed that the assessors did not take into account the risk of delays on other projects, he maintained his view that the JV response was strong based on the detailed plans and explanations set out in the bid. Siemens' subjective disagreement is not sufficient to demonstrate any manifest error in the consensus score for which clear and coherent reasons were given.

DP 1.1 C4 - Project management sub-plan

275. The relevant question for component C4 was:

> "The Tenderer shall provide a Project Management plan, which shall … explain how the Tenderer's project management function will manage the interfaces between the entities referred to in C2 and C3 through a management organisation chart and supporting explanation."

276. The entities referred to in C2 and C3 were the JV consortium members.

277. The JV bid contained an organisation management chart and explained that a project management representative, who would be based at each key worksite, would report to the appropriate deputy project director. The deputy project director would oversee the scope of works across all sites through a series of governance reviews specific to the work packages allocated to the respective sites, including weekly site core team meetings, site specific planning reviews and monthly planning reviews, whereby interface milestones would be mapped and tracked. This explanation was illustrated by reference to a case study.

278. The individual technical assessments marked this component as (i) 'Reasonable', (ii) 'Strong' and (iii) 'Reasonable'. This was moderated to a consensus score of 'Reasonable,' the second assessor agreeing to amend his score from 'Strong' to 'Reasonable', recognising that the JV had not provided sufficient explanation as to the processes and tools for interface management to support a higher score.

279. This was reflected in the consensus rationale:

> "In answering this Component, the Tenderer has provided a detailed management organisation chart. Whilst the response

> provides details of the team members and roles, there is insufficient explanation of the tools and processes for interface management that will be used to justify a higher score."

280. Siemens' case is that the score of 'Reasonable' was irrational in view of the JV's failure to explain how interfaces would be managed. It is pleaded that the only positive attribute in respect of the JV's bid was the provision of a detailed management organisation chart when the question required an explanation of how the JV's project management function would manage the interfaces between the JV members, programme and directorate level and of key systems suppliers and the JV's explanation in that regard had been insufficient.

281. The pleaded allegation is based on a false premise. The JV bid did not solely rely on the management organisation chart but provided details of the structures that would be used to manage the interfaces. The assessors recognised that the JV failed to provide sufficient explanation as to how it would manage the interfaces so as to justify a score of 'Strong', as explained by Mr Hamilton-Jenkins in his witness statement. The identified deficiency in the response was recognised and taken into account in the assessment. Siemens has not established any manifest error.

DP 1.2 C3 - Project programme

282. The stated purpose of the project programme sub-plan ('DP1.2') was to set out the principles behind the plan of the train manufacturer and maintainer ('TMM') and to provide an overall programme for the delivery of the works and MSA services.

283. The relevant question for component C3 was:

> "The Tenderer shall provide a Project Programme plan, which shall:
>
> …
>
> include a programme for the Works and MSA Services up to and including Fleet Acceptance which:
>
> • contains Contract Programme Dates for all of the Programme References, as defined in MSA Schedule 3, Part A;
>
> • does not rely on the Purchaser delivering to the TMM in advance of the Purchaser Earliest Give to TMM Dates, as defined in MSA Schedule 3, Part A;
>
> • delivers the Purchaser Latest Get from TMM Dates, as defined in MSA Schedule 3, Part A; and
>
> • complies with MSA Schedule 8 (Project Programme) in respect to the requirements of paragraphs 7.2 and 7.3 and covers substantially the requirements of paragraphs 7.6 and 7.9."

284. MSA Schedule 8 required the project programme to be in Primavera P6 (version 8.2 or later), identifying the start and finish dates and the critical path for the works and MSA services up to and including Fleet Acceptance, in logic linked CPA network format.

285. The consensus rationale (wrongly labelled C2) stated:

> "The Tenderer has provided a programme including key dates defined in the MSA 3 part A. The Tenderer has satisfied all requirements of this Component and a Strong score has been allocated."

286. No issue is taken with the consensus score of 'Strong' based on an assessment of the first three bullet points of C3. Siemens challenge the overall score on the ground that the assessors failed to assess the fourth bullet point, compliance with MSA Schedule 8, which was not in accordance with the evaluation method set out in the ITT, resulting in a breach of transparency on HS2's part.

287. Mr Hamilton-Jenkins agreed in cross-examination that the intention of the question was to permit the assessors to check for consistency between material submitted by a tenderer so as to ensure that the programme sub-plan complied with requirements under MSA Schedule 8. However, the assessors were not given access to a copy of any of the tenderers' programmes in a Primavera format and, as a result, they could not see the critical path. Following a request for clarification, the assessors were instructed that they should not assess the final bullet point, which was struck through. Mr Hamilton-Jenkins confirmed that this applied to all tenders so that they were all assessed on the same basis.

288. In considering whether the change made during assessment of the bids amounted to a breach of the obligation of transparency, it is important to have regard to the purpose of the transparency principle, which serves to ensure compliance with the principle of equal treatment. In this case, there is no issue as to the interpretation of the ITT by the RWIND tenderers, or as to the interpretation of the award criteria by the contracting utility. Section D.2.1.3 of Appendix D to the ITT required the tenderers to provide a .pdf file format version of their programme in response to this question. Section D.2.1.4 required the tenderers to provide in addition an .xer file format version of their project programme, stating that the .xer file format version of the programme would not be evaluated but would be used to support the 'contractualisation' process. Therefore, the RWIND tenderer would understand that the assessors would not consider the Primavera version of the programme, including the logic linked critical path network, as part of the assessment of the bids.

289. The clarification issued to the assessors clearly stated that the final bullet point in component C3 should be disregarded but the other bullet points required the assessors to consider compliance with key programme dates defined in the MSA. The assessors did so, as reflected in the consensus rationale. Therefore, the RWIND tenderer's understanding, namely, that the key start and finish dates in the programme would be assessed (but not the Primavera version) was implemented by the assessors. The award criteria were applied objectively and uniformly to all tenderers. Therefore, there was no breach of the principles of transparency or equal treatment.

DP 1.3.1 C7 – Design development

290. The stated purpose of the DP 1.3.1 sub plan was for the tenderer to set out how it would develop the interior design of the units with the purchaser on a collaborative basis with the objective of delivering a high-quality, user-focused customer experience.

291. The relevant question for component C7 was:

> "The Tenderer shall provide a Customer Experience Collaborative Design plan, which shall:
>
> …
>
> include an indicative programme showing dates, durations and key dependencies for the activities identified in response to items C1 to C4 above along with a justification for how this programme allows for sufficient time to achieve the required outcomes. Note: a simple block-diagram form of programme or similar, along with appropriate narrative and references to milestones in the Project Programme (submitted in response to DP1.2), would be sufficient to address this Component."

292. The JV bid in response to C7 contained a collaborative design framework plan and a collaborative design delivery plan with commentary.

293. The individual technical assessments marked this component as (i) 'Strong', (ii) 'Reasonable' and (iii) 'Reasonable'. This was moderated to a consensus score of 'Reasonable'.

294. The consensus rationale stated:

> "The Tenderer has provided a Reasonable response to this Component. The Tenderer has provided detailed descriptions and project plans for the Collaborative Design Framework and Collaborative Design Delivery. The submission clearly contains insights and experiences from previous projects and is focussed on establishing the CDT quickly, which the Tenderer states will maximise the opportunity for design without impacting engineering or delivery schedules.
>
> However, the Tenderer's programme appears to show a relatively compressed design schedule with no lead in time from project commencement to the beginning of the Discover phase. The Discover, Define and Develop phases of the Double Diamond are completed in less than one year. The brevity of this lead in time and the compressed timescale to complete the first three phases of the Double Diamond raises concern that a robust and holistic interior design development process may not be achievable."

295. Siemens' case is that it was irrational for the assessors to ascribe the JV's bid a score of 'Reasonable' on the grounds that (i) the JV indicated a weaker programme than that put forward by Siemens; and (ii) the JV included a lack of lead in time and a compressed

timetable, which did not give assessors confidence that there was sufficient time allowed in the programme to achieve the required outcomes.

296. As to the first allegation, absent any evidence that the bids were treated differently, such as by the application of different criteria, a comparison between the JV's bid and Siemens' bid is impermissible. HS2 was required to assess the content of each bid separately against the specifications and criteria in the ITT.

297. As to the second allegation, the criticisms relied on by Siemens were identified by the assessors and taken into account in their assessment. It was a matter for them to decide what weight to give to each factor of the response. Mr Dawson, one of the assessors, stated in his witness statement that the assessors were not of the view that the design development process was unachievable, particularly as the JV explained that it intended to take advantage of the lead in time and complete certain tasks before it was issued with the notice to proceed. Siemens has not established any manifest error.

DP 1.3.2 C6 – Operational functionality

298. DP 1.3.2 required the tenderers to explain how they would collaborate with the purchaser and other stakeholders to agree the required unit functionality, manage delivery and support the wider railway systems integration activity.

299. The relevant question for component C6 was:

> "The Tenderer shall provide an Operational Functionality plan, which shall:
>
> …
>
> include an indicative programme showing dates, durations and key dependencies for the activities identified in response to items C1 to C5 above along with a justification for how this programme allows for sufficient time to achieve the required outcomes."

300. The JV bid in response to C6 contained an indicative programme block diagram with narrative, stating that further details of milestones and testing activities were set out in the project programme (DP1.2).

301. The individual technical assessments marked this component as (i) 'Strong', (ii) 'Reasonable' and (iii) 'Weak'. This was moderated to a consensus score of 'Reasonable' as set out in the minutes of the moderation meeting:

> "Assessor Three discussed how the Tenderer could have shown testing activities more clearly but accepted that dates were provided for them.
>
> The Assessors discussed the activities shown and their alignment in response to items Cl to C5.
>
> Assessor One discussed that level of detail provided in the Tenderers response was sufficient, as it detailed dates, durations

> and key dependencies for the activities identified in response to items Cl to C5 but was concerned that the durations shown are insufficient.
>
> All Assessors continued to discuss the Tenderer's submission and agreed a score of Reasonable.
>
> Assessor One changed their score from Strong to Reasonable as on reflection the Tenderer had not provided sufficient narrative to justify the duration shown for certain activities in the programme.
>
> Assessor Three changed their score from Weak to Reasonable as they hadn't accounted for the dates shown on the Tenderers programme."

302. The consensus rationale stated:

> "This component was reasonably answered by the Tenderer. The Tenderer provides a detailed programme showing the activities for developing Operational Functionality. The activities shown, and their alignment with components C1-C5 could be clearer. The durations given in the programme appear quite short and there is limited justification for why the times given are sufficient. The Tenderer provides some explanation for how delays can be mitigated."

303. Siemens' case is that it was irrational to award a score of 'Reasonable' given the failure to show MSA milestones for the testing activities and inter-activity dependencies in respect of C3 to C5.

304. In cross examination, Mr Sterry accepted that the JV's programme did not indicate MSA milestones for its testing activities and did not show all of the dependencies between activities as required. He recognised that these were weaknesses but, as he explained in his witness statement, balanced against those deficiencies, the assessors considered that the JV's response included the programme dates, dependencies and activities as required.

305. The criticisms relied on by Siemens were identified by the assessors and taken into account in their assessment. No manifest error has been established.

DP 1.3.5 C1 – Approvals

306. The stated purpose of DP 1.3.5 was to set out the approach the tenderer would follow to obtain all of the regulatory approvals to ultimately allow the units to operate in unrestricted passenger service. The relevant regulatory bodies for this part of the tender assessment were the Notified Body and Designated Body, independent companies that carry out assessments as to whether train manufacturers' designs meet the mandatory standards of the National Technical Specification Notices.

307. The relevant question for component C1 was:

> "Explain how the Tenderer will work with the Notified Body / Designated Body to achieve Intermediate Statements of Verification and Certificates of Verification to support testing, trial running and authorisation of the Unit."

308. The JV bid described the process for getting approval for a train from a Notified Body and/or Designated Body and relied on its experience in engaging with these bodies and the approval processes in the UK. The JV stated that it would commence engagement early, commissioning an accredited entity as the combined Notified Body and Designated Body to improve efficiency, using the IBM DOORS database to record requirements, compliance statements, and validation and verification ('V&V') evidence. It provided a general description of the work that would be carried out by its UK approvals team and referred to its consortium collective experience in this area.

309. The individual technical assessments marked this component as (i) 'Weak', (ii) 'Strong', and (iii) 'Reasonable'. This was moderated to a consensus score of 'Reasonable'.

310. The minutes of the moderation meeting recorded:

> "Assessor One changed their score from Weak to Reasonable after considering the positive aspects of their response identified by the other assessors, inc. the use of DOORS for requirements capture/management, and the use of a combined NoBo/DeBo for assessment (reducing the number of interfaces).
>
> Assessor Two changed their score from Strong to Reasonable after acknowledging that the Tenderer could have provided more detail on the assessment process and engagement with the NoBo/DeBo.
>
> All Assessors agreed a consensus score of Reasonable."

311. The consensus rationale stated:

> "The Tenderer includes a summary of the overall regulatory framework under R(I)R, which is correct, but wider than the subject of this question … The Tenderer's response could have been more focused around the specifics of the question.
>
> The Tenderer identifies the benefits of early NoBo / DeBo engagement and sets out their plan of when they will appoint the NoBo / DeBo, appointing a single company ...
>
> The Tenderer provides a diagram that shows phases of testing and the level of V&V that will be complete to support ISVs and CoV s ...
>
> The Tenderer explains how they will use DOORS to capture requirements and V&V evidence …

> The Tenderer explains which teams will undertake the approvals work and highlights the experience of this team …
>
> The Tenderer could have provided significantly more detail about the processes that they will use to work with the NoBo / DeBo (and specifically which assessment modules they will use). In particular the Tenderer could have provided more detail about how they will undertake manufacturing assessment (module SD or via SH1). The Tenderer could have provided more information on how they work with and manage the NoBo / DeBo."

312. Siemens' case is that it was irrational to award a score of 'Reasonable' as the JV's bid omitted key information as to how it planned to work with the NoBo/DeBo. In particular it failed to provide any information as to whether it would adopt the SB + DS or SH1 module as part of the assessment.

313. Mr Sterry accepted in cross examination that the failings he identified in his individual assessment amounted to a shortcoming in the JV's bid. The criticisms relied on by Siemens were identified by the assessors, discussed in the moderation meeting and taken into account in their assessment. It was a matter for the assessors to determine the weight to be given to the positive and negative aspects of the response. No manifest error has been established.

DP 1.3.5 C2 – Approvals

314. The relevant question for component C2 was:

> "Explain how the Tenderer will undertake a risk assessment and how the Assessment Body will be engaged in this process."

315. The JV bid described the processes that it would undertake, using its risk assessment framework, to comply with the Common Safety Method for Risk Evaluation and Assessment regulation ('CSM-REA').

316. The individual technical assessments marked this component as (i) 'Reasonable', (ii) 'Reasonable' and (iii) 'Weak'. This was moderated to a consensus score of 'Reasonable'.

317. The minutes of the moderation meeting recorded:

> "Assessor Three changed their score from Weak to Reasonable that [sic] there was sufficient breadth of risk assessment process covered, including how the Tenderer will work with the AsBo and with WCP and other stakeholders. There was enough breadth to overcome the lack of detail in some areas."

318. The consensus rationale stated:

> "The Tenderer explains how a risk assessment compliant with CSM-REA would be undertaken, and how an AsBo would be appointed 4 months after NTP to enable early agreement on

specific methods and processes. The AsBo would review the risk assessment framework. Workshops would be arranged with the stakeholders to identify hazards develop the required safety requirements.

The Tenderer could have provided more detail in their response and more substantial supporting information, such as the specific Safety activities and a simple timeline of the project linking the Safety activities to the various project stages. The Tenderer also states it will build on existing experience from other projects; this can be expected to assist in developing a complete set of hazards and acceptable close-outs.

The Tenderer could have provided some information on their internal organisation to deliver this scope of work."

319. Siemens' case is that it was irrational to award a score of 'Reasonable' in view of the clear shortcoming in the JV's bid.

320. Mr Sterry, who initially assessed the component as 'Weak', accepted in cross examination that the failings he identified in his individual assessment amounted to a shortcoming in the JV's bid, namely, the JV's failure to explain the process it would follow, including the clear steps it would take, the roles of different parties and the deliverables from that process; and insufficient detail in respect of specific safety activities.

321. The criticisms relied on by Siemens were identified by the assessors, discussed in the moderation meeting and taken into account in their assessment. It was a matter for the assessors to determine the weight to be given to the positive and negative aspects of the response. No manifest error has been established.

Stage 2.3 C6 – Maintenance technical plan

322. The stated purpose of the maintenance technical plan was for the tenderer to set out the maintenance regime for the units, including justification for the regime, and demonstrate that the Train Plan Parameters ("TPPs") of the TSA could be met.

323. The TPPs defined the minimum requirements for units to be in the possession of the TMM, in order to allow it sufficient time and frequency of possession of the units to provide its services, including:

i) Fleet Availability, which required the tenderer to make a specified number of units available to HS2, the Availability Benchmark, depending on the number of accepted units;

ii) Maintenance and Inspection Rules, which set out requirements relating to the interval at which certain maintenance and inspection activities were to be undertaken;

iii) Depot and Stabling Rules, which set out the number of units to be stabled overnight at various locations in the UK.

324. The relevant question for component C6 was:

> "The Tenderer shall provide a Maintenance Technical Plan, which shall:
>
> …
>
> demonstrate that the Tenderer can meet the Train Plan Parameters, including during periods of planned overhauls."

325. The JV bid stated that its approach was minimised maintenance interventions and automated management of interventions, resulting in limited stoppages for planned maintenance. It set out its rules for planned maintenance, overhaul programme and corrective maintenance, identifying its service locations around the UK.

326. The individual technical assessments marked this component as (i) 'Weak', (ii) 'Strong' and (iii) 'Strong'. This was moderated to a consensus score of 'Reasonable'.

327. The consensus rationale stated:

> "Overall the response is assessed as Reasonable.
>
> The Tenderer's Maintenance Plan approach is based upon minimising maintenance interventions and the automated management of interventions. This limits the number of planned maintenance stoppages, which subsequently provides capacity for unplanned maintenance and resilience to perturbation. A flexible approach to night and weekend working is provided.
>
> Despite the solid approach, the Tender lacked sufficient evidence demonstrating compliance with the Train Plan Parameters during periods of planned overhauls."

328. Siemens' case is that the JV failed to provide sufficient evidence demonstrating compliance with the TPPs during periods of planned overhauls. Mr Elliott, one of the assessors, could not recall in cross-examination whether or not he had been provided with a copy of the JV's TPPs when assessing this component. The score of 'Reasonable' was irrational as it did not adequately account for the JV's failure to provide sufficient evidence that its maintenance technical plan would comply with the TPPs, as was required by the question at C6 of Stage 2.3.

329. Mr Elliott explained in his witness statement that planned overhauls occur when the trains require intensive maintenance, having been running for a number of years, and they require the trains to be taken out of service for a greater period of time than that allocated to routine maintenance. Because the HS2 trains would all become operational at about the same time, the tenderers were required to provide a planned overhaul strategy to explain how they would spread out this essential maintenance work whilst still delivering enough trains per day to run the service. He considered that the JV had provided calculations to demonstrate that it would have sufficient capacity to maintain the trains and that the overhauls would not threaten the TPPs, describing (i) when maintenance activities would be carried out; (ii) the number of hours/days that would

be required for those activities; and (iii) the resources allocated to carry out the activities, including contingency allowances. Although cross-references to the relevant TPPs could have provided additional evidence that the JV would meet them, that approach was not the only way in which it could demonstrate compliance.

330. The criticisms relied on by Siemens were identified by the assessors, discussed in the moderation meeting and taken into account in their assessment, as evidenced by the consensus rationale. It was a matter for the assessors to determine the weight to be given to the positive and negative aspects of the response. No manifest error has been established.

DP 1.3.5 C3 – Approvals

331. The relevant question for component C3 was:

> "Describe how the Tenderer will elicit the required information about the CRN and undertake a compatibility assessment of the Unit for its operation on the CRN, leading to a Network Rail Summary of Compatibility."

332. The JV bid stated that it would use its generic interface document to identify interfaces considered in the compatibility assessment between any rolling stock and the CRN, which would be reviewed to define interfaces applicable to HS2 trains. Further technical information would be derived from the 'Ellipse system' containing CRN asset information and the resulting interface control document would be used for discussions with Network Rail.

333. The individual technical assessments marked this component as (i) 'Weak', (ii) 'Reasonable' and (iii) 'Reasonable'. This was moderated to a consensus score of 'Reasonable'.

334. The minutes of the moderation meeting recorded:

> "Assessor One changed their score from Weak to Reasonable after taking into account where the other assessors had identified positive aspects of the Tenderer's response, including their use of previous compatibility knowledge to feed into the assessment for operation on CRN, and the staged incremental increase in the compatibility assessment as the project progressed."

335. The consensus rationale stated:

> "The Tenderer identifies the applicable standard (RIS-8270-RST) and the key outputs of this standard … The Tenderer could have provided a clearer list of deliverables leading up to these deliverables (e.g. for testing or intermediate stages).
>
> The Tenderer explains that they will use a generic ICD and populate this based on standards and the 'Ellipse' system. The Tenderer could have included more information about gauging data or other data sources that may be outside the Ellipse system.

> The Tenderer could have provided more information on the technical areas that compatibility assessment will focus on. The Tenderer identifies the importance of their relationship with Network Rail via the NR Project Sponsor, and highlights an understanding of the difficulties with undertaking compatibility assessment …
>
> The Tenderer explains that they will progressively demonstrate compatibility via compliance to standards and evidence from design simulation and/or testing. This, however, does not recognise that in some cases, compliance to a standard in itself may not ensure adequate compatibility. They then explain how this information will form the Compatibility File."

336. Siemens' case is that it was irrational to award a score of 'Reasonable' in view of the shortcoming in the JV's bid, which put in doubt the JV's competence to achieve the necessary accreditation.

337. Mr Sterry accepted in cross examination that the JV failed to set out a clear list of deliverables, failed to set out all intermediate steps to achieve accreditation and appeared to rely on the Ellipse system, which did not contain key information such as gauging data, for information regarding the CRN.

338. The criticisms relied on by Siemens were identified by the assessors, discussed in the moderation meeting and taken into account in their assessment. It was a matter for the assessors to determine the weight to be given to the positive and negative aspects of the response. No manifest error has been established.

DP 1.3.7 C4 - Noise

339. DP 1.3.7 was concerned with the tenderer's approach to manage the internal and external noise performance of the units.

340. The relevant question for component C4 was:

> "The Tenderer shall provide a Noise plan, which shall:
>
> …
>
> identify and justify where research and development ['R&D'] will be undertaken to ensure requirements are met, describing the specific activities, such as prototyping and trials, that will be used to develop the design."

341. The JV bid stated that, based on their relative contribution to overall train noise, the JV would focus on high-level noise and bogie and running gear, and described its proposed research, testing and modelling.

342. The individual technical assessments marked this component as (i) 'Strong', (ii) 'Strong' and (iii) 'Reasonable'. This was moderated to a consensus score of 'Reasonable'.

343. The consensus rationale stated:

> "The Tenderer has provided evidence explaining areas for R&D and the activities that will be undertaken to develop those aspects of the Unit design. However, the Tenderer's identification of R&D topics covers exterior noise but omits justification why consideration of other R&D areas such as interior noise has not been included.
>
> Identify and justify R&D to meet requirements
>
> Two areas for R&D are identified based on their relative contribution to overall train noise, which are High Level Noise and Bogie & Running Gear. No further R&D topics have been identified.
>
> Describe activities to inform design (prototyping and trials)
>
> R&D activities for the two areas identified is evidenced that builds upon the work already undertaken. Prototyping and wind tunnel validation is evidenced along with full pass-by noise testing being undertaken on the 'Pre-Series / Systems Integration Test Units'."

344. Siemens' case is that the score of 'Reasonable' was irrational given that the JV's identification of research and development topics was limited to exterior noise and omitted consideration of other areas, such as interior noise. Further, only two specific areas for exterior noise were identified, without justification that this would be sufficient.

345. In cross-examination, Mr Lucas agreed that he identified two concerns in his initial assessment, namely, that the R&D outlined by the JV related solely to exterior noise, and the R&D for exterior noise was itself limited to only two activities. He explained in his witness statement that in the moderation meeting, the assessors were not necessarily of the view that the JV's proposals for R&D were insufficient; rather, they thought the response showed good judgment as to what would be achievable as part of the contracted works. However, it was for the tenderers to show that their concept solutions were already sufficiently well-developed to justify their limited approach and still satisfy the acoustic requirements. That lack of justification reduced the moderated score from 'Strong' to 'Reasonable'.

346. The criticisms relied on by Siemens were identified by the assessors, discussed in the moderation meeting and taken into account in their assessment. It was a matter for the assessors to determine the weight to be given to the positive and negative aspects of the response. No manifest error has been established.

DP 3.1 C2 – Maintenance deliverability

347. The stated purpose of the maintenance deliverability sub-plan (DP 3.1) was for the tenderers to demonstrate their approach to undertaking planned and unplanned maintenance and managing in service issues during full operational service.

348. Component C1 required the tenderers to provide a maintenance deliverability plan, identifying the projected planned and unplanned maintenance workload to be undertaken at the home maintenance facility, with justification for the workload estimate(s).

349. The relevant question for component C2 was:

> "with reference to C1, set out the organisational structure for its TSA maintenance delivery organisation identifying the responsibilities and number of staff by role and justify why it is sufficient to deliver the planned and unplanned maintenance workload."

350. The JV bid set out the organisational structure for maintenance, identifying the roles and responsibilities of the individuals, stating that technician numbers were based on the development process for TSA organisation, supplier predictions and in-service experience of international high-speed and UK fleets.

351. The individual technical assessments marked this component as (i) 'Strong', (ii) 'Reasonable' and (iii) 'Reasonable'. This was moderated to a consensus score of 'Reasonable'.

352. The consensus rationale stated:

> "This component was reasonably answered by the Tenderer. The Tenderer provides a robust explanation of its organisation design process including organisation chart, roles and responsibilities. The number of staff for certain roles is discussed however the justification for the numbers could have been more detailed. An understanding of headcount per role over time based on annual workloads could also have been provided. A reasonable level of confidence is provided in the Tenderer's response to this Component."

353. Siemens' case is that the score of reasonable was irrational given that the JV provided limited justification for the number of staff and failed to provide the headcount per roll over time based on annual workloads. Without that information, the JV failed to provide adequate justification as to why the level of support proposed would be sufficient to deliver the planned and unplanned maintenance workload as required by the question.

354. Mr Zagikyan, one of the assessors, agreed in cross-examination that the question required the tenderer to show that it had the right resources in the right place at the right level to meet the maintenance requirements and he accepted that, although the JV proposed numbers of staff to undertake certain tasks, it failed to justify that proposed number. However, he disagreed that the score should have been reduced to 'Weak'. As he set out in his witness statement, the JV provided a detailed organisation chart and explained the responsibilities attached to each of the roles referred to in this chart in a good degree of detail, a good response to the first part of C2. The assessors took the view that the JV could have provided further justification as to why the identified organisational structure was sufficient to deliver the planned and unplanned maintenance workload. Some justification was provided, such as the explanation that

the number of technicians proposed was based on its previous experience of high-speed services and UK fleets. The assessors considered that the JV's response would have been improved if it had provided a headcount per role over time but did not consider the omission of this detail to be significant given that it was not expressly required.

355. The JV's failure to provide justification for the number of staff by role against the maintenance workload was an omission to respond to part of the component but this omission was identified by the assessors, discussed in the moderation meeting and taken into account in their assessment. It was a matter for the assessors to determine the weight to be given to the positive and negative aspects of the response. No manifest error has been established.

DP 3.2 C1 – Mobilisation plan for TSA

356. The stated purpose of the contract mobilisation sub-plan ('DP3.2') was to set out how the tenderer would develop its resources and processes between Contract Award and the start of full operational service.

357. The relevant question for component C1 was:

> "The Tenderer shall provide a Contract Mobilisation plan, which shall: explain, through both a description and programme, the mobilisation activities between Contract Award and the commencement of full service operation to enable the Tenderer to perform the Services and other obligations under the TSA."

358. The JV bid contained a high-level programme of activities with descriptions and a case study, stating that its mobilisation methodology was based on its experience on other project mobilisations in the UK over the last 10 years.

359. The individual technical assessments marked this component as (i) 'Strong', (ii) 'Weak' and (iii) 'Strong'. This was moderated to a consensus score of 'Reasonable'.

360. The minutes of the moderation meeting recorded:

> "Assessor One agreed to change their score from Strong to Reasonable because up to reflection the detail provided for some of the mobilisation activities was limited. Assessor Two agreed to change their score from Weak to Reasonable because, given the word limit imposed on the Tenderer, there is limited opportunity to provide further detail regarding all mobilisation activities. Assessor Three agreed to change their score from Strong to Reasonable because the description of some of the mobilisation activities identified is limited."

361. The consensus rationale stated:

> "The Component was Reasonably answered by the Tenderer. The response to this component provides a high level programme which provides a limited description of the mobilisation activities. The supplementary description of the

> mobilisation activities is closely aligned to the programme but lacks alignment with the services in the TSA. The case study provides evidence of the tenderer's approach to document management but limited evidence is provided regarding other activities the tenderer will undertake to perform the services and obligations stated in the TSA. The Tenderer could have provided further description for the mobilisation activities between Contract Award and commencement of full service operation. A Reasonable level of confidence is provided in the Tenderer's response to this Component."

362. Siemens' case is that the score of 'Reasonable' was irrational given that the JV provided a limited description of mobilisation activities which lacked alignment with the services in the TSA.

363. This criticism was identified by the assessors, discussed in the moderation meeting and taken into account in their assessment. It was a matter for the assessors to determine the weight to be given to the positive and negative aspects of the response. No manifest error has been established.

DP 3.4 C4 – Refinement of maintenance plan

364. The stated purpose of the reliability and whole life management sub-plan ('DP 3.4') was to identify how the tenderer would monitor unit performance, ensure contractual levels of reliability and how it would manage the ongoing technical configuration of the units.

365. The Tenderer was required to provide a Reliability and Whole Life Management plan, explaining the scope of its Data Reporting and Corrective Action System ('DRACAS') (C1), set out details of its asset management system that it would use to manage the maintenance, performance and technical configuration of the units, demonstrating how this would enable early detection of performance issues (C2), and explain how any interventions required to address identified areas of poor performance would be developed and implemented (C3).

366. The relevant question for component C4 was:

> "drawing on C2 and C3, explain how it would continuously refine the Maintenance Plan based on in-service experience and fleet performance."

367. The JV bid stated that processes defined in its response to components C2 and C3 would provide constant monitoring and evolution of train performance for safety, reliability and availability and such continuous monitoring would feed into live updating and improvement of the maintenance plan and documentation. It identified the sources of the data used, reviews and initiatives that would be used to refine its maintenance plan and relied on case studies.

368. The individual technical assessments marked this component as (i) 'Strong', (ii) 'Reasonable' and (iii) 'Strong'. This was moderated to a consensus score of 'Reasonable'.

369. The consensus rationale stated:

> "The component was reasonably answered by the Tenderer. The Tenderer has outlined the process for the continuous refinement of the Maintenance Plan, including in-service and in-service reporting and case studies from other projects are provided. The Tenderer could have provided more information regarding how the engineering and safety process is utilised in the refinement of the Maintenance Plan. A reasonable level of confidence is provided in the Tenderer's response to this Component."

370. Siemens' case is that the score of 'Reasonable' was irrational because the JV provided limited information as to how the engineering and safety process would be utilised in the refinement of the maintenance plan which was fundamental to the question.

371. Mr Zagikyan agreed in cross-examination that the JV's bid did not address the safety process but disputed that this was the focus of the question. His evidence was that the JV had shown the continuous refinement of its maintenance plan diagrammatically and explained the continuous improvement initiatives that it would use to routinely update methods and practices. The JV also provided two case studies in which it demonstrated how it had made operational savings by continually refining its maintenance plan.

372. The omission relied on by Siemens was identified by the assessors, discussed in the moderation meeting and taken into account in their assessment. It was a matter for the assessors to determine the weight to be given to the positive and negative aspects of the response. No manifest error has been established.

DP 3.5 C5 – Fit out works

373. The stated purpose of the depot design and acceptance sub-plan was to identify how the tenderer would work collaboratively with the purchaser to develop the design of the home maintenance facility to ensure it met the requirements of the tenderer to support the performance of the services under the TSA.

374. The relevant question for component C5 was:

> "The Tenderer shall provide a Depot Design and Acceptance plan, which shall:
>
> …
>
> explain its approach to working with the Purchaser and its contractors to ensure a safe and efficient delivery of the TMM Fit Out Works."

375. The JV bid contained an explanation of its approach to working with the purchaser to ensure a safe delivery of the TMM fit out works by a collaborative approach to risk management with key stakeholders, referring to included case studies.

376. The individual technical assessments marked this component as (i) 'Strong', (ii) 'Reasonable' and (iii) 'Strong'. This was moderated to a consensus score of 'Reasonable'.

377. The consensus rationale stated:

> "This Component was reasonably answered by the Tenderer. The Tenderer provides a high level overview of their approach, they state they have extensive experience and will use this experience to ensure all works are planned, detailed and supported by safe systems of work, and where risk needs to be assessed be proven to be as low as reasonably practicable.
>
> There is limited information of their approach to ensure efficient delivery of the TMM Fit Out Works. A reasonable level of confidence is provided in the tenderer's response to this Component."

378. Siemens' case is that the score of 'Reasonable' was irrational because the JV failed to explain how it would undertake the fit out works efficiently, an integral element of the question that it neglected to answer in any detail.

379. Mr Zagikyan agreed in cross-examination that both efficiency and safety were important elements of the question at component C5 and that the JV provided limited information of its approach to ensure efficient delivery of the TMM fit out works.

380. The omission relied on by Siemens was identified by the assessors, discussed in the moderation meeting and taken into account in their assessment. It was a matter for the assessors to determine the weight to be given to the positive and negative aspects of the response. No manifest error has been established.

Conclusion on Scoring Challenges

381. The context in which the evaluation of technical compliance and deliverability was carried out was the selection of those tenderers who demonstrated that their design and delivery proposals were capable of satisfying the requirements of the MSA and the TSA. It was not intended that the assessors should approve or accept the tenderers' proposals within the Procurement; the design, programming and project management would be carried out under the Contract. At this stage, the design and delivery plans were not complete and were not intended to be completed until the successful bidder entered into the Contract. Obligations under the Contract would include design, manufacture, delivery and testing to meet specified contractual requirements. In particular, the purpose of the Stages 2 to 4 evaluation process was not to select the strongest design proposal or the plan that carried lowest risk; rather, it was to identify those proposals that met the evaluation thresholds so as to merit progression to Stage 5, the Assessed Price.

382. The court's role is not to carry out its own assessment of the proposals and substitute its own scores. The court's role is supervisory; it is limited to reviewing whether the rules set out in the ITT were followed, in accordance with the principles set out in the UCR, without discrimination or manifest error.

383. It is not sufficient for Siemens simply to rely on deficiencies in the JV bid that were noted, discussed and taken into account by the assessors in reaching their consensus scores. Having identified all relevant features of the bid, both positive and negative, the

assessors had a significant margin of appreciation in undertaking the scoring exercise against each component question. In order to establish a breach of the UCR in respect of the alleged scoring errors, it would be necessary for Siemens to identify deficiencies that were not considered by the assessors, or to identify matters relied on by the assessors that were extraneous to the ITT, or to identify some other clear error in the assessment.

384. For the reasons set out above, Siemens has not established that HS2 took into account undisclosed criteria in breach of the principles of transparency and equal treatment, or made manifest errors, in its assessment of the JV's tender at Stages 2 and 3 of the Procurement.

Issue 2 – Shortfall tender decision

385. Siemens' case is that HS2 wrongly exercised its discretion in permitting the JV to continue to Stage 5 of the procurement exercise despite its failure to satisfy the evaluation threshold for testing set out in DP1.5 and therefore submitting a Shortfall Tender.

386. HS2's defence is that the JV met the overall DP1 evaluation threshold and HS2 exercised its discretion in accordance with the tender conditions to deem the JV's Shortfall Tender as meeting the evaluation threshold for testing.

DP 1.5 – Testing sub-plan

387. Delivery Plan 1 (DP 1) concerned assessment of the train design, manufacture and acceptance delivery plan, through sub-plans for project management (DP 1.1), project programme (DP 1.2), design and development (DP 1.3) manufacturing and assembly (DP 1.4) and testing (DP 1.5).

388. The stated purpose of DP 1.5 was to set out the approach the tenderer would follow to test the units and the wayside data system prior to and following delivery to the CRN and HS2 networks.

389. The DP 1.5 question required the tenderers to produce a testing sub-plan. Component C1 provided:

> "include a testing schedule that shall, for the Units and Wayside Data System, define testing for: providing customer assurance; demonstrating TTS compliance; demonstrating compliance with Mandatory Standards; demonstrating compatibility with the CRN; and supporting systems integration on the HS2 Network. The testing schedule should show for each phase of testing the planned start and end dates, location of tests, which Units from the fleet are to be used for each test, and a list of the areas of the design to be tested."

390. The moderation meeting minutes for C1 recorded the assessors' agreement that the JV provided a comprehensive list of design areas to be tested, with identification of the reason for the testing. The schedule identified the dates, units and location of testing

but the JV's bid was ambiguous in its details for testing on the CRN. A consensus score of 'Reasonable' was agreed.

391. Component C2 provided:

> "explain how the scope of testing has been determined and justify the completeness of the testing schedule."

392. The moderation meeting minutes for C2 recorded the assessors' agreement that the JV explained how the scope of testing had been determined, using the IBM DOORS tool to capture requirements in respect of customer assurance, TTS, mandatory standards, compatibility, system integration, RAMS and product development. However, the JV failed to present detailed evidence as to how its past experience had been utilised in establishing the testing scope and schedule. A consensus score of 'Reasonable' was agreed.

393. Component C3 provided:

> "describe how the testing schedule minimises the need for testing on the HS2 Network, what test facilities the Tenderer intends to use to achieve this and why these are sufficiently representative of the HS2 Network."

394. The moderation meeting minutes for C3 recorded that testing off the HS2 Network would be limited to 200km/h whilst the HS2 Network would be used for testing up to 390km/h. The JV did not propose high-speed testing on other rail networks to minimise the need for testing on the HS2 network. Instead, the JV proposed the use of a high speed test rig at a research facility but did not provide an explanation as to how testing on the rig would minimise the need for testing on the HS2 network, or how the rig was sufficiently representative of the HS2 Network. It was noted that the rig was still in development. A consensus score of 'Weak' was agreed.

395. Component C4 provided:

> "describe how the testing will contribute towards achievement of reliability growth, including any specific activities included to achieve this."

396. The moderation meeting minutes for C4 recorded the assessors' agreement that the JV provided limited information in relation to how testing would be used to proactively drive a contribution towards developing reliability growth. Specific activities to drive reliability growth during the testing period were not sufficiently presented or explained. The JV identified elements to develop the reliability of the train but they were not brought together in the proposal to evidence a convincing approach to reliability growth contribution through testing. A consensus score of 'Weak' was agreed.

397. Component C5 provided:

> "justify the credibility of the testing schedule to achieve the Project Programme (submitted in response to DP1.2) by showing

> that sufficient contingency has been included for all risks of delay."

398. The moderation meeting minutes for C5 recorded the assessors' agreement that the JV provided an explanation of the high level contingency levels applied to the testing schedule, supported by reference to previous project experience, including details of days build up and alternative resources to continue the testing. However, the JV presented limited mitigation for delays relating to availability of the HS2 network for testing which depended upon increasing HS2 network testing paths and staffing levels. The assessors considered that this might not be a credible solution given other access demands on the HS2 infrastructure at the same time. A consensus score of 'Weak' was agreed.

399. Thus, the JV received three scores of 'Weak' (C3, C4 and C5) and two scores of 'Reasonable' (C1 and C2) for DP 1.5. This gave rise to a classification of 'Low Confidence' with an evaluation rating of 25%, resulting in a total score of 150 out of 600 for that question, lower than the evaluation threshold of 330. Hence, the JV's tender was a 'Shortfall Tender'.

Section 6.4 of the IfT

400. Under section 6.4.1 of the IfT, HS2 reserved, in its absolute discretion, the right to deem a shortfall tender as having met the evaluation thresholds.

401. Section 6.4.2 stated that, when considering whether to deem a shortfall tenderer as having met the evaluation thresholds set out in Section 6.3.4, HS2 might take a number of relevant factors into consideration, including but not limited to:

    i) the extent to which other tenders met, exceeded, or did not meet, the relevant evaluation thresholds;

    ii) the degree to which the shortfall tender failed to achieve the relevant evaluation thresholds;

    iii) the extent of the difference between the shortfall tender and those tenders that met the evaluation thresholds;

    iv) whether the shortfall tender failed to achieve any of the evaluation thresholds for any other stage;

    v) the overall impact on the Procurement if the shortfall tender (and any other shortfall tenders) remained or did not remain in the Procurement; and

    vi) the requirement to adhere to the principles of equal treatment, transparency and non-discrimination.

Review Panel 1 (RP1)

402. On 7 January 2021 the members of RP1 held a meeting to provide an initial review of the draft Shortfall Tender Report prepared by Ms Whittingham, Head Counsel, and to consider whether the panel would recommend that HS2 exercise its discretion under

section 6.4 of the IfT in respect of any of the shortfall tenders. The shortfall tenders were anonymised.

403. The panel noted the following:

i) 'Burnell' (Siemens) did not have any shortfall tenders and would progress to stage five of the Procurement; all other tenderers had at least one shortfall tender.

ii) Three of the other tenders failed to meet the Stage 2.2 evaluation threshold and also failed to meet at least one other evaluation threshold; therefore RP1 would not recommend the exercise of HS2's discretion under section 6.4 of the IfT for them.

iii) Whilst a shortfall tender on DP 1.5, 'Stebbing' (the JV) still met the overall evaluation threshold for DP1.

iv) If one of the 'Weak' scores on DP 1.5 was 'Reasonable', it would have met the evaluation threshold for DP 1.5.

v) Stebbing had performed very well across all the other stages of the Procurement.

404. It was agreed that Mr Sterry, the Lead Technical Assessor, would be instructed to review the assessment of Stebbing's response to DP 1.5 to consider what deliverability risk had been identified and recommend whether HS2 would be content to contract with Stebbing if it became lead tenderer based on the information in their submission to DP 1.5.

405. By email dated 14 January 2021 Mr Sterry provided his comments to the RP1 members. Regarding C3, he noted that if the units were only tested to 200km/h (at the manufacturer's test facility and on CRN compliant test track), the amount of testing on the HS2 Network would increase, as both the units and the infrastructure would require testing at higher speeds. However, the JV's proposal for pre-HS2 Network testing up to 200km/h was in accordance with the MSA requirement for testing to 175km/h. Therefore, there was no indication that the JV would not meet the requirements in the MSA.

406. Mr Sterry noted further that the JV did not demonstrate that the test rig facilities, proposed as mitigation for the lack of high speed testing, would be representative of the HS2 Network. However, as both the test rig facility and the HS2 Network were in development, there was no evidence that the rigs could not be configured to be representative of the HS2 Network.

407. Regarding C4, he noted that the JV's proposal included a table of activities without adequate explanation as to how testing would achieve reliability growth. However, the MSA had clear acceptance requirements on reliability that the winning tenderer would need to meet and the response did not constrain what could be achieved during the testing and design phase.

408. Regarding C5, Mr Sterry recognised that the JV identified limited options for managing delays to testing on the HS2 Network but stated that this was related to the above issues

(on C3 and C4). He commented that concern about the time available for HS2 Network testing could be addressed by a change to require testing of the rolling stock on another network "separate from the tender process" but clarified in his witness statement that no such change was proposed or adopted by HS2.

409. Mr Sterry's overall view was that HS2 should be content to contract with the JV despite its score of 'Low Confidence' on DP 1.5:

> "Having reviewed the reasons for a 'Weak' assessment, the Lead Technical Assessor's opinion is that HS2 Ltd should be content to contract with Stebbing in spite of the score of 'Low Confidence'. The issues that caused the Low Confidence can be addressed via a change (i.e. requiring high speed testing) and assurance on reliability and testing during the contract."

410. On 15 January 2021 RP1 held a further meeting, by conference call, to review and finalise the Shortfall Tender Report. The panel discussed Mr Sterry's view on the extent of deliverability risk associated with Stebbing's DP 1.5 score and concluded that it would be appropriate to exercise HS2's discretion to deem Stebbing to have met the evaluation threshold for DP 1.5. The panel noted that no change to the train proposal or the MSA would be required in contractualisation to manage any deliverability issue.

411. The final version of the Shortfall Tender Report was dated 22 January 2021. In addition to the points noted in its previous meeting, the panel noted that if HS2 chose not to exercise its discretion under section 6.4.1 of the IfT in relation to any of the shortfall tenders, it would be left with only one tender in the Procurement, namely, Burnell. Although the Procurement could proceed with a single tender, potentially this would introduce some risk to the implementation of Stage 5 and Contract Award, for example, if the remaining tenderer subsequently withdrew its tender.

412. The panel's recommendation in the Shortfall Tender Report was that Stebbing should be deemed to meet the DP 1.5 evaluation threshold, as set out at paragraphs 4.3.4 to 4.3.6:

> "4.3.4 …
>
> a. Only a single Evaluation Threshold for a sub plan of DP1 has not been met. This was a single question and the Tenderer needed only to score one Reasonable instead of a Weak at component level to have passed the Evaluation Threshold. By way of contrast, Stage 2.2 is made up of 45 questions with multiple Components. A Tenderer would not have failed to meet the Stage 2.2 Evaluation Threshold due to a single Weak score at Component level. Failure to meet the Evaluation Threshold results from the Tenderer scoring Moderate confidence or below across a significant number of their responses to the Stage 2.2 questions…
>
> b. Despite not meeting the Evaluation Threshold for sub-plan DP 1.5, the Tenderer has still met the overall Evaluation Threshold for DP1;

> c. The Tenderer has met all other Evaluation Thresholds, including Stage 2.2 with the highest overall score on this Stage;
>
> d. If this Shortfall Tender is deemed to meet the DP1.5 Evaluation Threshold, HS2 Ltd will have two Tenderers in Stage 5, which mitigates the potential risks to the conclusion of the Procurement …
>
> e. It may be considered disproportionate not to deem this Tenderer to have met this single sub plan Evaluation Threshold, where this is a very different position to the other Tenderers who have other Evaluation Threshold issues.
>
> 4.3.5 RP1 has also questioned the deliverability risk associated with allowing Stebbing to proceed to Stage 5. The Lead Technical Assessor has reviewed the DP1.5 response and consensus rationale for Stebbing to assess whether HS2 Ltd should be content to contract with Stebbing, if they become Lead Tenderer, despite the DP1.5 Evaluation Threshold not being met.
>
> 4.3.6 The Lead Technical Assessor's opinion is that HS2 Ltd should be content to contract with Stebbing if they become Lead Tenderer in spite of the score of 'Low Confidence' in this one Sub-Plan. The issues that caused the Low Confidence can be addressed post contract award and do not require any change to the Train Proposal of the Tenderer or any amendment to the draft MSA terms during contractualisation."

413. The RP1 recommendation and the Shortfall Tender Report were endorsed by RP2 at a meeting on 19 January 2021 and approved by RP3 at a meeting on 22 January 2021. Accordingly, the JV's Shortfall Tender was deemed to meet the Evaluation Threshold and permitted to progress to Stage 5 of the Procurement.

Siemens' allegations

414. Siemens' case is that HS2 was in breach of its obligations, including its duties of equal treatment, transparency, proportionality and those arising under regulation 88 of the UCR, and its duty to act without manifest error, in permitting the JV's bid to continue to Stage 5 of the Procurement:

i) HS2 failed to take into account, adequately or at all, the associated risks to the deliverability of the Contract;

ii) HS2 erroneously allowed the JV to proceed on the basis that its overall performance was strong;

iii) HS2 failed to take into account, adequately or at all the fact that no other tenders had failed to meet the evaluation threshold for DP 1.5;

iv) HS2 failed to take into account, adequately or at all, the alleged deficiencies in the JV partners' testing and manufacturing processes on other rolling stock contracts in the public domain;

v) HS2 proceeded on the basis that the JV would be allowed to improve its bid in relation to testing following Contract Award and that the testing plan in DP 1.5 was not contractualised;

vi) HS2 acted on the erroneous basis that proceeding with a single tender would introduce a material level of risk to the implementation of Stage 5 and the reaching of Contract Award.

Exercise of discretion

415. As recognised by the express words used in section 6.4.2, the exercise of discretion in a public procurement is capable of engaging and infringing the principles of equal treatment and transparency: *Stagecoach* (above) at [41].

416. Although the discretion afforded to HS2 was described as an absolute discretion, it remained subject to principled limits. Any such discretion must not be exercised on an unlimited, capricious or arbitrary basis; it must be exercised rationally and in accordance with the policy on which it is based: *Stagecoach* at [44]-[46].

Ground (i) – deliverability risk

417. Siemens allege that HS2 failed to take into account, adequately or at all, the associated risks to the deliverability of the Contract, in that: (a) no account was taken of the obligation to minimise testing on the HS2 network pursuant to clause 2.5.2 of schedule 12 to the MSA; (b) without testing at 300km/h and above, it was not possible to understand the aerodynamic performance, energy consumption, dynamic behaviour of the bodies and body shells, or the performance of the pantograph; (c) it was irrational to discount the fact that test rig facilities were in development and not demonstrated to be representative of the HS2 network; (d) it was irrational to consider that the limited information in the JV's bid on reliability growth could be addressed by the Contract; (e) HS2 failed to recognise that the above factors aggravated the limited provision made by the JV for managing delay to testing on the HS2 network; and (f) no account was taken of the JV's proposal to make available four rather than eight test units.

418. It is not in dispute that testing was a fundamental requirement to ensure the specified standards of safety, efficiency, reliability and whole life value were achieved across the project. In cross examination Mr Smith and Mr Rayner confirmed that the testing of rolling stock was critical to deliverability of the programme and that off-network testing would reduce the risk of delays to the programme. In recognition of the importance of testing to the project, the tenderers were assessed by reference to the Section 3 delivery plans, including the testing sub-plan.

419. Siemens allege that HS2 failed to assess the risks to deliverability posed by its 'Weak' score on DP 1.5. Reliance is placed on Mr Sterry's admission in cross examination that he was not asked to, and did not carry out, a risk assessment regarding deliverability. Such criticism is misplaced. Firstly, Mr Sterry was not requested to carry out such a risk assessment. Secondly, by considering the purpose of each of the elements of

concern identified in the DP 1.5 components, and the potential impact on testing, he did in fact implicitly assess risk to deliverability in respect of that issue (albeit not as a formal risk assessment). Thirdly, it was clear to the members of RP1 from the contents of his e-mail the parameters of his review. The issue of deliverability risk arising out of the deficiencies assessed in the DP 1.5 response was addressed by RP1, as is evident from paragraphs 4.2.4 and 4.2.5 of the Shortfall Tender Report. It was a matter for RP1 to decide the extent of the technical assistance needed for the purpose of that consideration and for exercising its discretion.

420. Criticism of the role played by RP2 and RP3 is misplaced. Contrary to the suggestion by Siemens, they were not required to carry out a fresh review of all underlying documents, such as the JV's responses or the moderation minutes. The role of RP2 was to review and provide senior leadership assurance of the recommendations from RP1 and, once satisfied, endorse and sponsor RP1's recommendations to RP3. Likewise, the role of RP3 was to review and, as appropriate, endorse the recommendations, actions and reports submitted by RP2 for onward submission to governance. Although RP2 and RP3 could instruct further action to be taken by RP1 and RP2 respectively, it was a matter for each review panel to determine the scope of investigation required and to raise any matters for clarification needed for them to fulfil their oversight responsibilities. The suggested "chain of manifest errors" is simply not made out.

421. As to allegation (a), that no account was taken of the obligation to minimise testing on the HS2 network, the JV's failure to propose high-speed testing on other rail networks to minimise the need for testing on the HS2 network was the stated basis of the 'Weak' score given by the assessors. That was part of what prompted the review and such weakness was expressly referred to by Mr Sterry in his email. The MSA requirement to minimise the need for testing on the HS2 Network must be read together with the MSA requirement for successful testing to be conducted at a speed of at least 175km/h. The JV's proposal satisfied that minimum requirement. Mr Sterry was not asked to carry out an analysis to determine whether increased reliance on the HS2 Network could lead to delays in the programme. Mr Smith's view was that the impact of any extended testing programme was a greater risk to the contractor (who would be responsible under the MSA for achieving the delivery plan, including the testing sub-plan) than to HS2. Correct or not, the impact of delay was considered, his view was one that was open to him and could not be said to be manifestly in error.

422. As to allegation (b), that without testing at 300km/h and above, it was not possible to understand certain aspects of performance, the JV's bid included a proposal to test up to 360/390km/h but on the HS2 Network. Such testing to that speed was not a specified requirement under the MSA and it was not requested as part of the DP 1.5 components.

423. As to allegation (c), that it was irrational to discount the fact that test rig facilities were in development and not demonstrated to be representative of the HS2 network, the JV's failure to show the representative nature of the rigs was the stated basis of the 'Weak' score given by the assessors. Mr Sterry did not discount that fact; he considered that it was not a barrier to HS2 contracting with the JV because the test rigs could be developed so as to be representative. This was an apparently rational response to the question that has not been shown to be wrong. Siemens' criticism that this was in breach of section 6.1.2 of the ITT misunderstands the exercise that Mr Sterry was undertaking. He did not purport to carry out a fresh assessment of the JV's response to DP 1.5; the

exercise was limited to whether the 'Low Confidence' score gave rise to concerns that were so serious they would prevent HS2 from contracting with the JV.

424. As to allegation (d), that it was irrational to consider that the limited information in the JV's bid on reliability growth could be addressed by the Contract, Mr Sterry explained in his written and oral evidence that reliability factors were linked to acceptance criteria under the MSA. If the JV failed to demonstrate that fleet reliability was sufficiently high, HS2 could stop accepting trains into service. It is material that the weakness in the JV bid was not a failure to identify activities that would improve reliability, which I note were assessed as part of ID 2.2.26; rather, it was a failure to explain an approach to drive reliability through testing. In those circumstances, it was not irrational for Mr Sterry to consider that the contractual safeguards could be used to mitigate against this risk.

425. As to allegation (e), that HS2 failed to recognise that the above factors aggravated the limited provision made by the JV for managing delay to testing on the HS2 network, this is simply wrong. Mr Sterry expressly referred to the fact that the JV identified limited options for managing delays to testing on the HS2 Network but stated that this was related to the other issues already addressed in his email. Given that the other points could not be shown to be in error, that was not an irrational approach. Siemens correctly points out that C5 was a separate component that required a separate response from the JV but this fails to appreciate the task undertaken by Mr Sterry; as set out above, he was not seeking to mark or re-mark any of the components.

426. As to allegation (f), that no account was taken of the JV's proposal to make available four rather than eight test units, HS2 correctly points out that this is based on a misunderstanding of the DP 1.5 response. Section 2.5.1 of the instructions for tenderers provided that the tenderer was required to make available eight test units to HS2 to support the HS2 infrastructure testing and systems integration programme. In its response to DP 1.5, the JV referred to the testing that it would carry out using four of its test units but did not refer to the additional four units that were required under the Contract. This did not amount to a failure in its response because it was not part of the information requested by the components in DP 1.5. As Mr Sterry explained, he would not have expected the JV to need all eight units for its own testing but it did not indicate that the other test units would not be provided. Indeed, it was clear from the JV's response to DP 1.2, that it would provide eight test units as required under the MSA. Siemens' criticism of this evidence is unfounded. Mr Sterry did not seek to rely on the reference to DP 1.2 as part of any assessment of DP 1.5; as set out above, he did not carry out an assessment of DP 1.5. But he was entitled to rely on it to refute the inference drawn by Siemens from the JV response to DP 1.5 that the JV's bid showed a breach of the MSA requirement.

427. It follows from the above, that I reject Siemens' case that HS2 failed to take into account, adequately or at all, the associated risks to the deliverability of the Contract.

Ground (ii) – the JV's overall performance

428. Siemens' case is that HS2 erroneously allowed the JV to proceed on the basis that its overall performance was strong. Reliance is placed on Mr Ariba's concession in cross-examination that the Shortfall Tender Report referred to the overall performance of the JV as "strong across all stages" whereas it should have stated that the performance of

the JV was strong "across all other stages", to reflect the small margin by which it passed DP1.

429. This ground of complaint is unjustified. It is self-evident that the JV did not perform strongly in DP 1.5; hence, the Shortfall Tender and the need for the shortfall tender assessment. However, HS2 was entitled to take account of the fact that the weak score in DP 1.5 was an exception. The Shortfall Tender Report showed in Figure 1 the respective scores for all tenderers (anonymised) across Stages 2 to 4, from which it was clear that Siemens and the JV had performed strongly in comparison with the other tenderers.

Ground (iii) – other tenders

430. Siemens' case is that HS2 failed to take into account, adequately or at all the fact that no other tenders had failed to meet the evaluation threshold for DP 1.5.

431. This ground of complaint is not justified. It was clear from the table at Appendix B to the Shortfall Tender Report, which summarised details of the shortfall tenders against factors in section 6.4.2 of the IfT, that the JV was the only tenderer who failed to meet the evaluation threshold for DP 1.5. In cross examination, Mr Ariba confirmed that this information was taken into account by the review panels. Further, it is evident from the minutes of the RP1 meeting on 7 January 2021, particularly paragraphs 3.5, 3.9 and 3.10, that the panel populated Appendix B as they worked through each relevant factor.

Ground (iv) – other projects

432. Siemens' case is that HS2 failed to take into account, adequately or at all, the alleged deficiencies in the JV's testing and manufacturing processes on other rolling stock contracts in the public domain.

433. This ground of complaint is not justified. There was no specified requirement for HS2 to consider prior performance when assessing the tenders at Stages 2 to 4. Siemens rightly points out that the factors identified in section 6.4.2 of the IfT were not exhaustive. This would entitle, but did not mandate, HS2 to embark on a wide-ranging historical review of the tenderers for the purpose of exercising its discretion in relation to the Shortfall Tender. HS2 did not consider such extraneous factors in respect of any of the tenders for the purpose of this exercise; indeed if it had taken account of any tenderer's prior good performance to remedy a failure in meeting the evaluation thresholds, it would have been vulnerable to an allegation of unequal treatment and lack of transparency. In this case it is sufficient for HS2 to show that it was not irrational for it to leave any consideration of prior performance to the pre- contract checks.

Ground (v) – improved bid

434. Siemens' case is that HS2 proceeded on the basis that the JV would be allowed to improve its bid in relation to testing following Contract Award and that the testing plan in DP 1.5 was not contractualised.

435. This ground of complaint is not justified. Although Mr Sterry's e-mail postulated a change to the testing on other networks before operation on the HS2 network, such proposal was not carried through to the Shortfall Tender Report, which expressly

provided at paragraph 4.3.6 that the issues of concern could be addressed post Contract Award but did not require any change to the train proposal of the tenderer or any amendment to the draft MSA terms during contractualisation.

Ground (vi) – risk of single tender

436. Siemens' case is that HS2 acted on the erroneous basis that proceeding with a single tender would introduce a material level of risk to the implementation of Stage 5 and the reaching of Contract Award.

437. This ground of complaint is not justified. HS2 was entitled to consider the impact on the Procurement if only one tenderer proceeded to Stage 5. It would remove any competition on price and could result in HS2's decision to terminate the Procurement if the Assessed Price of the sole Stage 5 tenderer proved to be too high or the tenderer withdrew from the Procurement. It was a matter for HS2 to determine the level of risk it was prepared to take on these matters. No irrationality has been established.

Conclusion on Shortfall Tender

438. The Shortfall Tender decision was an exercise of absolute discretion on the part of HS2. The evidence is clear that the decision taken by RP1 and endorsed by the other review panels was careful, rational and based on relevant evidence.

439. Mr Ariba's evidence was that, although the JV did not meet the evaluation threshold for one component in DP 1.5, it met the overall evaluation threshold for Stage 3.1 and comfortably met the threshold in Stages 2.2, 2.3 and 4. Having considered all of the factors set out in the minutes of the DP1 meetings, his view was that the exercise of discretion to allow the Shortfall Tender to go forward to Stage 5 was straightforward.

440. Mr Williamson recalled his view that overall, the JV had provided a strong technical response. His judgment was that it would have been irrational to exclude it from the process based on the one area of weakness identified in DP 1.5. He considered that the JV's low score for several of the components of DP 1.5 were justified based on its weak answer but that the points of concern could be addressed and RP1 felt that allowing the JV to continue in the procurement would not present undue risk to HS2.

441. Mr Smith explained in his witness statement that, in the RP2 meeting, the panel's review of the performance of each tenderer identified that both the JV and Siemens clearly met the overall benchmark for the technical specifications in Stages 2.2 and 2.3, substantially ahead of the other tenderers. The decision to allow the Shortfall Tender to proceed to Stage 5 was unanimous. The component failed by the JV related to its testing plan and how it would minimise the need for testing on the HS2 network. The purpose of any testing plan was for the contractor to demonstrate, with a high degree of confidence, that it delivered in accordance with the contractual specification. Although it did not demonstrate the wider range of off network testing that would have enhanced its score, the JV met the minimum requirements specified in the MSA for high speed testing. It was recognised that there were identified risks associated with testing arising from the JV's response on DP 1.5 but those risks were known and steps could be taken in mitigation.

442. Mr Rayner recalled that the decision to allow the Shortfall Tender to proceed to Stage 5 in the RP3 meeting held on 22 January 2021 was uncontroversial and unanimous. The minutes of the meeting recorded that the panel approved the Shortfall Tender Report, finding that the information in it was clear and the reasoning for exercising HS2's discretion was sound.

443. In summary, each of the individuals involved in the decision was aware of the JV's failure to meet the evaluation threshold for DP 1.5, considered the factors identified in section 6.4.2 of the IfT, and reached a conclusion that could not be said to be irrational. Oversight and review of the decision by RP2 and RP3 reached the same conclusion. Siemens has not established that the Shortfall Tender decision was in breach of the UCR or amounted to a manifest error.

Issue 3 – Change of control consent

444. Siemens' case is that HS2 wrongly consented to a change of control of the JV, following Alstom's acquisition of Bombardier's holding company, permitting a change of circumstances and sharing confidential and commercially sensitive information with Alstom and the JV, giving them an unfair advantage.

445. HS2's defence is that following the acquisition, Alstom and the JV were obliged to notify HS2 of the change in circumstances, including which tenderer would continue in the procurement exercise; there was no improper sharing of information.

ITT rules on change of circumstances

446. By section 15.3.4 of the IfT, HS2 reserved the right to reject or disqualify any tenderer for a number of reasons, including a tenderer who:

> "undergoes a change in identity, control or financial standing or any other materially adverse change affecting the Tenderer which in the reasonable opinion of HS2 Ltd means that a Tenderer has become ineligible pursuant to the UCR 2016 and/or puts the Tenderer in breach of the PQP requirements and/or the Minimum Standards (as defined in the PQP) and/or would have an adverse impact on the Procurement."

447. Section 15.6 contained the following provisions regarding a change in circumstances during the Procurement:

> "15.6.1 HS2 Ltd is relying on the information provided to HS2 Ltd by Tenderers to date during the Procurement. If, at any time prior to Contract Award, there is any material change to such information, the Tenderer is required to notify HS2 Ltd immediately. For example, Tenderers must notify HS2 Ltd of any deterioration in the financial strength of the Tenderer (or Parties to a Consortium).
>
> 15.6.2 In the event that a Tenderer proposes a change in circumstances which involves a change in the status or identity of the Tenderer or the membership and/or structure of a

Consortium, the Tenderer, or Lead Party (if the Tenderer is a Consortium), must immediately inform HS2 Ltd of such proposed change and provide such information as may be reasonably requested by HS2 Ltd in respect of the change. This will allow HS2 Ltd to consider the impact of the change and whether or not to provide its consent to the change. For the avoidance of doubt, changes in circumstances for these purposes include, but are not limited to, the following:

a. any change in legal status of the Tenderer;

b. any change in the membership of a Consortium;

c. a Tenderer, or Tenderers, that subsequently decide to create, or join, a Consortium for the purposes of the Contracts;

d. changing the provider of the Parent Company Guarantee and/or performance guarantee(s);

e. the splitting, demerger, reallocation of equity, or other change in the composition of a Tenderer pre-qualified as a Consortium;

f. changing the legal status of a pre-qualified Consortium, e.g. incorporating an unincorporated joint venture; and/or

g. any change of control of the Tenderer or any Party in a Consortium.

15.6.3 HS2 Ltd reserves the right to refuse to consider or refuse consent to any proposed change in circumstances and/or to disqualify any Tenderer/Tenderers at any stage in the procurement process whose proposed change (i) means that the Tenderer no longer meets any of the requirements of Assessment Stages 1, 2 and 3 set out in the PQP, (ii) would lead to insufficient competition, and/or (iii) would otherwise be contrary to any of the rules of the Procurement (whether under the ITT or the UCR 2016).

15.6.4 HS2 Ltd further reserves the right to reassess a Tenderer's EoI and/or Tender where a change in circumstances occurs or there is a material change to the information provided at the PQP stage, and to disqualify a Tenderer at any stage up to Contract Award if, due to such a change, the Tenderer no longer meets any of the requirements of Assessment Stages 1, 2 and 3 set out in the PQP."

448. Section 15.7 contained a prohibition on multiple tenders in the Procurement:

"15.7.1 Tenderers are reminded that under the PQP HS2 Ltd did not accept multiple EoIs from the same organisation / economic

> operator or from multiple organisations / economic operators within the same corporate group or otherwise under common ownership (whether as single Applicant or as Party to a Consortium). Tenderers are advised that in this ITT stage they may:
>
> a. only belong to one Tenderer and submit one Tender as that Tenderer.
>
> b. not offer their services as a rolling stock manufacturer acting as a sub-contractor to another Tenderer.
>
> 15.7.2 Where a change in circumstances (if consented to by HS2 Ltd) would lead to multiple Tenders from Tenderers within the same corporate group or otherwise under common ownership, as part of the information in the notification of such change in circumstances under Section 15.6, or as soon as possible thereafter, the affected Tenderers are required jointly to propose which of the Tenderers will continue in the Procurement following such change."

449. Section 15.9 of the IfT reminded the tenderers of the terms of the confidentiality agreement signed by them relating to the tender information.

450. Section 15.9.4 stated:

> "Tenderers shall treat all information relating to their Tender as confidential and where any such information needs to be copied to parties supporting the Tenderer, then the Tenderer shall ensure that those parties shall also treat the information as confidential. Tenderers may disclose, distribute or pass information to another person associated with their Tender (including but not limited to, for example, the Tenderer's insurers or advisers) if either:
>
> a. this is done for the sole purpose of enabling a Tender to be made and the person receiving the information undertakes in writing to the Tenderer to keep the Information confidential on the same terms as set out in this ITT (and the Confidentiality Agreement); or
>
> b. the Tenderer obtains the prior written consent of HS2 Ltd in relation to such disclosure, distribution or passing of information (HS2 Ltd's consent may be given subject to such conditions as it sees fit (including as to entry into legally binding confidentiality undertakings))."

451. Section 15.9.5 stated:

> "HS2 Ltd may disclose detailed information relating to Tenders to HS2 Ltd's members, directors, officers, employees, agents, advisors or beneficiaries and HS2 Ltd may make the Tender and

> Contracts available for private inspection by HS2 Ltd's members, directors, officers, employees, agents, advisors or beneficiaries. HS2 Ltd also reserves the right to disseminate information that is materially relevant to the Contracts and/ or the High Speed 2 Project to all Tenderers, even if the information has only been requested by one Tenderer, subject to the duty to protect any Tenderer's commercial confidence in its Tender. HS2 Ltd will act reasonably as regards the protection of commercially sensitive information relating to the Tenderer, and commercially sensitive information will be kept confidential and only disclosed on a need to know basis within HS2 Ltd, its agents, advisors and beneficiaries."

452. Section 15.14.1 provided that a tenderer might be disqualified at any stage of the process if, in connection with the Procurement or the Contracts, there was any collusion between tenderers, including where any tenderer:

> "(g) communicates to any person other than HS2 Ltd the amount or approximate amount of the proposed Tender (except where … (ii) such disclosure is made in confidence solely to enable affected Tenderers to decide, as required by paragraph 15.7.2, which of their Tenders will continue in the Procurement following a change in circumstances, provided that following such disclosure multiple Tenders are not subsequently submitted by such Tenderers)."

Material facts

453. In December 2018, Siemens raised a request for clarification from HS2 regarding a potential merger between Siemens and Alstom.

i) In response to CQ00268, HS2 set out its understanding that a significant change in the ownership and control structure of Siemens would constitute a change in circumstances for the purpose of section 15.6.2 of the IfT, and that completion of the merger would lead to there being two existing tenderer entities within the same corporate group or otherwise under common ownership contrary to section 15.7 of the IfT.

ii) In response to CQ00269, HS2 stated that section 15.7.2 anticipated that the decision as to which tender would remain in the Procurement would be proposed as part of the notification of a change in circumstances under section 15.6:

> "That is, the notice would propose who is to withdraw and who is to remain, and request consent from HS2 Ltd as to any changes (such as to provider of PCG) in respect of the remaining Tenderer. HS2 Ltd may then seek further information.
>
> This should be one joint submission by both Tenderers, ideally in advance of completion. However, if (due to the manner in which the merger is to be implemented) this is not possible, HS2

> Ltd would expect the affected Tenderers to write proposing how they will ensure that the situation is regularised as promptly as possible – see further below."

iii) In response to CQ00270, HS2 stated that it would be for the tenderers to decide which tender would remain in the Procurement.

iv) In response to CQ00271, HS2 set out its understanding that it would be possible for the tenderers to discuss and decide which tenderer would remain in the competition without a necessary breach of the non- collusion restrictions in section 15.14 of the IFT, which were intended to guard against the fixing of terms and pricing between tenderers who both submitted tenders in an attempt to distort the competition.

> "Following the Tender Return Date, the scope for breach of the non-collusion restrictions lessens significantly, as Tenders (including pricing) will have been submitted and cannot then be amended by the Tenderers (other than in certain limited circumstances).
>
> HS2 Ltd suggests that when it becomes necessary for the Tenderers to interact to make this decision, the Tenderers jointly approach HS2 Ltd requesting our agreement to the sharing of limited details between the parties to allow for this discussion to take place. To the extent this is after Tender Return Date, HS2 Ltd will be able to take a more relaxed approach to sharing of information relating to the Tenders (provided the merger is by that stage certain to proceed). "

v) In response to CQ00272, HS2 noted that various regulatory clearances might be required before completion of any merger. HS2 would want to receive notice of the change immediately on the tenderers becoming aware of it pursuant to section 15.6 of the IfT. Ideally this would be in advance of completion of the merger but, if not possible, HS2 would wish to be made aware of it immediately after completion, even if a decision remained pending on which tender would remain in the Procurement.

454. Ultimately, the proposed merger between Siemens and Alstom was vetoed by the European Commission on competition grounds and did not go ahead.

455. On 17 February 2020, a press release was issued by Alstom and Bombardier Inc. announcing that they had signed a memorandum of understanding with a view to Alstom's acquisition of the holding company of Bombardier, one of the JV parties.

456. On 21 February 2020, HS2 sent a message to the JV and Alstom, stating:

> "Per section 15.6 of the IfT, HS2 Ltd requires Tenderers to notify it of any changes in circumstances. This includes, but is not limited to, the matters set out in paragraph 15.6.2 of the IfT. In addition, we would like to remind you of the provisions of section 15.7 (No Multiple Tenders). We note that closing is not

> expected until H1 of calendar year 2021 and that the proposed acquisition remains subject to various conditions. However, we would be grateful if you could keep us advised in a timely manner as to the programme and progress in achieving financial close for the acquisition and promptly notify us of any issues arising under sections 15.6 and 15.7 of the ITT."

457. By letter dated 24 September 2020, the JV provided an update on the ongoing acquisition process and likely timescale for the transaction, if regulatory approvals were received:

> "As you may be aware, BT and Alstom signed the Sale and Purchase Agreement ("SPA") on Wednesday 16 September 2020, an important milestone in the Alstom Transaction process. Notwithstanding the signing of the SPA both BT and Alstom remain separate companies and bidders until the final acquisition agreement is signed closing the Alstom Transaction. The timing is not yet clear, but we are projecting that the Alstom Transaction will most likely close in quarter four of 2020 or quarter one of 2021, subject to any delays arising in completing the processes for achieving global regulatory approvals. The transaction is subject to approval by a number of global competition authorities, including in the EU, US, China and elsewhere. Under the terms of the SPA entered into between BT and Alstom, the parties are contractually required to close the Alstom Transaction within a limited number days of satisfaction of the last condition to the Alstom Transaction, which is expected to be the receipt of final competition approval."

458. By letter dated 2 October 2020, Mr Ariba responded to the above letter, indicating information that HS2 would need if the anticipated change of circumstances request were made. This included details of the new ownership structure, any changes to the parent company guarantee provider, and confirmation that there would be no other changes to the tender.

459. On 1 December 2020 Alstom and Bombardier issued press releases confirming that all necessary regulatory approvals required to complete the sale of Bombardier to Alstom had been received and that the transaction was expected to close on 29 January 2021. Notification of this information was sent by the JV to HS2 on 3 December 2020.

460. On 8 December 2020 HS2 acknowledged the notification and stated:

> "Given the greater certainty on the closing date for the transaction, we would be grateful if you are able to provide us with an update on your plans for when you expect to request HS2 Ltd's consent to the associated change in circumstances, including the decision as to which Tender remains in the procurement."

461. On 14 December 2020 the JV responded to HS2, stating:

> "We will only be able to provide further information relating to consent for change of circumstances after the acquisition completes. If there is any change to the anticipated date of completion then we will keep you advised."

462. On 15 December 2020 Alstom notified HS2 that it did not consider that there would be any change in its circumstances, given that it was acquiring Bombardier and therefore Alstom would not be subject to any change of control:

> "Accordingly, we would be grateful if you could please confirm that our understanding of the IfT (and our previous correspondence) is correct ie: - there is no change in circumstances for which Alstom would need to obtain HS2 consent; and - the tenderers have the discretion to determine which of the two tenders they wish to withdraw, in accordance with our own assessment process. We do not need to obtain HS2 consent for either the assessment process or the bid which we have accordingly determined should be withdrawn.
>
> Of course, we would expect that Bombardier Transportation will need to notify HS2 of a change in control and we assume that you are in correspondence with Bombardier separately on this issue."

463. On 26 January 2021 the JV requested a meeting with HS2 to discuss the change of control notification required by the IfT and the extent to which HS2 could assist with the proposed expert evaluation process to determine which tender remained in the Procurement in order to align it with the tender process.

464. Mr Ariba's evidence is that a telephone call took place with the JV on 28 January 2021, during which he reiterated his position that he was waiting for a formal change of circumstances notice before HS2 could consider it.

465. On 28 January 2021, Alstom sent an update to HS2 concerning the post-acquisition bid withdrawal process, having regard to the anticipated transaction close, stating:

> "The VHS Commitment given to the European Commission includes a bid selection mechanism requiring an independent expert (jointly appointed with Bombardier/Hitachi) to select which bid to maintain and which to withdraw with a view of maintaining the bid best positioned to win. In light of this legal requirement, and given the common interest of HS2, Alstom and Bombardier/Hitachi in ensuring that the best positioned bid remains in the procurement, it is important that the expert conducts an as thorough assessment of the bids as possible. We expect this process to take longer than the 2 weeks that you had initially envisaged during our correspondence over the summer. We will be in a better position to estimate and agree on the timeline once we receive your input on the questions below."

466. Alstom stated that the selection process would be expedited if HS2 could engage with the expert and produce information required for the expert exercise or, alternatively, confirm that the information provided to the expert was correct.

467. By letter dated 29 January 2021, the JV notified HS2 under Section 15.6 of the IfT that the Alstom Group had acquired Bombardier, giving rise to a change of circumstances, and provided details of the change of control, stating:

> "For the purposes of paragraph 15.7.2 of the ITT, please note that the parties are in the process of agreeing to the appointment of an independent expert in accordance with the European Commission mandated mechanism to determine which bid (Alstom's or JV's) will continue in the procurement. We intend to appoint the independent expert and to finalise the terms of the expert determination process imminently, so that the independent expert determination can commence. By nature of the expert being independent, they will need to gather and verify the relevant bid data from both bidders and to address any clarifications with HS2, which is likely to take some time. Once the process has been established, we will advise HS2 accordingly."

468. Also on 29 January 2021, Mr Ariba contacted all tenderers by telephone and by letter to inform them of the outcome of Stages 1 to 4 of the tender evaluation process. Siemens was told that its bid had passed Stages 1 to 4 and would proceed to Stage 5. The JV was told that its tender was deemed to meet the Stages 1 to 4 evaluation thresholds and that it would proceed to Stage 5. Alstom was told that it had been disqualified.

469. On 3 February 2021 Mr Ariba sent a message to Alstom, stating:

> "You are aware that your Tender will not be evaluated further in the procurement process for the reasons stated in the notification letter.
>
> While we have seen Alstom's public announcement of the completion of the acquisition as scheduled on 29 January 2021, we are not aware of what information has been shared between Alstom and the Bombardier Transportation/Hitachi joint venture.
>
> Our suggestion is that Alstom and the Bombardier/Hitachi joint venture may wish to write to us seeking our agreement that your confidential notification letters can be shared with each other and with the appointed expert. We would provide this agreement when requested.
>
> We are then happy to liaise further with you, or directly with the expert, in relation to any other information that should be required..."

470. On 5 February 2021, the JV confirmed that prior to the acquisition, ethical walls were put in place, preventing any information sharing with Alstom, which would continue unless and until one of the bids was withdrawn or otherwise no longer part of the bidding process. It agreed that the JV's confidential notification letters could be shared with Alstom, and with the appointed expert, and stated that it would consent to HS2 informing Alstom that the JV had progressed to Stage 5 evaluation, subject to Alstom agreeing an equivalent disclosure by HS2 to the JV in relation to their bid.

471. Following a chasing telephone call and letter by HS2 to Alstom on 10 February 2021, Alstom responded in the following terms:

> "… we are not aware of the outcome of stages 1-4 for the Hitachi/Bombardier JV bid.
>
> We are content for HS2 to share the result of stages 1-4 for the Alstom bid with the Hitachi/Bombardier JV, as a verbal disclosure. We consider the details of HS2's assessment to be commercially sensitive and highly confidential and we do not consent to HS2 sharing the notification letter with the Hitachi/Bombardier JV, nor do we consent to HS2 sharing any further details beyond that Alstom was found to be unsuccessful at Stage 1-4. In particular, we do not consent to HS2 informing the Hitachi/Bombardier JV of any breakdown of the Stage 1-4 outcome for Alstom by reference to individual stages.
>
> We would expect HS2 to provide us with a similar level of information in relation to the Hitachi/Bombardier JV."

472. Mr Ariba agreed to this request. On 15 February 2021 he contacted Alstom and the JV by telephone. In his witness statement, Mr Ariba stated that he told Alstom that the JV was successful on Stages 1 to 4 and he told the JV that Alstom was unsuccessful on Stages 1 to 4.

473. On 26 February 2021, HS2 wrote to both Alstom and Bombardier, acknowledging receipt of the notification of change in circumstances under section 15.6 of the IfT, confirming the above telephone conversations, and requesting them to confirm which tenderer would continue in the Procurement pursuant to Section 15.7.2 of the IfT as soon as possible and in any event by 4pm on 5 March 2021.

474. On 5 March 2021, each of Alstom and Bombardier confirmed in writing that Alstom would withdraw its bid and the JV would continue in the Procurement in accordance with Section 15.7.2.

475. HS2 considered the proposed change of circumstances against the factors set out in Section 15.6.3, and decided to approve it, as set out in the file note dated 8 March 2021 prepared by Mr Ariba:

> "There have been no changes to the original EoIs previously assessed, the Tender submission for the ITT or the Revised Tender Information submitted by the JV. Confirmation has been provided that the PCG provider is unchanged. As such, no

> further documentation has been reviewed. The Alstom Transaction was a shareholding acquisition of Bombardier Transportation (Investment) UK Ltd. There is therefore no cause to re-assess the Tenderer's EoIs and the Tenderer still meets the requirements of the PQP Assessment Stages 1 to 3.
>
> …
>
> The Procurement has progressed through to Stage 5, with the outcome communicated to Tenderers. The two parties involved in the acquisition are aware of the status of each other in relation to the outcome of Stages 1 to 4. The change in circumstances will not affect the number of Tenderers in Stage 5 of the procurement.
>
> …
>
> HS2 Ltd is aware of no other reason why it should refuse consent to the proposed change…"

476. HS2 considered the following additional factors:

i) Mr Ariba noted that HS2 considered a number of 'change in circumstances' notifications from various tenderers in the Procurement. All such requests were considered in a consistent manner, to ensure equal treatment.

ii) HS2 considered the request from the JV and Alstom in accordance with Section 15.6 of the 1fT.

iii) Following the outcome of Stages 1 to 4 of the procurement, only one of the parties involved in the acquisition would have had its tender evaluated further; further, the bid selection decision would have been made by an independent party, had there been any choice to be made between the two tenders.

iv) In consenting to this change, HS2 followed the rules set out in section 15.7.2 of the IfT (prohibition on multiple tenders) and no requirements of the PQP/IfT were waived or advantage given.

v) On the basis of (i) the context of a complex, high value procurement where it is common for interested economic operators to undertaken corporate reorganisations, (ii) the existence of provisions in the IfT assuming such a change may occur (provided there remained sufficient competition and the EoI tests would still be met), and (iii) the considerations set out in the file note, and in the absence of any intervention in the decision process by HS2, it would not be proportionate to refuse consent to the proposed change.

477. The effect of the Section 15.7.2 confirmation and the Section 15.6.3 approval was that the JV's Tender remained in the Procurement.

Siemens' allegations

478. Siemens' case is that HS2 was in breach of its obligations, including its duties of equal treatment, transparency and in breach of express terms of the ITT:

    i) HS2 permitted Alstom and the JV to delay notifying HS2 as to which bid would remain in the process, contrary to their obligations under section 15.7.2 of the IfT and giving them an unfair advantage.

    ii) HS2 unlawfully communicated to each of Alstom and the JV the status of the other's tender following Stages 1 to 4 of the Procurement, which:

        a) failed to ensure compliance with the independent expert determination process prescribed by the European Commission as a condition for clearance of the Alstom-Bombardier acquisition;

        b) undermined the ethical walls in place between the two tenderers;

        c) was in breach of the procurement confidentiality rules, including section 15.9.5 of the IfT; and

        d) was contrary to the requirement in section 15.7.2 that Alstom and the JV should propose which tender should remain in the competition without the involvement of HS2.

    iii) HS2 communicated to the JV and Alstom information about their respective bid status in an inappropriately informal and non-transparent manner, namely, by telephone.

    iv) HS2 unlawfully failed to take into account the material changes of circumstances relating to Bombardier in granting the change consent.

Notification under section 15.7.2

479. Ms McCredie KC, leading counsel for Siemens, submits that under section 15.6.2 of the IfT, where a change in circumstances would lead to multiple tenders from tenderers within the same corporate group or otherwise under common ownership, this was to be notified immediately to HS2 to allow it to decide whether to give its consent. Under section 15.7.2 of the IfT, affected tenderers were required jointly to propose in that notification, or as soon as possible afterwards, which of them would continue in the Procurement following such change. Siemens' case is that the JV's letter dated 24 September 2020, alternatively the JV's portal message dated 3 December 2020, amounted to a notification to HS2 of a proposed change in circumstances under section 15.6.2. Such notification triggered the obligation under section 15.7.2 for the tenderers to jointly propose in that notification, or as soon as possible thereafter, which of them would continue in the procurement following the change.

480. It is said that Mr Ariba erroneously considered that section 15.7.2 did not apply until the change in circumstances was complete and wrongly considered that the complexity of the acquisition made it impossible for Alstom and Bombardier to make their proposal under section 15.7.2 earlier than March 2021. As a result of this misunderstanding, he took no steps to enforce the proposal until 26 February 2021, following the JV's letter dated 29 January 2021, and did not receive the selection of which bid would proceed

until 5 March 2021. As a result, the JV and Alstom gained an unfair advantage in deciding which of their bids was most likely to win the Contract after the outcome of Stages 1 to 4 was known.

481. Ms Hannaford KC, leading counsel for HS2, submits that the tender rules allowed for the section 15.7.2 decision to be made after closing of the acquisition and it was not possible for Alstom and the JV to make such notification earlier. Prior to closure of the transaction, the acquisition was uncertain because it was subject to global merger and other regulatory approvals, which were not granted until 1 December 2020, and other corporate steps, which were not completed until 29 January 2021.

482. She submits that it was clear from the clarification provided by HS2 in December 2018, in response to Siemens' requests, that the section 15.7.2 proposal could be made after closing provided that it was made as promptly as possible. Further there was clear recognition by HS2 that the notice of change under section 15.6 might not be possible in advance of completion. Although notification prior to a change might work in relation to straightforward changes, such as change in the membership of a consortium or a change in the entity providing a parent company guarantee, it would have been understood by the RWIND tenderer that a complex merger, in respect of which the outcome remained uncertain until all approvals and agreements came together, could only be notified at the point of completion.

483. The starting point for the court is to consider the time at which any proposed change in circumstances was required under section 15.6.2 of the IfT as understood by the RWIND tenderer. The context is relevant. Section 15.6.1 imposed on tenderers an obligation to notify HS2 immediately if there were any material change to the information provided during the Procurement. That would include any change to the status or financial position of a tenderer. Section 15.6.2 obligated tenderers to inform HS2 immediately of a proposed change in circumstances which involved a change in the status or other relevant aspect of the tenderer, such as the Alstom acquisition. Reading those provisions together, it is apparent that the notification required did not include potential or contingent changes. The reference to "proposed change" was the requested change based on the resolved intention by a tenderer to change the status of the tenderer or other information provided during the Procurement. Although it was always open to a tenderer to provide advance notice of a possible but as yet unconfirmed change (such as Siemens' discussion of its potential merger when it made its request for clarification pre-tender), the obligation to notify HS2 under the terms of the ITT did not arise until there was a definite proposal to make a change.

484. Such understanding is supported by section 15.6.3, which entitled HS2 to refuse consent to any proposed change in circumstances. The proposed change referred to could not include the acquisition itself because HS2 did not have power to refuse consent to Alstom's acquisition of Bombardier; its power was limited to a right to grant or refuse consent to any proposed change in the status of the JV consortium as tenderer as a result of the acquisition. In practice, it could only grant or refuse consent when the acquisition was final and certain, although, of course, it was always open to HS2 to give informal indications as to what information might be required, any conditions that might be attached, and whether consent was likely to be forthcoming.

485. Likewise, the section 15.7.2 obligation to propose which of the tenders would continue in the Procurement, following a change of circumstances that would lead to multiple

tenders, could not arise before regulatory approval of the acquisition was received and the final commercial terms were fixed. In order for the affected tenderers to decide which tender would continue in the Procurement for the purpose of making a joint proposal to HS2, they had to communicate and share information about their bids. It was anticipated in HS2's response to CQ00271 that any sharing of bid data would be permissible only when the relevant transaction was certain to proceed. As agreed by Ms Hensher in cross examination, the danger in sharing information too early was that a bid might have to be withdrawn pursuant to anti-collusion rules if subsequently the acquisition did not go ahead. Recognising that there might be such difficulty, section 15.7.2 provided for a joint proposal as to which tender would continue in the Procurement in the section 15.6 notification, or as soon as possible thereafter.

486. Although the sale and purchase agreement in respect of the acquisition was signed on 16 September 2020, the global merger and other regulatory approvals were not received until 1 December 2020, and finalisation of the corporate steps to closure was not achieved until 29 January 2021. It was only at the date of closure that the change in circumstances became certain, giving rise to an obligation under section 15.6.2 to notify HS2, and an obligation under 15.7.2 to make a joint proposal as to the tender that would continue in the Procurement as soon as possible thereafter.

487. Siemens' argument that the notification under section 15.6.2 was made on 24 September 2020 or 3 December 2020 is rejected. Whilst it is correct that the issue of the date of notification must be considered as a matter of substance rather than form, the documents relied on do not support its case that notification was made on the postulated dates. The letter dated 24 September 2020 made it clear that the acquisition remained subject to global regulatory approvals; as such, the outcome remained uncertain. Similarly, the portal note dated 3 December 2020 indicated that the anticipated closing date was subject to outstanding corporate steps and the subsequent JV letter dated 14 December 2020 clarified that it would not be able to provide further information relating to consent for change of circumstances until after completion of the acquisition.

488. As to the alleged delay, Mr Ariba was clear in cross examination that he did not allow the JV parties to delay their section 15.7.2 selection until closing of the transaction so that they could gain an advantage through knowledge of the outcome of the Stage 1 to 4 evaluations. The time scale for completion of the acquisition was indicated as the first half of 2021 when the memorandum of understanding was made public in February 2020 and this proved to be accurate. There is no evidence that the notifications under section 15.6 and 15.7 were delayed pending the outcome of Stages 1 to 4 of the evaluations. The JV issued its notification under section 15.6.2 on 29 January 2021, the date of closure of the acquisition. The joint proposal under section 15.7.2 was made on 5 March 2021, just over five weeks later. Having regard to the sensitivity surrounding the sharing of bid information, and in the light of Siemens' suggestion (in its 2018 request for clarification) that ten weeks might be appropriate for this exercise, this was within the anticipated time scale permitted by section 15.7.2.

489. Further, there is no evidence that any delay to the joint proposal under section 15.7.2 gave Alstom and/or the JV any unfair advantage. Siemens' case is that notification of the proposed change, triggering the obligation under section 15.7.2 to propose which bidder would continue in the Procurement, arose on 24 September 2020, alternatively 3 December 2020. However, by that stage Alstom was aware that it did not comply

with two Mandatory TTS Requirements and, as a result, was likely to be disqualified. An appeal was possible but any reliance on an assumed favourable outcome must be considered a high risk strategy. Therefore, even if the JV and Alstom had made an earlier notification, it is inconceivable that the outcome would have been anything other than a joint proposal to keep the JV in the Procurement.

Disclosure of tender status

490. Siemens alleges that HS2 unlawfully communicated to each of Alstom and the JV the status of the other's tender following Stages 1 to 4 of the Procurement, which (i) failed to ensure compliance with the independent expert determination process; (ii) undermined the ethical walls in place between the two tenderers; (iii) was in breach of the confidentiality rules; and (iv) was contrary to section 15.7.2.

491. Siemens' case is that Mr Ariba agreed in cross examination that it was not in HS2's remit to tell the tenderers who to put forward to continue in the Procurement under section 15.7.2 but, on 3 February 2021, he suggested to Alstom and the JV that HS2 could share with them the status of the other's tender following Stages 1 to 4 and, following their agreement to that proposal, on 15 February 2021 Mr Ariba informed the parties by telephone of the outcome of their bids. In by-passing the expert determination process put in place by the European Commission and sharing this information with Alstom and the JV, HS2 was effectively intervening in the decision process because the outcome then became a foregone conclusion.

492. HS2's position is that it is clear from section 15.7.2 of the IfT that merging tenderers needed to cooperate to propose jointly which of the tenders would continue in the Procurement. Section 15.14.1(g) of the IfT permitted an exception to the non-collusion rule where section 15.7.2 applied, to enable tenderers to decide which tender would continue in the Procurement. There was no breach of any tenderer's commercial confidence in its tender where permission was expressly granted by Alstom and the JV, particularly in circumstances where those tenderers were permitted to share such information with each other under Section 15.14.1(g) in the context of the acquisition.

493. HS2 submits that it was not a party to the VHS commitment to the Commission, which concerned an undertaking by Alstom and Bombardier, to put in place a mechanism whereby a suitably qualified independent third party would select which bid to withdraw and which to maintain, if both remained in the competition at the time of completion of the merger. In any event, by 29 January 2021, when the merger was completed, Alstom's bid had been disqualified and the new corporate group had only one remaining tender, the JV's bid, in the competition. Therefore, there was no need for any third party selection decision.

494. The court starts by considering the anti-collusion provisions, forming part of the EOI Certificate required at PQP stage and set out in section 15.14 of the IfT. The provisions prohibited any form of price fixing, collusion with other tenderers, canvassing or bribery. The prohibited acts included at 15.14.1(g) communication by a tenderer to any person other than HS2 the amount or approximate amount of the proposed tender, except where such disclosure was made in confidence solely to enable affected tenderers to decide, as required by paragraph 15.7.2, which of their tenders would continue in the Procurement following a change in circumstances, provided that

following such disclosure multiple tenders were not subsequently submitted by such tenderers.

495. The purpose of such provisions was to avoid disruption to the fairness of the Procurement and any distortion to the competition. The sharing of information between Alstom and the JV as to the status of their respective bids did not offend the anti-collusion provisions in section 15.14, provided that such information was shared in order to determine which bid would be discontinued and which bid would continue in the Procurement. There was no advantage to Alstom and the JV, or unfairness to other tenderers; all bids had already been submitted and could not be changed, and any perceived advantage in the sharing of information dissipated once one of the bids was withdrawn. The decision to be made was simply which bid within the competition would be withdrawn to avoid multiple tenders from the same corporate group. For Alstom and the JV to make that decision, it was necessary for them to assess which bidder had the best prospect of success in the competition. The rules were not intended to force tenderers to select the continuing bid on an arbitrary basis but rather to maintain an effective competition.

496. Section 15.9.4 of the IfT provided that the information regarding a tender, including the status of a tender, was confidential to that tenderer but the stated exceptions included disclosure to another person associated with the tender with HS2's prior written consent. Prior to closure of the transaction, Alstom and the JV maintained ethical walls to guard against any improper sharing of information (particularly important where the anticipated deal might have fallen apart or not gained regulatory approval). Following the acquisition, each of Alstom and the JV became associated with the tender of the other, as members of the same corporate group. HS2 stated that it would give written consent to them to disclose the status of their bids as set out in Mr Ariba's letter dated 3 February 2021. Therefore, there was no barrier to the JV and Alstom sharing the status of their respective bids.

497. Section 15.9.5 of the IfT provided that HS2 would protect each tenderer's commercially sensitive information but there could be no breach of this obligation where, as here, permission was granted by each of Alstom and the JV for their information to be shared with each other.

498. The VHS commitment given to the European Commission by Alstom and the JV included a mechanism whereby an independent expert, jointly appointed, would select which bid to maintain and which to withdraw. HS2 had no obligation to adopt the independent expert assessment process for the following reasons. Firstly, it was not party to the VHS commitment. Secondly, the expert determination was not a requirement of the ITT or the UCR. Thirdly, as Alstom pointed out in its letter dated 15 December 2020, the tenderers had discretion to determine which of the two tenders they wished to withdraw and did not need HS2's consent for either the assessment process or selection of the continuing bid. Fourthly, Alstom and the JV agreed an alternative approach, by sharing the status of their respective bids through HS2. Fifthly, in the circumstances that arose, namely, disqualification of Alstom, there was nothing left for the independent expert to determine.

499. Finally, I do not consider that section 15.7.2 of the IfT was engaged in any event. The obligation on the tenderers to propose jointly which tender would continue in the Procurement, arose only where a change of circumstances, if consented to by HS2,

would lead to multiple tenders from the same corporate group. On 29 January 2021, the date of closure of the acquisition, Alstom's bid was disqualified and, if HS2 approved the change of circumstances, only the JV's bid would remain in the competition. It follows that there was no risk of the change in circumstances resulting in multiple tenders. Thus, it was not necessary for the tenderers to select which bid would continue in the Procurement pursuant to section 15.7.2.

Informal method of communication

500. Siemens alleges that, in breach of section 5.2.2 of the IfT and HS2's duties of equal treatment and transparency, HS2 communicated to the JV and Alstom information about their respective bid status in an inappropriately informal and non-transparent manner, namely, by telephone.

501. HS2's position is that Mr Ariba communicated with Alstom and the JV by telephone because it was a condition of Alstom's consent to its bid status being shared with the JV. The call was short and limited to very brief details as confirmed by Mr Ariba in his witness statement and in cross examination.

502. Section 5.2.2 of the IfT provided that all conversations between HS2 and tenderers were required to be via the HS2 e-sourcing portal. Despite that, Mr Ariba communicated with the tenderers by telephone on the following occasions:

   i) On 29 January 2021, Mr Ariba notified all tenderers of the outcome of their bids at Stages 1 to 4, followed by formal notification letters on the same date.

   ii) On 10 February 2021 Mr Ariba contacted Alstom by telephone to chase its response regarding the sharing of its bid status with the JV, as confirmed in a letter sent on the same date.

   iii) On 15 February 2021 Mr Ariba contacted the JV and Alstom by telephone to communicate the status of their respective bids, confirmed in letters sent on 26 February 2021.

   iv) On 5 March 2021 Mr Ariba took a telephone call from the JV, advising HS2 that Alstom would be pulling out of the competition. This was confirmed by Alstom's letter of the same date.

503. I find that these telephone communications were in breach of section 5.2.2 of the IfT. Although it is clear that Mr Ariba acted from the best of intentions in participating in each of these calls, they were very unwise and could give rise to a perceived lack of transparency. It was not sufficient that Alstom laid down a condition that the status of its bid must be communicated to the JV by telephone rather than in writing. HS2 should have refused this request because it was not in accordance with the tender rules. Indeed, an agreed statement in writing would have offered greater confidentiality and control by ensuring that Alstom could agree in advance the precise terms in which the information was conveyed.

504. However, I do not consider that this breach gave rise to any unfairness, unequal treatment or lack of transparency. As explained by Fraser J in *Bechtel* (above) at [274]-[280], the principle of transparency requires that a utility such as HS2 maintain suitable

records of its procurement process to enable (i) an economic operator to understand the reasons for which decisions adverse to it were taken in the course of that process; and (ii) the court to exercise its supervisory jurisdiction but isolated lapses of compliance do not automatically lead to a finding of breach of the principles of equal treatment or transparency.

505. In this case, the purpose of each telephone conversation was to expedite action, act as intermediary or give advance notice of information; they did not form part of the scoring of bids or the decision-making exercise carried out by HS2. A full and frank account has been given of each conversation by Mr Ariba, whom I accept was an honest and straightforward witness. In each case, the content of the conversation was subsequently and promptly confirmed in writing. Therefore, the court has full oral and written evidence as to what was said in the conversations. Further, the purpose of section 5.2.2, namely, to ensure there that there was a written record of all communications so as to protect HS2 and the integrity of the Procurement, was maintained.

506. In those circumstances, I find that these telephone calls amounted to technical breaches of section 5.2.2 of the IfT but had no causative effect.

Material changes to Bombardier's circumstances

507. Siemens alleges that HS2 unlawfully failed to take into account the material changes of circumstances relating to Bombardier in granting the change consent. It is said that Mr Ariba's failure to reassess the JV's expressions of interest, including their financial standing, when considering whether to consent to the proposed change in circumstances was irrational because the PQP requirements were continuing requirements up to Contract Award, and fairness to other bidders required HS2 to verify that the JV continued to satisfy those requirements in light of the changes to Bombardier's financial circumstances, which were widely publicised.

508. I reject these allegations. Firstly, the PQP and the ITT entitled, but did not mandate, HS2 to reassess the JV's circumstances, including its financial standing. Secondly, it was a matter for HS2 to decide when, during the Procurement, any additional assessment would be carried out. HS2 decided that pre-contract checks would be carried out following the Stage 5 evaluation and it was entitled to maintain that timing.

Conclusion on change consent

509. HS2 set out in detail its reasons for approving the change of circumstances in the file note dated 8 March 2021. Siemens has not identified any manifest error or irrationality in the careful assessment carried out by HS2 for the purposes of determining whether to consent to the proposed change of circumstances. For the above reasons, Siemens' challenge to the change consent decision fails.

Issue 4 - Stage 5 evaluation

510. Siemens' pleaded case is that the Stage 5 evaluation was flawed in that there were manifest errors in the evaluation of the JV bid and HS2 unlawfully permitted the JV to materially change its bid or evaluated the JV bid on the basis that it would be permitted to change its bid post-contract, in respect of modifications necessary to rectify design issues concerning dwell time.

511. The allegations identified from the list of issues are as follows:

i) HS2 unlawfully permitted the JV to materially change its bid and/or evaluated the JV's bid on the basis that the JV would be permitted to change material aspects of its tender post Contract Award, in particular by the "Substantial Modification Decision" (to substantially change the JV's train design in the future by increasing the number of bodyside doors to 16) and the "Further Substantial Modification Decision" (to make wide-ranging additional modifications to the JV's train design).

ii) HS2 failed adequately to take into account the requirements of the Contract in light of the JV's train design and track record.

iii) HS2 failed adequately to take into account the very low maintenance costs included by the JV.

iv) HS2 failed to reflect the failings that HS2 had recorded in respect of JV's bid in respect of C6 of the Stage 2.3 Maintenance Technical Plan, C2 of the DP 3.1, 'Pass-by Noise' and DP 1.5 'Testing'.

v) HS2 acted unlawfully in allowing the JV to supplement its bid by providing tables to reflect the Daily Unit Service Charge.

vi) HS2 acted unlawfully in allowing the JV to correct an inconsistency in its bid as to the timing of the Option Units and within the Option Unit intermediate milestones.

vii) HS2 acted unlawfully in using Appendix I of the JV's bid for evaluation purposes whilst accepting that Appendix M be used for contracting purposes when the JV had inconsistently presented TSA Ramp-Up Fixed and Variable costs between the two Appendices.

viii) HS2 gave internally inconsistent and/or manifestly erroneous reasons for its scoring.

ix) HS2 acted unlawfully in adopting aliases of villains from the James Bond films for the bidders, allocating Siemens the alias 'Dr No'.

x) HS2 made manifest errors in the heavy maintenance/overhaul analysis of Siemens' bid.

512. HS2's defence is that there were no manifest errors in the Stage 5 evaluation, which consisted of the application of a disclosed formula to the two Stage 5 tenders. The Stage 5 evaluation was not made on the basis of any unlawful change to the JV's bid or planned subsequent modification.

Power to seek clarification

513. Regulation 76(4) of the UCR provides that where information or documentation to be submitted by economic operators is or appears to be incomplete or erroneous, or where specific documents are missing, utilities may request the economic operators concerned to submit, supplement, clarify or complete the relevant information or documentation,

provided that such requests are made in full compliance with the principles of equal treatment and transparency.

514. Section 6.6 of the IfT set out the circumstances in which clarification of a tenderer's bid could be sought or provided:

> "6.6.1 Tenderers should be aware that HS2 Ltd is under no obligation to seek clarification of their Tender and it is the Tenderer's responsibility to ensure that its Tender is unambiguous and complete and, if necessary, to seek clarification of HS2 Ltd's requirements as set out in this IfT in advance of submitting their Tender.
>
> 6.6.2 HS2 Ltd's approach to clarifying Tenders will be consistent to ensure that all Tenderers are treated equally.
>
> 6.6.3 HS2 Ltd will limit the clarification of Tenders only to those questions which are permitted to be raised under the UCR 2016 (i.e. where information or documentation submitted by a Tenderer is or appears to be incomplete or erroneous, or where specific documents are missing). For example, HS2 Ltd may raise questions if an Assessor identifies in a Tender:
>
> a. contradictory information; or
>
> b. a response that has been referenced but cannot be found and which may have a bearing on the evaluation.
>
> 6.6.4 HS2 Ltd will take reasonable steps to agree with the Tenderer the answer to be put forward to the Assessors, but the final decision will be at HS2 Ltd's sole discretion.
>
> 6.6.5 Tenderers may not provide additional information within their responses to a Clarification Question raised by HS2 Ltd, even if that information is in the public domain, unless such information is specifically requested by HS2 Ltd in the Clarification Question.
>
> 6.6.6 Tenderer responses to HS2 Ltd clarifications which contain unsolicited additional information may be rejected by HS2 Ltd.
>
> 6.6.7 HS2 Ltd reserves the right to require the submission by a Tenderer of any additional or supplemental information as it may, in its absolute discretion, consider appropriate."

515. In *R (on the application of Hersi & Co) v Lord Chancellor* [2017] EWHC 2667 (TCC) Coulson J (as he then was) carried out a review of the relevant authorities and at [17] summarised the principles governing the circumstances in which a contracting utility had a duty to seek clarification:

> "(a) A duty to seek clarification of a tender will arise only in 'exceptional circumstances' (*Tideland*, *SAG*), sometimes called 'limited circumstances' (*Antwerpse*).
>
> (b) Such a duty may arise where a tender is 'ambiguous', but it will not do so in every case where a tender is ambiguous (*Tideland*)
>
> (c) It will only arise 'where the terms of a tender itself and the surrounding circumstances known to [the contracting authority] indicate that the ambiguity probably has a simple explanation and is capable of being easily resolved' (*Tideland*).
>
> (d) Such a duty may also arise where there is a 'simple clerical error' (*Antwerpse*) or 'when it is clear that [the details of a tender] require mere clarification, or to correct obvious material errors' (*SAG*). This would appear to be the same as the 'serious manifest error' referred to in *Adia*. It is not necessary for the error to be 'clerical' (whatever that might mean) but it must be 'simple', 'material', 'serious' and 'manifest'.
>
> (e) The duty will not arise where any amendment or clarification provided post-tender would 'in reality lead to the submission of a new tender' (*SAG*). The contracting authority 'cannot permit a tenderer generally to supply declarations and documents which will require to be sent in accordance with the tender specification and which were not sent…' (*Archus*).
>
> (f) There is no authority to support Mr Westgate's submission that 'the change generated by a request for clarification would have to fundamentally alter the nature of the bid before it becomes unacceptable'. I consider that this proposition is contrary to the cases I have cited and is unworkable in practice."

516. Such power or duty must be exercised in accordance with the principles of equal treatment, non-discrimination, transparency, proportionality and without manifest error discussed above. This was summarised by Fraser J in *Energysolutions EU v Nuclear Decommissioning Authority* [2016] EWHC 1988 (TCC) at [256]:

> "A principle of proportionality also applies, a failure to comply with which will constitute a manifest error. Thus there is a power under regulation 18(26), and in some circumstances there may be an obligation given the principle of proportionality, upon a contracting authority to seek clarification of a bid. But unless an authority in this position treats tenderers equally and fairly, it will not satisfy the requirements for equal treatment and non-

discrimination. Because the authority must treat tenderers equally and fairly, any request for clarification should not appear to have unduly favoured or disadvantaged the tenderer to whom it is addressed: *C-336/12 Ministeriet for Forskning v Manova A/S* [2014] PTSR 254 (2013) Oct 10th at [25]-[40] {AB/27/5-6}; *William Clinton trading as Oriel Training Services v Department for Employment and Learning* [2012] NICA 48 at [23]-[27]."

Stage 5 assessment

517. At Stage 5, the Assessed Price for each remaining tender was determined through the WLVM, calculated as the net present value for life-cycle costs and monetised benefits over the period from the commencement date of the MSA to the presumed end of the operating life of the units.

518. The life cycle costs included: (a) the capital costs of the original 54 trains/units; (b) the maintenance costs over the 35 year life of the initial units; (c) energy consumption for operating the 54 units over the HS2 Network and CRN over their 35 year life; (d) the track access charges for operating the initial units on the CRN; and (e) the capital and maintenance costs of proving certain additional units if the option were exercised by HS2.

519. The monetised benefits related to (a) the number of seats and (b) the level of pass-by (external) noise. As explained by Mr Warren in his witness statement, the monetised benefits were a way for HS2 to incentivise tenderers to optimise the rail service by ascribing a notional value to certain desired outcomes, including maximising the number of seats, reducing external noise levels, and lowering energy consumption.

520. Tenderers were required to complete the input excel worksheets in the Financial Pro Forma (Appendix I) and submit this in the 'Commercial Envelope'. Data in the input worksheets was used to calculate automatically the output worksheets. HS2 then used the output worksheets from Appendix I and entered them into the WLVM (Appendix H).

521. The Stage 5 evaluation was undertaken by two teams of assessors acting independently of each other: (i) Mr Warren was the commercial adviser and Angus Grant the Stage 5 assessor for one team; and (ii) Ben Wilson was the commercial adviser and Christopher Havard the Stage 5 assessor for the other team. Kieron Moore oversaw the process in his capacity as lead Stage 5 assessor.

522. Mr Warren explained in his witness statement the Stage 5 process adopted:

i) those involved in the Stage 5 evaluation were required to familiarise themselves with the Stage 5 documents;

ii) the commercial advisers carried out checks on the WLVM components, to verify that values submitted in a tenderer's Financial Pro Forma were consistent with those submitted elsewhere in its bid, including the Commercial Proposal Template (Appendix M), the TTS Response Spreadsheet and the Maintenance Model (Appendix K);

iii) the commercial advisers reviewed the Maintenance Model to ensure that it complied with the instructions provided in the Maintenance Model and that the Maintenance Model output was identical to the costs submitted by the tenderer in the Financial Pro Forma;

iv) the commercial advisers checked that the interiors-related costs had been accounted for separately;

v) the Stage 5 assessors took the outputs from the Financial Proforma and entered them as inputs in the WLVM to generate the Assessed Price.

vi) the Stage 5 assessment teams compared their findings (reached independently) and confirmed they had identical results.

vii) Mr Warren set out the teams' findings in the End of Stage 5 Report, including the initial ranking of the tenderers, his opinion as to whether there was an abnormally low price, whether the tie-break provision had been triggered, and his opinion on the Maintenance Model.

viii) The End of Stage 5 Report was reviewed by RP1, RP2 and RP3.

523. Following the Stage 5 evaluation process, HS2's Procurement Lead, Mr Ariba, prepared a report in respect of Stages 1 to 5, the Tender Evaluation Report.

524. Material features of the Stage 5 evaluation were:

i) The scores in Stages 2 to 4 were not carried forward for inclusion in the assessment (section 6.2.6 of the IfT).

ii) The ranking of tenders and the identification of the lead tenderer was solely on the basis of the Assessed Price, and no other evaluation scores (section 6.2.9 of the IfT).

iii) HS2 reserved the right to reconsider its evaluation of any previous stage of a tender should it subsequently become aware of information in the tender that was contradictory with the information assessed at a previous stage of the tender (section 6.2.10 of the IfT).

Allegation (i) Modifications

525. Siemens alleges that HS2 unlawfully permitted the JV to materially change its bid and/or evaluated the JV's bid on the basis that the JV would be permitted to change material aspects of its tender post Contract Award, in particular, by increasing the number of bodyside doors to 16 in the JV train design and other modifications to the JV's train design.

526. This allegation is rejected. The Stage 5 evaluation criteria were set out in the ITT. The evaluation did not require, and did not involve, any consideration of the details of the bids submitted at Stages 1 to 4. The Stage 5 assessors were not concerned with any review or evaluation of the technical proposals. Further, the Stage 5 evaluation did not require, and did not involve, consideration of any proposed or necessary changes to the

design proposals in the bids. Therefore, the question of any modification to the train design was not relevant to the Stage 5 calculation of the Assessed Price.

Allegation (ii) JV's past performance

527. Siemens alleges that HS2 failed adequately to take into account the requirements of the Contract in light of the JV's train design and track record.

528. This allegation is rejected. The Stage 5 evaluation did not require any consideration of the technical proposals or deliverability of the bids.

Allegation (iii) Maintenance Costs

529. Siemens alleges that HS2 failed adequately to take into account the very low maintenance costs included by the JV.

530. To the extent that this is an allegation of an error in the Stage 5 evaluation it is rejected. The Stage 5 evaluation did not require any assessment of the detailed costs included in the bids. The issue of the abnormally low tender review is considered below.

Allegation (iv) Stages 2-4 scores

531. Siemens alleges that HS2 failed to reflect the failings that HS2 had recorded in respect of JV's bid in respect of C6 of the Stage 2.3 Maintenance Technical Plan, C2 of the DP 3.1, 'Pass-by Noise' and DP 1.5 'Testing'.

532. This allegation is rejected. The Stage 5 evaluation did not require, and did not involve, any further assessment or allowance in respect of Stages 1 to 4.

Allegation (v) Daily Unit Service Charge

533. Siemens alleges that HS2 acted unlawfully in allowing the JV to supplement its bid by providing tables to reflect the 'Daily Unit Service Charge'.

534. The Financial Pro Forma required tenderers to enter the 'Daily Maintenance Charge' for seven bands of kilometrage, a blended rate of two separate charges entered into the Commercial Proposal: (i) the Heavy Maintenance Charge in Table 122; and (ii) the Daily Unit Charge in Tables 155, 156, 175 and 185.

535. Mr Warren's evidence was that he picked up an apparent inconsistency in the tenders between the figures for the Daily Unit Charge in the above tables of the Commercial Proposal and the figures entered in the Financial Pro Forma. Accordingly, on 15 February 2021, he raised a clarification question with Siemens. Siemens explained in its response on 16 February 2021 that the figures were not intended to match; the figures in the Financial Pro Forma were required to reflect a blended rate taking into account both the Daily Maintenance Charge as well as an element of the Heavy Maintenance Charge, whereas the charges were shown separately in the tables in the Commercial Proposal.

536. On 18 February 2021, Mr Warren raised a clarification question on this issue with the JV. In its response, the JV acknowledged that it had made an error in the Commercial Proposal (Appendix M); it had wrongly included the Heavy Maintenance Charge within

the Daily Unit Charge in Table 155. The JV was permitted to correct this error by providing a replacement Table 155, together with revised Tables 156, 175 and 185 (which contained the Daily Unit Charges for subsequent years).

537. As explained by Mr Warren in his evidence, the result of the JV's error was to overstate the Daily Unit Charge for the purpose of Appendix M. Appendix M was the basis for the contractual price and, if uncorrected, the overstatement would have resulted in a significant overpayment under the Contract. However, Appendix M was not used in the WLVM to calculate the Assessed Price. The Financial Pro Forma (Appendix I), which was used for the WLVM and Assessed Price had been populated correctly.

538. Therefore, allowing the JV to correct its error was within HS2's discretion under Section 6.6.3 of the IfT and did not have any impact on the Section 5 evaluation of the JV's Assessed Price.

Allegation (vi) Option Units

539. Siemens alleges that HS2 acted unlawfully in allowing the JV to correct an inconsistency in its bid as to the timing of the 'Option Units' and the Option Unit intermediate milestones.

540. Mr Warren identified an inconsistency in the JV's bid relating to the dates for delivery of the Option Units and the sequence of activities for the same. He permitted the JV to correct the inconsistency by providing new dates for the Option Units with the correct sequence, allowing for a two-week period between delivery and acceptance as required by Table 13 of the IfT (rather than one week between each delivery as initially shown by the JV).

541. The revised dates had no impact on the prices for each Option Unit, the milestone payments or service charge values in the bid but they did affect the NPV figures in the Financial Pro Forma and resulted in a modest adjustment to the JV's Assessed Price (a few hundred thousand pounds).

542. This request for clarification and correction to the JV's bid was within HS2's discretion under section 6.6.3 of the IfT because the dates originally submitted were obviously erroneous and the change to the JV's Assessed Price was not substantial or material to the outcome.

Allegation (vii) Appendices

543. Siemens alleges that HS2 acted unlawfully in using Appendix I of the JV's bid for evaluation purposes whilst accepting that Appendix M be used for contracting purposes when the JV had inconsistently presented TSA Ramp-Up Fixed and Variable costs between the two Appendices.

544. Mr Warren identified an inconsistency between the JV's entries in the Financial Pro Forma (Appendix I) and the Commercial Proposal (Appendix M) in respect of ramp up costs. Accordingly, on 10 February 2021 he raised a clarification question, asking the JV to explain how the figures in Appendix I related to those in Appendix M.

545. The inconsistency arose because the Financial Pro Forma (Appendix I) instructed tenderers to add a variable per unit monthly fee for maintenance charges over the 'Ramp Up' period (during delivery of the first units), whereas the Commercial Proposal Template (Appendix M) at Table 133 instructed tenderers to input a single figure per kilometrage band. Mr Warren expected tenderers to use the single figure in the Commercial Proposal Template for the cells in the Financial Pro Forma. However, the JV populated the Financial Pro Forma with variable figures, which allowed individual costs to be applied for each month of the ramp-up period, and then used those cost based monthly figures to calculate an average for the purposes of the Commercial Proposal Template.

546. The JV provided its clarification response on 15 February 2021, explaining the difference between the figures in the two appendices, stating that the Financial Pro Forma (Appendix I) could be used for evaluation purposes and the Commercial Proposal Template (Appendix M) could be used for contracting purposes.

547. HS2 accepted the JV's explanation as a reasonable interpretation of the tender rules and concluded that the figures in the Financial Pro Forma formed a satisfactory basis for assessment. Mr Warren also satisfied himself that any NPV difference between the approach adopted by the JV and that anticipated by HS2 would not be material because they were both derived from the same cost base and the JV used an average of data that had already been applied to the Financial Pro Forma. As he explained in cross examination, in the overall context of the Assessed Price, the ramp-up period was a very small part of the overall maintenance cost, which itself was only part of the Assessed Price.

548. This request for clarification and acceptance of the JV's explanation of the inconsistency between Appendix I and Appendix M was within HS2's discretion under section 6.6.3 of the IfT and any impact on the JV's Assessed Price was not substantial or material to the outcome.

Allegation (viii) Reasons

549. Siemens alleges that HS2 gave internally inconsistent and/or manifestly erroneous reasons for its scoring.

550. Although this allegation was pleaded, it was based on an apparent inconsistency regarding an erroneous reference in Mr Wilson's notes to DP 2.3 instead of the Stage 2.3 maintenance technical plan. This plan was not used in the Stage 5 evaluation; it was a high level strategy document and the more detailed Maintenance Model (Appendix K) was used in the Stage 5 evaluation. Siemens does not appear to have pursued this allegation and has not shown that it had any impact on the outcome of the Stage 5 evaluation.

Allegation (ix) Alias names

551. Siemens alleges that HS2 acted unlawfully in adopting aliases of villains from the James Bond films for the bidders, allocating Siemens the alias 'Dr No'.

552. HS2 allocated alias names to the bidders in order to ensure anonymity during the assessment stages. The assumed names changed at each stage of the Procurement and

were based on different themes throughout. At Stage 5, Siemens was allocated the alias 'Dr No' and the JV was allocated the alias 'Le Chiffre'. Both were names of fictional villains in James Bond films. They had no significance other than to anonymise the tenderers. This allegation has no merit and is rejected.

Allegation (x) Heavy maintenance/overhaul analysis

553. Siemens alleges that HS2 made manifest errors in the heavy maintenance/overhaul analysis of Siemens' bid.

554. To the extent that this is an allegation of an error in the Stage 5 evaluation it is rejected. The Stage 5 evaluation did not require any assessment of the detailed costs included in the bids. The issue of the abnormally low tender review is considered below.

Conclusion on Stage 5 evaluation

555. Siemens has not established any manifest error and/or breach of the principles of equal treatment, non-discrimination and transparency in the Stage 5 evaluation.

Issue 5 – Abnormally low tender review

556. Siemens' case is that, HS2 wrongly concluded, following an abnormally low tender review, that the JV's pricing was explained and justified.

557. HS2's position is that it carried out an abnormally low tender review on both Siemens' tender and the JV tender, and concluded that the pricing in both was explained and justified.

Applicable test

558. Regulation 84 of the UCR states:

> "(1) Utilities shall require economic operators to explain the price or costs proposed in the tender where tenders appear to be abnormally low in relation to the works, supplies or services.
>
> (2) The explanations given in accordance with paragraph (1) may in particular relate to —
>
>> (a) the economics of the manufacturing process, of the services provided or of the construction method;
>>
>> (b) the technical solutions chosen or any exceptionally favourable conditions available to the tenderer for the supply of the products or services or for the execution of the work;
>>
>> (c) the originality of the work, supplies or services proposed by the tenderer;
>>
>> …

(3) The utility shall assess the information provided by consulting the tenderer.

(4) The utility may only reject the tender where the evidence supplied does not satisfactorily account for the low level of price or costs proposed, taking into account the elements referred to in paragraph (2) ..."

559. The applicability of Regulation 84 of the UCR was considered by Fraser J in *Bechtel* (above). He referred to his earlier judgment *SRCL Ltd v NHS Commissioning* [2018] EWHC 1985 (TCC), a case concerning the Public Contracts Regulations 2015, and held that the same material principles applied under the UCR. I gratefully adopt the summary of those principles set out at [463]:

"(a) There is no basis for imposing a general duty on authorities (here, HS2) to investigate whether a tender is abnormally low [193].

(b) If the authority considers that a particular tender is abnormally low *and* considers that it should reject the tender for that reason, there is a duty on the authority to require the tenderer to explain its prices [193].

(c) Absent a satisfactory explanation, the authority 'shall reject the tender' in the circumstances expressly set out in Regulation 69 PCR 2015 and Regulation 56 (2) namely non-compliance with specified fields of environmental and social legislation [193]. UCR 2016 is different, and Regulation 76(6) states that the 'Utility may decide not to award a contract to the tenderer' if it does not comply with specified fields of environmental, social and labour law legislation. This is rather different wording than used in Regulation 56(2) PCR 2015.

(d) Otherwise, the authority is entitled to reject the tender if the evidence does not satisfactorily account for the low level of price, but it is not required to do so [193].

(e) The court's function is not to substitute its own view for that of the contracting authority on whether a tender has the appearance of being abnormally low. The correct approach is only to interfere in cases where the contracting authority has been manifestly erroneous [197].

(f) There is no definition of the words 'abnormally low'. However, the expression must encompass a bid which is low (almost invariably lower than the other tenders) and the bid must be beyond and below the range of anything which might legitimately be considered to be normal in the context of the particular procurement [204].

> (g) A contracting authority has a discretion as to what test it uses for identifying what may be an abnormally low tender and an 'anomaly threshold' is a perfectly permissible approach as a matter of EU law [205]."

Abnormally low tender review

560. The procedure for carrying out a review of the bids to determine whether any tender was abnormally low was set out in section 10.3 of the TOEP:

> "10.3.1 In accordance with Regulation 84 of the UCR, each of the two Commercial Advisors, acting independently, should consider whether any Assessed Price, or any component as defined in table 11 of the IfT, appears to be abnormally low. The findings and reasoning must be recorded in the Evaluation System.
>
> 10.3.2 Subsequently, the Procurement Lead and the Lead Stage 5 Assessor will convene a meeting with the Commercial Advisors to review the findings of each Commercial Advisor, including the noting and addressing of any differences in findings between the Commercial Advisors.
>
> 10.3.3 The Procurement Lead and the Commercial Advisors will agree upon an appropriate course of action for any issues raised.
>
> 10.3.4 In the event that any of the prices (or components thereof) appear to be abnormally low, the Procurement Lead must advise RP1, clearly documenting the reasons why the Assessed Price and/or component(s) are considered abnormally low. As required by Regulation 84, the Procurement Lead will subsequently raise a clarification question with the Tenderer to seek explanation of the relevant price or costs in their Tender.
>
> 10.3.5 If, in the opinion of the Commercial Advisors, the Tenderer's response satisfactorily explains the Assessed Price of the Tender, the evaluation may proceed. In all other circumstances the Procurement Lead must advise the matter to RP1 for consideration.
>
> 10.3.6 The Procurement Lead must ensure that any correspondence relating to this matter is saved to the Evaluation System."

561. Mr Warren explained in his evidence that he and Mr Wilson carried out the abnormally low tender review in respect of the bids submitted by Siemens and the JV. They jointly decided the methodology that they would adopt and then carried out their reviews independently. It is suggested by Siemens that this was contrary to the procedure

anticipated by the TOEP, in that they did not determine the method of assessment separately, but the TOEP did not prescribe an agreed, common methodology. Although the approach to the review was agreed, the review exercise was carried out by Mr Warren and Mr Wilson independently. This was not in breach of the TOEP.

562. Mr Warren and Mr Wilson initially carried out a benchmarking exercise using a report prepared by HS2's technical advisers, SNC-Lavalin, dated October 2017, followed by a more detailed analysis of the maintenance figures to identify the reasons for disparity in the bids and any concerns. Siemens' Assessed Price was very substantially higher than the JV's Assessed Price. Mr Warren noted that both tenderers had submitted low tenders and there was consistency in their underlying cost components, which gave him confidence that they had approached the task of pricing maintenance in the same way. His view was that neither tender had submitted an abnormally low tender.

563. It is said by Siemens that a deficiency in the review was the absence of any definition of 'abnormally low' in the TOEP and the differences in understanding of the term between Mr Smith and Mr Warren. In cross-examination, Mr Warren disagreed with Mr Smith's test of 'massive loss-leader'. However, it is important to note that regulation 84 did not define 'abnormally low tender'. Regardless of how an individual might define the term, of greater importance is the substance of the review – the criteria adopted, the factors considered in addressing the question and the reasons for the conclusion.

564. The outcome of the abnormally low tender review in respect of the JV bid was set out in a file note dated 15 March 2021 prepared by Mr Warren and Mr Wilson:

> "The capital prices provided by each of the Tenderers are within the benchmark range and provide no cause for concern. Moreover, additional confidence in the manufacturing aspect of the prices comes from further review which shows that the balance of non-recurring and recurring costs and proportion of the prices allocated to interiors are all in line with market norms.
>
> The maintenance prices provided by each of the Tenderers are notably lower than expected and are below the benchmark range, and therefore merited further consideration. As an initial observation, it is noted that the comparable benchmark data includes a small number of transactions and consequently limited reliance should be placed on it. Moreover, it is further noted that market trends in recent years have seen considerable reductions in the cost of rolling stock maintenance as manufacturers have refined and optimised their maintenance regimes.
>
> Nonetheless, the whole life average cost from the bidders show prices that are lower than the trends have indicated. This is not necessarily a point of concern as analysis of the maintenance price build-up of each Tender identifies similarities in the maintenance approach and underlying cost structures for the scope of work. Furthermore, it should be considered that the HS2 requirement for a whole life price has permitted Tenderers to

> further optimise plans beyond what is possible in more limited duration arrangements reflected in the available market data. Detailed review of the Tenderers' maintenance models (Appendix K of the Tender submission) shows that the main differences in the Tendered prices arise for the different levels of provisions for risk, contingency and margin, with Le Chiffre being lower than the other Tenderer assessed at Stage 5.
>
> The consistency in underlying costs coupled with the observed market trends and optimisation opportunity offered by the HS2 requirement suggests that whilst the prices are lower than the available benchmark data, the prices can be explained and justified, and while clearly different commercial approaches have been taken this does not mean that the required services cannot be delivered for the prices offered, and hence they are not necessarily abnormal.
>
> Recognising the different commercial approaches taken by the Tenderers, in the case of Le Chiffre, HS2 should be mindful of the low levels of provision for risk, contingency and margin in their maintenance price as this increases the risk of the Tenderer losing money at some point during the term of the TSA. As a result, one or more of the following adverse situations could arise: (i) a failure to control costs within CPI; (ii) the need to undertake heavy maintenance/overhaul activities more frequently; and (iii) a failure to achieve the required levels of fleet reliability resulting in increases in maintenance costs and liabilities under the performance regime. It is recommended that HS2 Ltd reflects this in its risk register and develops appropriate mitigations."

Siemens' Allegations

565. Siemens' allegations are that:

i) HS2 failed to properly investigate whether the price tendered by the JV was abnormally low or to require the JV to explain the price or costs proposed in its tender, in light of: (a) the alleged deficiencies in the JV's response to DP 1.5, (b) the difference between the JV's Assessed Price and Siemens' Assessed Price; (c) the fact that the JV's capital price was lower than HS2's baseline rolling stock budget; (e) the alleged competitiveness of the Siemens' bid and (d) alleged "onerous" requirements of the Contracts;

ii) HS2 ignored relevant benchmarks;

iii) HS2 erroneously considered that the levels of provision for risk, contingency and margin in the maintenance price could be mitigated through the TSA Performance Bond and Parent Company Guarantee;

iv) HS2 irrationally decided that the price tendered by the JV was not abnormally low;

v) HS2 failed to exclude the JV's tender from the Procurement in breach of regulation 84(5).

Discussion and conclusion

566. It must be recognised that the court's role in considering this part of the claim is supervisory; it is not for the court to substitute its own view as to whether either bid could be said to be an abnormally low tender. It was a matter for HS2 to decide whether to carry out an abnormally low tender review and, if so, to decide on the methodology and criteria for such review.

567. Siemens correctly identifies the significant difference between the JV's Assessed Price and Siemens' Assessed Price as a matter that justified scrutiny by HS2. However in itself, it did not indicate an abnormally low tender.

568. It is clear that the same methodology and criteria were applied to Siemens and the JV, including the same benchmarks. Checks were carried out which established that the capital prices of both tenders were within the benchmark range and the manufacturing prices of both tenders were in line with market norms. The assessors noted that the maintenance prices in both tenders were lower than the comparable benchmark data but were satisfied that they were in line with recent market trends. In particular, the assessors noted that the maintenance price build-up of each tender indicated similarities in the maintenance approach and the underlying cost structures for the scope of work.

569. The disparity between the pricing in the bids, the maintenance costs, the allowance for risk, contingencies and margin were all matters that were expressly considered by HS2. There was no obligation on HS2 to require the JV to explain any of its prices, in the absence of an assessment that it had submitted an abnormally low tender.

570. It is not sufficient for Siemens to identify the outcome that it contends should have been reached, or the reasons on which such argument is based. It must establish that the JV's Assessed Price was beyond and below the range of anything which might legitimately be considered to be normal in the context of the Procurement. Despite Mr West's careful and skilful cross examination, although he identified different factors that might have been considered as part of the review exercise, or different weight that might have been given to such factors, he was unable to establish any manifest error or irrationality in the approach or conclusions reached by HS2.

571. For the above reasons, the allegations are rejected.

Issue 6 – Verification prior to negotiation

572. Siemens' case is that HS2 acted in manifest error in its decision to make the JV lead tenderer without verifying compliance with the PQP and Mandatory TTS Requirements. Prior to negotiating with the JV as lead tenderer, HS2 had an obligation to verify whether the JV continued to satisfy Stages 1 to 3 of the PQP and whether it met the mandatory requirements and evaluation thresholds of Stages 1 to 4 of the ITT.

573. HS2's defence is that HS2 had no obligation to verify the JV's compliance with the PQP and ITT throughout the Procurement. Although it had an entitlement and discretion to check, confirm and refresh matters under the PQP and ITT, it did not have

any general duty to verify such matters and did not have any obligation to do so before the JV was appointed as lead tenderer.

574. Regulations 76(5) and 84 of the UCR impose obligations on utilities to verify that tenderers comply with the rules and requirements applicable to tenders, and to award contracts in accordance with the objective rules and criteria identified in the tender documents. However the UCR do not impose any general obligation on utilities to review or re-assess tenders subsequent to such evaluation in accordance with the published rules of the competition.

575. Siemens relies on Case C-448/01 *EVN AG and Wienstrohm GmbH v Austria* [2003] ECR1-14527 at [47]-[52] for the proposition that effective verification is a key requirement for discharge of obligations arising under the principle of equal treatment. That case concerned a procurement for the award of a public contract for the supply of electricity. The award criteria were stated to be the economically most advantageous tender based on the impact of the services on the environment in accordance with the contract documents, and included a mandatory requirement that the tenderer had produced a minimum amount of electricity from renewable sources. A weighting of 45% was awarded to the tenderer that stated it could supply the most energy from renewable sources but there were no tender requirements against which the accuracy of the information contained in the tenders could be effectively verified.

576. The court held that such criterion was contrary to the principles of equal treatment and transparency:

> "[47] … the principle of equal treatment of tenderers ... implies, first of all, that tenderers must be in a position of equality both when they formulate their tenders and when those tenders are being assessed by the contracting authority (*SIAC Construction*, paragraph 34).
>
> [48] More specifically, that means that when tenders are being assessed, the award criteria must be applied objectively and uniformly to all tenderers (*SIAC Construction*, cited above, paragraph 44).
>
> [49] Second, the principle of equal treatment implies an obligation of transparency in order to enable verification that it has been complied with, which consists in ensuring, inter alia, review of the impartiality of procurement procedures …
>
> [50] Objective and transparent evaluation of the various tenders depends on the contracting authority, relying on the information and proof provided by the tenderers, being able to verify effectively whether the tenders submitted by those tenderers meet the award criteria.
>
> [51] It is thus apparent that where a contracting authority lays down an award criterion indicating that it neither intends, nor is able, to verify the accuracy of the information supplied by the tenderers, it infringes the principle of equal treatment, because

> such a criterion does not ensure the transparency and objectivity of the tender procedure.
>
> [52] Therefore, an award criterion which is not accompanied by requirements which permits the information provided by the tenderers to be effectively verified is contrary to the principles of community law in the field of public procurement."

577. The principles set out above are not controversial and reflect the obligations set out earlier in this judgment, namely, for utilities to implement a uniform and transparent method of evaluation of tenders against the criteria identified in the tender documents.

578. The PQP, which is not the subject of any challenge by Siemens, contained requirements for potential tenderers to demonstrate their professional and technical capability to perform the Contract, together with the basis of evaluation of those requirements. Section 2.4 stated that applicants submitting an EOI would be assessed in accordance with the criteria at Section 5 of the PQP. Section 5 explained the basis on which the submissions would be assessed against the evidence provided in response to the criteria specified for each question.

579. Economic and financial resilience was assessed on the basis of financial information provided by the applicants, some of which was assessed on a pass/fail basis; some of which was marked against tests set out in section 5.7. Minimum standards were identified and a due diligence process was carried out by HS2 against additional criteria to obtain confidence in the ability of the applicant to fulfil its obligations under the Contract.

580. Technical and professional capabilities of the applicants were assessed by marking their EOI responses, which were required to be supported by evidence submitted in the form of case studies. The marking scheme was set out in the PQP.

581. Likewise, the ITT, which is not the subject of any challenge by Siemens, contained mandatory requirements and evaluation thresholds for tenderers to meet, together with the basis of evaluation of those requirements, through Stages 1 to 5 as described earlier in this judgment.

582. Therefore, unlike the facts in the *EVN* case, the PQP contained assessment criteria, and the ITT contained award criteria, accompanied by requirements and the basis of assessment of those requirements, which permitted the information provided by tenderers to be effectively verified. It was not suggested in *EVN* that every single component within each tender must be independently verified; what was required was for the tender documents to explain which parts of the tender would be assessed and the basis on which such assessment would be conducted with sufficient clarity to permit of uniform interpretation by all RWIND tenderers.

583. It does not follow from the principles set out in *EVN* that utilities, having carried out such evaluation, have any obligation to review or re-assess tenders at a subsequent stage.

584. The principles of equal treatment and transparency give contracting utilities a wide margin of discretion in designing and setting award criteria but, once set, the utilities

must follow those rules. The extent to which, if at all, a utility is required to undertake any subsequent verification or re-assessment of a tender or other information supplied at the pre-qualification stage depends on the rules set out in the tender documents.

585. The following provisions of the PQP are relied on by Siemens:

i) Section 5.16.1 provided that HS2 reserved the right to exclude an applicant at any stage of the pre-qualification process if it failed to satisfy any of the requirements for assessment stages 1, 2 and 3, or having satisfied those requirements, circumstances changed and it no longer satisfied any of those requirements.

ii) Section 5.16.2 provided that HS2 reserved the right to exclude a tenderer during the tender stage, up to and including Contract Award, if it no longer satisfied all of the requirements for assessment stages 1, 2 and 3.

iii) Section 5.18.1 provided that HS2 reserved the right to reassess an applicant's expression of interest (EOI) where it became aware of, or was made aware of, a change in the applicant's circumstances.

iv) Section 5.18.2 provided that if any of the information provided in the applicant's EOI changed at any subsequent stage in the procurement process, the applicant was required to notify HS2 immediately.

586. The following provisions of the ITT are relied on by Siemens:

i) Section 6.2.10 provided that HS2 reserved the right to reconsider its evaluation of any previous stage of a tender, should it subsequently become aware of information in the tender that was contradictory with information assessed at a previous stage of the tender.

ii) Section 15.3.4 provided that HS2 reserved the right to reject or disqualify any tenderer who underwent a change in identity, control or financial standing or any other materially adverse change which put the tenderer in breach of the PQP requirements or minimum standards; or in HS2's opinion otherwise became ineligible pursuant to the UCR or did not have the ability, resources or economic or financial standing to perform the Contract in accordance with HS2's requirements.

iii) Section 15.6.4 provided that HS2 reserved the right to reassess a tenderers EOI and/or tenderers where a change in circumstances occurred or there was a material change to the information provided at the PQP stage; and to disqualify a tenderer at any stage up to Contract Award if, due to such change, the tenderer no longer met any of the requirements of assessment stages 1, 2 and 3 set out in the PQP.

iv) Section 15.6.1 provided that if at any time prior to Contract Award, there was any material change to the information provided during the procurement (including any deterioration in the financial strength of the tenderer), the tenderer was required to notify HS2 immediately.

587. It is immediately clear from the above that the PQP and ITT documents imposed on the JV an obligation to inform HS2 of material changes in circumstances that affected information provided earlier in the procurement process, or its ability to satisfy the requirements set out in those documents. However, although it gave a general right to HS2 to review or verify information and assessments up to Contract Award stage, it did not impose any obligation to do so.

588. In my judgment, the PQP did not impose any obligation on HS2 to re-examine whether the JV continued to satisfy Stages 1 to 3 of the PQP after the pre-qualification process. Further, the ITT did not impose any obligation on HS2 to carry out a retrospective assessment to determine whether the JV satisfied the Mandatory TTS Requirements or evaluation thresholds of Stages 1 to 4 of the ITT after conclusion of that part of the tender process. In the absence of any obligation in the Procurement documents, there was no requirement for HS2 to verify any aspect of the bid when selecting the JV as the lead tenderer, undertaking negotiations or reaching the Contract Award recommendation. Although the UCR and principle of equal treatment impose an obligation on contracting utilities to provide for a transparent and effective method of verification of tenders, that does not extend to any obligation to repeat or review such verification.

Issue 7 – Pre-contract checks

589. Siemens' case is that HS2 acted in manifest error in its decision to recommend the Contract Award to the JV without verifying its technical and financial capability to perform the Contract.

590. HS2's defence is that it carried out pre-contract award checks which did not give rise to any grounds to reconsider the status of the JV as lead tenderer and it acted properly and within its margin of discretion in deciding to recommend award of the Contract to the JV.

Pre-contract checks

591. HS2 carried out pre-contract checks in respect of the JV prior to the decision to recommend Contract Award.

592. In August 2017, as part of the PQP process, Ernst & Young LLP ("EY") prepared a report which evaluated the responses received from potential tenderers regarding economic and financial resilience, using the financial test set out in the PQP:

i) turnover threshold, a simple turnover ratio, to assess the burden of the contract on the bidder's turnover – the minimum standards test;

ii) liquidity, measured by a ratio between current assets and current liabilities – cash accounts receivable and short term investments divided by the bidder's current liabilities, to give an indication of whether the bidder has enough liquidity or available assets to be able to cover its short term liabilities;

iii) gearing, the ratio between debt and shareholder funds;

iv) interest cover, the earnings before interest and tax ('EBIT') divided by gross interest, an indication of whether the level of debt is serviceable against level of earnings;

v) net assets, total assets less total liabilities, to indicate the overall value, net worth and health of the bidding organisation.

593. One of the bidders in the JV failed two of the due diligence measures; the other bidder in the JV passed all the tests.

594. The EY report was used by Mr Chapman, Head of Financial Governance and Treasury, to assess whether the bidders met the PQP criteria; if not, whether there was mitigating information which would deem them to meet the criteria. The JV was successful in passing the PQP stage.

595. In July 2021 Grant Thornton was instructed by HS2 to undertake a fresh evaluation of the JV, using updated financial statements against the same financial tests used in the original PQP process. On 15 July 2021, Grant Thornton produced a draft report on the updated financial standing review.

596. On 11 August 2021 HS2 raised requests for information and confirmation of PQP responses, on issues such as discretionary grounds for exclusion, which were sent to the JV. On 3 September 2021 the JV provided its response, together with a further response on 13 September 2021.

597. In September 2021 Grant Thornton produced its final report, based on the JV bidders' updated financial statements for the previous three years, their responses to additional economic and financial resilience bid questions raised by HS2, and online searches conducted by Grant Thornton in relation to matters such as acquisitions, disposals, debt, gearing, profits warning, solvency, cash flow, credit ratings and investor sentiment.

598. The report stated that the review of the online search results in relation to the JV did not identify any article which would have a significant negative impact on the assessment of the PQP financial tests and no additional clarifications were identified as necessary as a result of those findings.

599. The report stated that both Bombardier and Hitachi passed the minimum standards test based on turnover. One of the JV bidders failed one of the five tests (the interest cover test) and the other bidder failed a different test (the liquidity test), thereby failing the due diligence process. Both bidders provided mitigating information in relation to the failed tests for consideration by HS2.

600. In respect of the liquidity test, the mitigating information included an explanation that liquidity was reduced below the threshold by reason of the conversion of loans into a capital reserve in equity as part of a business reorganisation, to support long term development of the group. In respect of the interest cover test, the mitigating information included that during the three years in question the bidder reported interest income which more than offset the interest expense, leaving it with a net interest income and the magnitude of the interest expense remained very low.

601. On 15 September 2021 an extraordinary meeting of the Commercial and Investment Panel ("the CIP") was held, at which the CIP endorsed the outcome of the procurement process and HS2's recommendation that the Contract should be awarded to the JV for onward transmission to the Commercial Investment Committee ("the CIC") and the HS2 board, subject to RP3 approval.

602. On 20 September 2021 Mr Chapman and Mr Ariba produced a financial file note on the outcome of pre-contract financial tests:

> "The Pre-Qualification pack (PQP) sets out (paras 5.7.14 to 5.7.28 certain financial and economic tests to be applied to an Applicant (the "PQP Financial Tests"). The PQP Financial Tests are designed to test the economic and financial resilience of an Applicant to fulfil their contractual obligations if they were to be awarded the contracts.
>
> HS2 Ltd has:
>
> a. requested updated financial information from the Consortium;
>
> b. re-run the PQP Financial Tests;
>
> c. requested and received a written statement in accordance with para 5.7.20 of the PQP regarding the due diligence criteria that are not met by each Party;
>
> d. asked the Consortium to confirm any matters disclosable under Questions S3a.01-Q02, Q04 and Q05 in the PQP; and
>
> e. in light of the above, finalised the outcome of the PQP Financial Tests re-run based on updated financial information.
>
> This note records the outcome of the PQP Financial Tests re-run using updated financial information."

603. Mr Chapman and Mr Ariba expressed their views that the explanations provided by both parties were consistent with the valuation of their latest annual report and accounts and the failures were explicable without generating concerns over the ability of these parties to fulfil their obligations under the Contract. The corporate transactions referred to by both parties were considered ordinary course of business and thus presented a sufficiently low financial and economic risk for HS2 to engage with the JV.

604. They recorded their opinion that, following the due diligence process, the economic and financial resilience of the JV as tested did not undermine confidence in its ability to fulfil its obligations under the Contract and HS2 should be comfortable to deem the JV to have met the minimum standards and due diligence process for economic and financial capacity.

605. It was noted in particular that:

    i) each of the parties originally met, or were deemed to meet, the PQP tests in their own right;

ii) there was no concern over the headline combined financial strength of the consortium as indicated by its overall aggregated turnover assessment;

iii) insofar as the due diligence tests resulted in failures, satisfactory explanations were provided as to why the failure of the relevant criterion presented a low risk to the ability of the party to undertake the Contract and these explanations were consistent with publicly available information, the audited financial information and the post balance sheet events; and

iv) further comfort could be taken from the parent company guarantees, advance payment bonds and performance bonds.

606. The conclusion set out in the file note was that HS2 decided to deem the JV to have passed the minimum standards and due diligence criteria for economic and financial resilience.

607. Following a meeting of RP3 on 20 September 2021, the financial file note was finalised on 23 September 2021 and approved.

608. In respect of technical issues that, by then, had been raised by Siemens in the procurement challenge (Claims 5 and 6), Mr Sterry carried out pre-contract technical checks and prepared a report dated 23 September 2021: 'Pre-Contract Award Checks (technical/delivery)' ("the Technical Note"). The conclusions included:

i) there was no evidence that the JV withheld any matter that should have been raised as a potential discretionary exclusion ground at PQP stage;

ii) there were no issues affecting the information provided in the case studies relied on in the EOI and therefore no issues affecting the original Stage 3b scores;

iii) with the exception of two Stage 2.2 responses that may have been weakened (which would not have affected the JV's satisfaction of the Stage 2.2 threshold), there were no issues which undermined the validity of information provided in the tender Stage 2.2 and Stage 3 responses;

iv) there were no issues that indicated that the JV did not have the ability or resources to deliver the Contract;

v) there were two main issues that appeared to cast doubt on the JV's ability to deliver, namely, software issues experienced on Bombardier Aventra units and cracking issues on Hitachi IEP Class 80x units but, in each case, HS2 were satisfied that the issue did not have any direct implications for the JV's tender;

vi) none of the issues identified presented grounds to re-consider the fact that the JV met the PQP requirements or the outcome of the tender evaluation.

609. The results of the investigations were set out in the Award Recommendation Report, which was considered and approved by RP1, RP2 and RP3.

610. The HS2 Board Meeting of 28 September 2021 endorsed the Award Recommendation Report for onward submission to the Secretary of State for Transport. The Secretary of

State's approval was subsequently given and on 29 October 2021 HS2 formally notified the JV and Siemens of its intention to award the Contract.

Siemens' allegations

611. Siemens' allegations are:

i) HS2 improperly moved the main DfT approvals point from selection of the preferred supplier to the Contract Award stage in order to assist with the Talgo litigation.

ii) HS2 irrationally and unlawfully failed properly to investigate whether the JV continued to have the ability, resources or economical financial standing to perform the Contract in accordance with the minimum requirements set out in the PQP process.

iii) HS2 irrationally and unlawfully failed properly to investigate whether the JV had the technical ability to perform the contract and/or whether its tender continued to satisfy the relevant mandatory requirements and evaluation thresholds for stages 1 to 4.

Improper purpose

612. On 11 May 2021, Mr Alan Over, Director of HS2 Phases 1 and 2a, DfT, wrote to Michael Bradley, CB, Chief Financial Officer of HS2 in the following terms:

> "As you will be aware HS2 Ltd is required to seek approval from DfT at each procurement stage for rolling stock contracts including selection of a preferred bidder and contract award as set out in the Development Agreement Clauses 12.5(F) (d) and (e).
>
> In line with this, we have been following an approach which sought to conclude the main assurance and approval steps now upon selection of the preferred supplier. Approval of the final award decision would then have been routine assuming you had contractualised the deal within the approved mandate.
>
> Our teams have discussed this approach in light of the current legal challenge. The changed situation means that there is more risk in concluding the main approvals at this point and in doing so we could conceivably complicate the legal defence. We have therefore agreed with the Principal Accounting Officer to reverse this plan and move the main approvals point to the contract award stage following any court judgment and based on your proposed final position with the preferred bidder.
>
> Based on your assurance that the lead bidder (Le Chiffre) has the best overall Whole Life Value (WLV) in accordance with your model and Invitation to Tender and in line with your Tender Opening and Evaluation Plan, you therefore have approval to

> proceed to notify the preferred bidder and to prepare a final position for final approval ahead of the final award decision and subject to any court judgment.
>
> As part of the contractulisation process you should not agree to anything that would be deemed novel or contentious without our prior agreement."

613. Siemens relies on this letter as indicating an improper purpose on the part of HS2. It is said that the desire not to complicate the legal defence in the Talgo litigation (challenge by another bidder) was unrelated and extraneous to the discharge of HS2's legal duties in respect of the ongoing conduct of the Procurement.

614. Mr Smith was sent a copy of the letter. In his third witness statement he stated that under the terms of the development agreement between HS2 and the SS DfT, HS2 needed the DfT's approval for the selection of the lead tenderer and at Contract Award. Mr Smith explained that HS2 was looking for opportunities to streamline the process and discussed with the DfT whether it would give conditional approval for both stages if HS2 could conclude the deal with the lead tenderer within a certain set of agreed negotiation parameters. However the DfT could not commit to the Contract Award without full visibility of the price. Given the ongoing challenge from another tenderer, Talgo, HS2 was reluctant to disclose the relative position of the lead tenderer's bid as against its competitors, particularly in relation to the relative cost benefit. Hence, the proposed solution was for the DfT to approve the selection of the lead tenderer but move the final approvals point to Contract Award stage.

615. In cross examination, Mr Smith stated that the agreed process under the development agreement was to have the main approvals point at Contract Award stage. Although there were discussions about a proposed streamlined process, as set out in the letter, that was not followed and HS2 reverted back to the original process to avoid having to share details of the pricing at such an early stage. He denied that there was any improper purpose.

616. Siemens' case is that the decision to change the process was made for the improper purpose of avoiding risk in the Talgo litigation. If and to the extent that this is relied on as an alleged breach of the UCR or rules of the Procurement, it is rejected.

617. Firstly, as set out above, HS2 did not owe any obligation to Siemens to carry out pre-contract checks (absent notification or discovery of any material change in circumstances or of incorrect information supplied by the JV). Secondly, the timing of the DfT approvals was a matter between HS2 and the DfT; it was not a matter dealt with in the ITT. Thirdly, I do not consider that Mr Smith's reason for wishing to delay sharing details of the pricing was an improper motive; it was a sensible decision to preserve the integrity of the competition against the possibility of a successful challenge by Talgo. Fourthly, the timing of any pre-contract checks did not affect the outcome of the same.

Reconsideration of the PQP and ITT requirements

618. As set out above, neither the rules of the Procurement nor the principles of equal treatment and transparency imposed on HS2 any obligation to verify continuing

compliance with the PQP or compliance with the Mandatory TTS Requirements and evaluation thresholds set out in Stages 1 to 4, including the Shortfall Tender decision.

619. However, Siemens is correct in its submission that, having decided to conduct pre-contract checks, such checks, and HS2's discretion to exclude a tender, could not be exercised on an unlimited, capricious or arbitrary basis. HS2 was obliged to carry out such checks and exercise such discretion rationally and without manifest error.

Economic and financial resilience

620. The pre-contract checks on economic and financial resilience of the JV were carried out by Mr Chapman and summarised in the financial file note produced with Mr Ariba on 20 September 2021. For the purpose of this review, Mr Chapman obtained an updated PQP financial evaluation from Grant Thornton, raised requests for information and sought confirmation that the JV's PQP responses remained valid. The re-run of the PQP financial tests by Grant Thornton disclosed that each of the JV entities failed one out of five due diligence tests. The JV produced mitigating explanations for the due diligence failures, which were considered by Mr Chapman before reaching his concluded view that the economic and financial resilience of the JV as tested and described did not undermine confidence in the ability of the JV to fulfil its obligations under the Contract. HS2 should be comfortable to deem the JV to have met the minimum standards and due diligence process for economic and financial capacity.

621. Siemens' criticism of Mr Chapman's understanding of the PQP and its application is misplaced. There is no challenge to the PQP process, the initial assessment at pre-qualification stage or its outcome, leading to the JV's invitation to tender. Mr Chapman was not seeking to recreate the original PQP evaluation or carry out a fresh assessment; his review was limited to obtaining the PQP financial tests on updated accounts and assessing the JV's financial performance and resilience.

622. It is said that Mr Chapman failed to obtain the information he needed properly to assess whether the JV continued to meet the minimum standards stipulated in the PQP, including failing to obtain the 2020 accounts, or any interim or management accounts. That complaint is not well-founded. It was a matter for Mr Chapman to determine the extent of any investigations and further information required for the purpose of the pre-contract checks. The updated financial tests were carried out independently by Grant Thornton and Mr Chapman was entitled to rely upon them.

623. Further it is said that Mr Chapman did not adequately assess the reasons behind the JV's failure to meet the due diligence criteria. Siemens has identified its disagreement with the views arrived at by Mr Chapman in respect of the due diligence issues and mitigating explanations, relying on Mr Stoesser's assessment. However, Mr Stoesser's subjective disagreement is not sufficient to establish a manifest error, particularly as he did not consider all relevant materials, including the Grant Thornton report. Having identified the relevant issues, the weight to be given to the additional information and explanations provided by the JV was a matter for Mr Chapman.

624. At Stage 3a.03 of the PQP, applicants were assessed against internationally recognised business management standards and practices. Evidence was requested of independent third party accreditation of business management systems, including: (i) at S3a.03-Q04, an Information Security Management system certification; and (ii) at S3a.03-Q06, an

Asset Management system certification. These questions were assessed on a pass / fail basis. Applicants that did not meet the minimum standards set out in the Stage 3a questions were required to outline how they had addressed the issue or would meet the requirements if invited to tender. Section 13 of the PQP provided that HS2 reserved the right to reject an EOI if the applicant failed to pass any of the requirements of Stage 3a; further, HS2 could elect to take forward an applicant's proposal that failed to meet the Stage 3a requirements, if satisfied that the relevant issue had been addressed or would be addressed by the time of tender.

625. The JV successfully passed the PQP process and no challenge has been made to that decision.

626. As part of the pre-contract checks, the JV was requested to provide an update on progress in obtaining any of the listed accreditations which were not held at the time of the EOI. Bombardier's response was that it did not hold the Information Security Management accreditation but it was generally compliant with the requirements and it should be available in Q1 of 2022; it did not hold the Asset Management accreditation but that action plans had been identified to work on the issue, which would be produced post contract signature. Hitachi's response was that it was working towards the Information Security Management accreditation but not the Asset Management accreditation.

627. Siemens' case is that the JV failed to meet the PQP minimum standards and should have been disqualified. However, the PQP entitled HS2 to exercise its discretion to deem an applicant as having passed the requirements and no challenge is made to the decision to invite the JV to tender. As set out above, although HS2 reserved its right to review such matters after the PQP process, it was not incumbent on it to verify any elements of the PQP process at the pre-contract stage. Mr Ariba's evidence was that there was no requirement for the JV to provide the relevant certification at that stage and it would not have had a negative impact on Contract Award. That was clearly within the ambit of HS2's discretion and there is no evidence that such an approach was irrational or amounted to manifest error.

Technical checks

628. The PQP included question 2.2(h), which required applicants to declare whether or not they had shown significant or persistent deficiencies in the performance of a substantive requirement under a prior public contract, a prior contract with a contracting entity, or a prior concession contract, which led to early termination of that prior contract, damages or other comparable sanctions. Failure on this issue could lead to discretionary exclusion from the tender process. The PQP also included the Stage 3b assessment to determine whether the applicant had appropriate technical and professional capabilities and experience to tender for the contract, scored on the basis of assessment criteria for each question, with a minimum threshold score required to proceed in the pre-qualification process.

629. In the EOIs submitted in June 2017, the JV partners stated that there were no such issues in response to question 2.2(h) and were successful at Stage 3b. No challenge has been made by Siemens to the PQP process.

630. In August 2021, as part of the pre-contract checks, HS2 asked the JV for confirmation that no matters had arisen subsequent to the EOI that amounted to mandatory or discretionary exclusion grounds and raised specific technical questions, arising from issues identified by Siemens in its procurement challenge.

631. In its response on 3 September 2021, the JV confirmed that there were no matters that had arisen subsequent to the EOI that amounted to mandatory or discretionary exclusion grounds, identified a list of former projects, one of which was a public contract, namely the Aventra London Overground, on which liquidated damages had been levied, and responded to the technical questions.

632. Mr Sterry carried out a review of the JV's response and produced the Technical Note dated 23 September 2021. Two issues were identified as potentially affecting the JV's EOI or tender, namely: (i) issues with power supply and communications compatibility in respect of the introduction of Intercity Express Project ("IEP") class 80x units; and (ii) cracking to yaw damper bracket installation, lifting pockets and coupler mounting on IEP class 80x vehicles.

633. During the introduction of the class 80x vehicles, electrical systems compatibility ("ESC") issues occurred with power supply systems and line side communications equipment, leading to delays in the introduction of the trains together with modifications to the trains and infrastructure. The relevant contract was not a public contract, the units were accepted for service, the contract was not terminated, damages were not paid and there was no evidence that any sanctions were imposed for significant or persistent deficiencies in performance. On that basis, Mr Sterry considered that this issue did not affect the EOI or tender information, and did not cast doubt on the capability of the JV to perform the Contract.

634. On 8 May 2021, Hitachi class 800, 801 and 802 trains were withdrawn from service after cracks were identified in some carriages of the trains in service with Great Western Railway ("GWR") and London North Eastern Railway ("LNER"). A review was carried out by the Office of Rail and Road ("ORR"), and an interim report was published on 9 September 2021. The ORR report identified two separate issues, fatigue load cracking and stress corrosion cracking.

635. Mr Sterry explained in his witness statement that the fatigue load cracking affected the yaw damper installation. The bogie, the part of the train that contains the wheels and interfaces to the track, rotates relative to the car body, the structure in which passengers travel, including rotation side to side ("yaw"). Yaw rotation occurs as the bogie goes round curves and through points, creating a cyclic movement between the bogie and the car body. The yaw damper absorbs some of this movement, particularly at high speeds. It connects the bogie to the bottom edge of the car body by means of a yaw damper bracket and is subject to significant cyclic forces. Fatigue cracking affected the class 80x trains in the area of the bolster, the main structural interface between the bogie and the car body. Mr Sterry considered that this issue did not raise any concerns for the HS2 project because the JV design, the material to be used for the bolster and the supplier were all different.

636. Stress corrosion cracking was found in the lifting plate and the coupler mounting plate, which appeared to be caused by the selection of '7000 series' high strength aluminium, the operating environment (including seawater) and residual stresses within the affected

components from manufacture. Mr Sterry considered that this issue did not raise any concerns for the HS2 project because the JV design, the material to be used for the car body and the manufacturer were all different.

637. The Technical Note also considered delays to introduction of Aventra units on a number of projects in the UK, including London Overground. A material cause of the delays was an issue with a new software platform in relation to the train control management system ("TCMS"). Necessary modifications to the software resolved the issue but adversely impacted delivery dates. Only the London Overground Aventra project was a public contract and liquidated damages were paid in respect of the delays. Mr Sterry considered that this issue did not raise any concerns for the HS2 project because the software developer, the software platform and development process were all different.

638. Other matters considered in the Technical Note included wheel defects associated with the ICE4, DB project in Germany. Mr Sterry considered that this issue did not raise any concerns for the HS2 project because the manufacturer and place of manufacture of the car body were different.

639. The conclusion of the Technical Note was that none of the issues presented grounds to reconsider the JV's satisfaction of the PQP requirements or the outcome of the tender evaluation process.

640. Mr Sterry's approach, set out in the Technical Note and explained in his evidence, was to carry out a review to determine whether any issues had arisen, subsequent to submission of the EOIs or tender, that undermined the statements or evidence by the JV in those submissions. Siemens criticises Mr Sterry for adopting a test in the pre-contract checks that was different to that set out in the PQP and ITT. However HS2 had no obligation to repeat the PQP or tender evaluation process. Indeed, it is likely that a fresh assessment, which was not provided for in the tender documents, would breach the principles of equality and transparency. This difficulty is highlighted by Siemens' suggestion that Mr Sterry failed to identify the broader significance of the cracking issues on Hitachi's design, manufacturing and testing processes. A wide-ranging review of the JV's processes was not part of the criteria in the PQP or the ITT assessment process and would have constituted a departure from the rules of the Procurement.

641. Siemens' challenge amounts to no more than an assertion that Mr Sterry should have found that the issues raised were so serious as to oblige HS2 to disqualify the JV. That fails to grapple with the exercise that he was undertaking, that is, a review of technical issues that had arisen since the PQP and tender assessments, to consider whether such issues gave rise to grounds for reconsidering the earlier evaluations as part of the pre-contract checks. The Technical Note identified the technical issues that had arisen and potential doubts on the JV's ability to deliver, before explaining the differences between the design, materials and suppliers in each case, which supported the conclusion that there were no grounds for reconsidering the earlier evaluations.

642. As set out earlier in this judgment, the court's role is supervisory; the court must not carry out its own investigation into the technical issues or substitute its own assessment. Siemens has not established any error in Mr Sterry's analysis of the technical issues, or the design and manufacturing features that he relied on which distinguished those projects from the JV's bid.

Conclusion on pre-contract checks

643. For the above reasons, Siemens has failed to identify any irrationality or manifest error in the pre-contract checks.

Issue 8 - Modifications

644. Siemens' case is that HS2 acted unlawfully in breach of its obligations:

i) by failing to disqualify the JV for non-compliance with mandatory TTS requirements, in particular TTS-94 and TTS-161;

ii) making the Award Recommendation Decision on the basis that the JV would be permitted to change material aspects of its tender post Contract Award to address the West Coast Partner's concerns as to the number of doors and the internal layout of the JV's train design;

iii) making the Award Recommendation Decision on the basis of a decision to substantially change the JV's train design in the future, by increasing the number of body side doors to 16 and further modifications, without taking into account the impact of these decisions on the JV's Assessed Price; and

iv) entering into the Contract despite knowing that the JV's tendered design was incapable of meeting the 'Sponsor's Requirements', making the implementation of the above modifications inevitable.

645. HS2's defence is that the mandatory dwell time was based on a model designed to assess compliance on a station on the HS2 network, rather than CRN stations. The JV's stage 2.2 scores supported its stated compliance with mandatory TTSs, including TTS-94, which contained the two-minute dwell time as a fixed parameter. Although modelling was carried out to consider potential improvements to dwell time and accessibility, no decision was made and no technical or commercial change process was initiated with the JV prior to contract. In any event, the differential between the Assessed Price of Siemens and that of the JV would not have been material to the tender outcome.

TTS 94 and TTS 161

646. Mandatory TTS-94 specified:

> "A 200m Train shall achieve a journey time of less than 03:45:30 (hours: minutes: seconds) between London Euston and Glasgow Central, in either direction, including two minutes stops at Old Oak Common and Preston. This requirement shall be achieved using the criteria specified in Appendix C."

647. Appendix C provided that the journey time requirements TTS-93 and TTS-94 should be complied with using the criteria set out, including:

> "Intermediate stops shall include a two-minute Dwell Time at each."

648. Mandatory TTS-161 specified:

> "The Unit shall deliver 95% confidence of achieving a Dwell Time of 2 minutes at intermediate stations, calculated in accordance with the Static Dwell Time Model in Appendix I using the 1SL."

649. The JV provided a completed version of the SDTM, which generated a unit summary of 95.5%, and declared compliance with TTS-161. As set out above, when discussing ID 2.2.23 as part of the Stage 2.2 tender evaluation, the operational component used in the SDTM was assessed and considered to be technically robust, producing a score of 'Strong'.

650. Mr Sterry carried out checks that the SDTM provided an accurate model of dwell times for the JV's design. Arup was instructed to carry out modelling to analyse dwell time performance of the JV's design on the CRN as compared with HS2's base design. The results confirmed that the SDTM provided an accurate model of dwell times for the JV's design and there was no underlying error in the model, as explained in Mr Sterry's first witness statement.

651. For the reasons set out above, HS2 was not obligated to review or revise any part of the tender evaluation process once completed. Although there were subsequent concerns raised as to the achievability of journey times based on the SDTM, there is no evidence that the JV failed to meet Mandatory TTS-94 or Mandatory TTS-161 as specified in the ITT. Therefore, there was no basis on which HS2 lawfully could have disqualified the JV.

Journey time issue

652. In early 2021, the West Coast Partner raised concerns as to the ability of the JV to achieve operational performance on the CRN. In a draft technical note dated 21 May 2021, it was noted that the JV met the TTS requirement to achieve a two-minute dwell time with 95% confidence level as determined by the SDTM provided to bidders in the ITT. However, the West Coast Partner was concerned that the SDTM did not accurately reflect the mix of likely travellers using HS2. It was observed that the JV's train design provided for ten doors on each side of the 200m train unit, in contrast to most other high speed rolling stock, which would typically have fourteen or sixteen doors per side. In combination with the high frequency train plan and the need for two-minute dwell times, it considered that the JV design posed a risk to its ability to achieve the required two-minute dwell times on CRN stations without step free access, a risk to service reliability should a unit suffer a door defect, requiring it to be locked out of use, and risk to service recovery with turnarounds at terminal stations.

653. The West Coast Partner recommended that the unit design should be modified to increase the number of body side doors to sixteen on each side of the unit.

654. A 'problem statement' was prepared by Mr Rowell, Mr Sterry and the West Coast Partner for a meeting to discuss the issue on 24 May 2021, summarising the operational problem identified above and stating:

> "Technical problem

> … The operational problem could be addressed by adding additional bodyside doors to the tendered rolling stock design (6 additional doors per side, taking the total to 16 doors per side, and this would mirror the HS2 Reference Train).
>
> The Commercial problem
>
> Adjustment to the tendered rolling stock (by increasing the required number of bodyside doors) will increase its price (both initial capital and ongoing maintenance). It will reduce the number of passenger seats which will in turn reduce the whole life value in the tender evaluation model (but it may not reduce the actual passenger revenue). It will reduce the predicted reliability of the unit which in turn will have a negative impact on the system performance but having more doors means there is redundancy in operational terms, and potentially a lower risk of train cancellations. The additional doors will however improve dwell time performance at CRN stations enabling robust delivery of faster dwell times at CRN stations that in turn provide journey time benefits…
>
> The Procurement problem
>
> Changes to the Lead Tenderer's Train Proposal increases the risk that an unsuccessful bidder may challenge the award decision. The changes would need to be undertaken in accordance with the Utilities Contract Regulations (UCR); this applies to modifications as well as awarding a new contract. There are broadly three options: (i) do nothing and accept the issue, (ii) make a change during contractualisation, and (iii) make a change after contract award. Negotiating this change will have a cost and programme impact either before contract award or after…"

655. Mr Rowell prepared a slide deck (wrongly dated 24 March 2021), which was discussed at a meeting with the West Coast Partner on 24 May 2021 and finalised on 25 June 2021. The summary position statement slide noted that there were two timing points to introduce a change and both carried risk, namely: (i) pre-award in contractualisation; and (ii) post-award in design development:

> "Summary Position Statement
>
> - The Lead Tenderer's design solution results in proportionately worse dwell time performance on the CRN than was expected from the requirements.
>
> - Additional bodyside doors would address this issue and this would also improve overall unit accessibility for passengers (at CRN and HS2 stations)…

- Other ways of improving dwell time and accessibility could be explored in design development (noting this may extend the design phase).

- There are two timing points to introduce a change, both carry risk:

    - Pre-award in Contractualisation

    - Post-award in Design Development

- On balance to HS2, the risks associated with introducing the change after contract award are more tolerable than those during contractualisation (which could lead to challenge and further delay to contract award).

- WCPD requests that the risks of this approach be made explicit in the governance papers submitted by HS2 as part of the Recommendation to Award the Rolling Stock Contract.

Next Steps

- Consideration around re-running Legion modelling to understand actual impact of Lead Tenderer design on CRN station dwell-time performance …

- Agree with procurement team when engagement with Lead Tenderer can commence, noting that WCPD requests that it should be ASAP and ideally be before contract award … Lead Tenderer supports early project to project engagement, but HS2 will only look to commence this once contractualisation has been completed (indicatively engage from late-July)…"

656. The final version of the technical note was produced by the West Coast Partner on 2 July 2021 and included the following matters:

> "4.1.2.20 … A design with fewer doors could have a detrimental impact on passenger perception regarding HS2 services enhancing accessibility. A key sponsor requirement of the programme relates to accessibility of services and that they 'are simple to use and accessible to all passengers including people with reduced mobility'. Conceptually fewer doors per coach can easily be seen to make boarding more difficult regardless of whether this is the case. Passengers may also have similar concerns in respect of safety evacuation from a train with fewer doors.
>
> 4.1.2.21 The unconventional design could create unwanted media attention with the railway technical press likely to be

> questioning of the design creating unnecessary adverse attention for the project.
>
> 4.1.2.22 WCPD and HS2 Ltd have discussed this issue in detail. Both parties agree that the Lead Tenderer's design solution results in proportionally worse dwell time performance on the CRN than was expected from the requirements. Additional bodyside doors would address this issue and this would also improve overall unit accessibility for passengers (at CRN and HS2 stations)… WCPD recommend the unit design is modified to increase the number of bodyside doors to 16 on each side of the unit.
>
> 4.1.2.23 A change to the number of doors will have a significant impact on the interior layout of the coaches, and consequently the position of the vestibules and toilets, and the total number of seats. The earlier this change is integrated the better. On balance to HS2 Ltd, the risks associated with introducing the change after contract award are more tolerable than those during contractualisation (which could lead to challenge and further delay to contract award). WCPD has requested HS2 Ltd to make this matter clear in Governance Papers supporting the Rolling Stock procurement award."

657. By letter dated 2 July 2021, Mr Rowell, Head of Delivery, Rolling Stock Projects at HS2, responded to the issues in the file note prepared by the West Coast Partner. In response to the recommendation to increase the number of doors, he stated:

> "As set out in the technical note, WCPD and HS2 Ltd have discussed this issue in detail and agree that the Lead Tenderer's design solution poses several risks to in service performance of the Units. Additional dwell time modelling work is now being conducted by HS2 Ltd and this will be used to inform further discussions with WCPD to define and agree the modifications required to the design of the vehicles to mitigate the identified risks…"

658. In his witness statement Mr Rowell explained that, at this stage, HS2 had not decided whether to progress the potential design change, although additional dwell time modelling was underway to help inform future discussions with the West Coast Partner. HS2 decided not to include discussions about a potential design change in contractualisation but was exploring the option of having early discussions with the JV following contractualisation. The West Coast Partner requested that HS2 make the matter clear in governance papers which HS2 agreed to do.

659. In cross-examination, Mr Rowell stated:

> "… no agreement to make a change had been made at that point and, on balance, through the points we've looked at already, any change that we made to the rolling stock, HS2 saw it more tolerable on balance carrying that out post contract award."

660. In August 2021, HS2 and the West Coast Partner attended a risk workshop at which the post contract risk register compiled by Mr Sterry and Mr Rowell was discussed. The July version of the register stated that the likelihood of the proposed design change was 95% but the later September iteration of the register stated that the likelihood of the same change was 80%. Mr Rowell explained in evidence that the percentage likelihood that the proposed design change would be made was reduced in the risk register because HS2 had not yet taken a decision to implement the same.

661. At the HS2 Board meeting held on 28 September 2021, Mr Rowell presented a paper, seeking approval of the outcome of the Procurement and the Award Recommendation Report, recommending award of the Contract to the JV, for onward transmission to the HS2 Board. The paper included the following:

> "WCPD has recommended that the Lead Tenderer's design is modified to increase the number of bodyside doors to 16 on each side of the unit and included as part of contractualisation. However, HS2 Ltd has taken the decision not to include this within contractualisation, as the change proposal has not yet been fully developed. HS2 Ltd has worked with WCPD to quantify the potential change cost to be included in the risk register for rolling stock."

662. The Board endorsed the outcome of the rolling stock procurement process and the Award Recommendation Report for onward submission to the Secretary of State DfT.

663. On 30 November 2021 HS2 entered into the Contract with the JV.

PCN 1 & PCN 2

664. By letter dated 17 January 2022, HS2 issued to the JV a 'Purchaser Change Notice' ("PCN 1"), requesting an initial change appraisal in respect of a proposed change:

> "HS2 Ltd require two-minute dwell times at intermediate stations to achieve HS2 railway capacity and journey times. The Train Technical Specification requirement TTS-161 requires Units to deliver 95% confidence of achieving a dwell time of 2 minutes at intermediate stations. At tender stage, HS2 Ltd provided tenderers with the Static Dwell Time Model (SDTM) which was used to calculate the level of confidence achieved by the tendered Build Layout.
>
> In response to this requirement, the Train Manufacturer & Maintainer (TMM) tendered a design with 10 Exterior Doors per side (200m Unit), as detailed in the General Layout drawing of the Train Proposal.
>
> The TMM's Train Proposal has demonstrated compliance with the TTS-161 requirement with 95% confidence of achieving a Dwell Time of 2 minutes, calculated using the Static Dwell Time Model.

> HS2 Ltd and West Coast Partnership Development (WCPD) have subsequently identified issues with the dwell times of this design in practice, which could lead to delays or require timetabled dwell times and journey times to be extended.
>
> In addressing the risk to achieving 2-minute dwells, this Purchaser Change Notice requests that the TMM assesses the impact of replacing Train Technical Specification requirement TTS-161 with two new requirements, as set out below:
>
> 7.15.6.1 TTS-161 – Door positions
>
> Each vehicle of the Unit shall have two Exterior Doors per side.
> 7.15.6.2
>
> TTS-3684 – Door positions
>
> The Unit shall achieve an Operational Component of Dwell Time, as defined in Appendix I, section 1.4 ….
>
> Other TTS requirements may change as a consequence of changing the layout to address these two requirements. The TMM should identify these in its initial response.
>
> The Purchaser hereby requests that an Initial Change Appraisal is delivered by the TMM in accordance with the MSA Full Change Process."

665. By a subsequent letter dated 16 February 2022 HS2 instructed the JV to provide a combined initial change appraisal in respect of PCN 1 together with PCN 2, proposed changes to the catering arrangement requirements. Mr Rowell explained in cross-examination that both proposed changes had an impact on the interior layout of the train units and therefore it made sense to consider them together.

666. By letter dated 28 April 2022, the JV provided its initial assessment of the impact of PCN 1 and PCN 2, including the forecast impact on programme, cost and TTS-requirements.

667. The indicative cost provided by the JV was very substantially in excess of the indicative benchmarking exercise carried out by SNC Lavalin and the overall programme delay predicted was not acceptable. Accordingly, by letter dated 1 July 2022, HS2 rejected the JV's proposal, informing it that no 'Change Confirmation Notice' under the MSA would be issued in respect of PCN 1 or PCN 2.

668. Subsequently, there were attempts to negotiate a price with the JV for the proposed changes, including a request for the JV to put forward a proposal within a defined budget. No agreement was reached on these matters and no change was instructed under the MSA.

Modification decision

669. Siemens' case is that the decision to award the Contract to the JV was taken on the basis that the JV would be permitted to substantially re-formulate its tendered design at a later date, in light of deficiencies in the tendered design to meet HS2's requirements and the Sponsor Requirements under the development agreement with the DfT.

670. Reliance is placed on the West Coast Partner's technical note (to which HS2 contributed), the problem statement, the slide pack circulated by Mr Rowell on 25 June 2021, HS2's letter dated 2 July 2021 to the West Coast Partner and the risk register, in support of its claim that HS2 decided to modify the design, to include additional doors and other internal f changes, post-contract.

671. It is said that the proposed amendments are materially different from the JV's tendered design and therefore demonstrate the intention of the parties to renegotiate the essential terms of the Contract. That represents a breach of the requirements of equal treatment and transparency because no other tenderer was given the opportunity to improve upon its bid, and the comparison of the tenders was made on the basis of a design that could not meet HS2's requirements and which HS2 has no intention to implement.

672. It is important to recognise the considerable latitude afforded to a contracting utility using the negotiated procedure in regulation 47 of the UCR, as in this case.

673. The ITT expressly provided for negotiations after selection of the lead tenderer at section 14.6 of the IfT:

> "14.6.1 Negotiations with the Lead Tenderer may cover any Qualifications, the contractualisation of the Tender (including as set out in Section 14.2 above), the impacts of Brexit (see Section 11.5) and may (without limitation) seek to improve the acceptability of any other matters identified as being less than fully satisfactory to HS2 Ltd against the requirements set out in the ITT.
>
> 14.6.3 If, during the negotiation stage, any amendment is made to the Lead Tenderer's Tender that has a net negative impact on the economic advantage offered by the Lead Tenderer, such that it would increase the Assessed Price of that Tender, then HS2 Ltd will verify whether, notwithstanding such amendment, the Lead Tenderer would still be the first ranked Tenderer following the process set out in Section 12."

674. The extent of the freedom to carry out negotiations after selection of the lead tenderer introduced by regulation 47 was considered in *Bechtel* (above) by Fraser J, who accepted the submission of the utility in that case that regulation 47 is far wider and gives utilities a greater flexibility in terms of negotiation when compared with the PCR:

> "[491] … The use of the word "negotiated" in the regulation would suggest that such a point is somewhat compelling; utilities are given very wide scope in terms of negotiation. The wording of the regulation is demonstrably wider than that of its counterpart in the Public Contracts Regulation, namely Regulation 29, which is competitive procedure with negotiation.

> In my judgment, this is to reflect the different type of projects undertaken by utilities, compared to other contracting authorities, who would use the Public Contracts Regulations rather than UCR 2016. Utilities need a wider degree of flexibility because of the different subject matter of the contracts.
>
> [492] Given the nature of utilities projects, such as HS2 (the scale of which is obvious) or the London Underground one (in that case it was a 30 year project) it would be far from sensible if, having selected the winning bidder, the utility was not permitted to negotiate, agree, discuss or make changes with that economic operator. As long as the process that leads to the winning bidder being identified is fair, transparent, treats the bidders equally and complies with the regulatory requirements, then once that winner is chosen, the utility is not bound strictly to contract only on the specific details contained in the tender. The opposite conclusion would make utilities projects unmanageable. Consider, as an example, start dates. Delays are caused by any number of factors. If the start date of a project is moved back by, say, 6 months, I do not interpret the regulations as requiring a further procurement competition to be undertaken reflecting that change. There is no distortion to the competitive process by permitting such negotiation, and I find that the regulations permit this. If this were not permitted, a change of dates would require a new competition. Such a conclusion would be somewhat lacking in any common sense or logic."

675. Thus, as a matter of principle, there was no unfairness to other tenderers, or any lack of transparency, in HS2's contemplation of negotiations with the JV, as lead tenderer, to change the design to meet concerns raised by the West Coast Partner or otherwise improve the technical performance of the trains. The freedom to negotiate was not unlimited. If, as alleged by Siemens, negotiations were used to allow the JV to correct a deficiency in its tender that amounted to breach of the rules set out in the ITT, such breach would not be saved by reliance on regulation 47. Further, as set out in section 14.6.3 of the IfT, if a negotiated amendment to its tender had a material impact on the JV's Assessed Price, HS2 had an obligation to verify whether the JV would still be the first ranked tenderer in accordance with the Stage 5 assessment.

676. On the facts of this case, Siemens has not established any breach of the rules in the ITT. As set out above, the JV satisfied the Mandatory TTS Requirements relating to dwell time as assessed in accordance with the IfT. Mr Sterry confirmed that there was no error in the SDTM or irregularities in the data used by the JV to complete its entries into the SDTM. The concerns raised in respect of dwell time and journey time stemmed, not from any deficiency in the JV's design as against the ITT requirements but rather, from the assumptions made regarding train design parameters and passenger behaviour when creating the model.

677. No modification decision was made as alleged by Siemens. The documents relied on identify the concerns raised by the West Coast Partner regarding journey times and accessibility, and contain firm recommendations for modifications to be made, but do not evidence any decision to make such changes. The most that could be inferred from

those documents is that any decision to modify the design would not be made until after the Contract had been entered into. That does not equate to a decision that the design would be modified after the Contract had been entered into.

Inevitability of modification decision

678. Siemens allege that the JV's train design does not satisfy the Sponsor's Requirements regarding dwell time, capacity and journey time and, as a result, it is inevitable that the above modifications to the design will be made. Further, it was irrational and manifestly erroneous for HS2 to enter into the Contract knowing that the contracted design would place HS2 in breach of its contractual obligations to the DfT under the development agreement.

679. Those allegations are rejected for the following reasons. Firstly, under section 15.3 of the IfT, HS2 reserved, in its absolute discretion, the right to terminate the procurement, withdraw the ITT or to decide not to the award the Contract to any tenderer. That gave HS2 an opportunity to withdraw from the Contract Award process but, as discussed earlier in this judgment, the exercise of such discretion must not be exercised on an unlimited, capricious or arbitrary basis; it must be exercised rationally and in accordance with the policy on which it is based: *Stagecoach* (above) at [41]-[46].

680. Secondly, although disparity between HS2's commitment to the Sponsor's Requirements under the development agreement and the performance achieved through the Mandatory TTS Requirements (which is disputed by HS2) might provide a principled basis on which HS2 could exercise its discretion not to enter into the Contract, it does not follow that a decision to enter into the Contract must be irrational. In cross-examination, Mr Rayner explained that there were a number of ways of mitigating problems on the CRN in order to address concerns about the Sponsor's Requirements. Siemens has not shown that the decision to enter into the Contract with the JV was outside the range of reasonable decisions that were open to HS2 in those circumstances.

681. Thirdly, the Sponsor's Requirements were contained in the development agreement between HS2 and the DfT but they did not form part of the ITT requirements. Therefore, compliance or otherwise with the Sponsor's Requirements is not material to the lawfulness of the Procurement process.

682. Fourthly, it is not inevitable that the proposed modifications to the design will be made. It is clear that Mr Sterry considered that the two-minute dwell times at intermediate stations in the Sponsor's Requirements could not be achieved through the JV design. The risk register reflected his view that a change was likely. Indeed he was frank in cross-examination that the modifications needed to be made. But he was also clear that the decision as to any modifications was not his decision to make. Further, the Sponsor's Requirements in relation to journey time, and the functional response in relation to dwell time, do not apply directly or solely to the rolling stock project but to the overall railway system. As Mr Sterry explained, in practice, HS2 could accept exceedance of the two-minute dwell time on some journeys without compromising the overall journey time and hence still meeting the Sponsor's Requirement on journey times. Mr Rayner was clear in cross-examination that HS2 has not decided whether the change is necessary or will be made; further, any change would be subject to agreement

on price, commercial terms, effect on the technical deliverability of the rolling stock and legality of the change.

683. Fifthly, there were attempts to negotiate modifications to the design through the change mechanism under the MSA, as evidenced by PCN 1 and PCN 2. HS2 and the JV were unable to agree the price and programme implications for such change and, as a result, no change was instructed. Subsequent discussions failed to produce a proposal from the JV and no agreement has been achieved.

684. Sixthly, the implications of the Contract for HS2's obligations under the development agreement with the DfT are not material to allegations of irrationality or manifest error. It is not for this court to determine the wisdom or otherwise of HS2's decision to enter into the Contract with the JV. The court is concerned solely with the lawfulness of the Procurement. Compliance with the Sponsor's Requirements was not included as part of the tender assessment criteria and no error in the rules of the Procurement has been established.

Prohibitory order

685. Siemens seeks an order preventing HS2 from implementing the proposed modifications, including through entering into associated amendments to the Contract with the JV, on the ground that such amendments would be in breach of regulation 88:

   i) The proposed changes would lead to a modified contract which is materially different in character from that which was set out in the draft MSA (regulation 88(7)(a)). Amended TTS-161 would introduce a fixed parameter for the number of doors and make redundant use of the SDTM. The layout changes contemplated would go beyond those foreshadowed within the collaborative design framework.

   ii) The proposed changes could have affected the outcome of the Procurement (regulation 88(7)(b)), both to the extent that the mandatory TTS requirements would be relaxed or modified and/or because of the impact on the Assessed Price when properly evaluated on the basis of the JV's modified tender design.

   iii) The proposed modifications would change the economic balance of the Contract (regulation 88(7)(c)). The quotation provided by the JV in response to PCN 1 and PCN 2, together with consequential reductions in the value of incremental capacity, would impact on the inputs to the WLVM.

686. HS2's response is that the proposed modifications would not constitute a breach of regulation 88:

   i) Regulation 88(1)(a) allows modifications where the procurement documents permit the same. In this case, section 14.6.2 of the IfT and the negotiated procedure allowed flexibility in negotiation which would include amendments to the design of the trains.

   ii) Regulation 88(1)(e) permits modifications which are not substantial in accordance with the definition in regulation 88(7). It is disputed that the

proposed changes under consideration, namely the additional doors and changes to layout, would be substantial.

iii) In any event, there was a substantial difference between the Assessed Price of Siemens and that of the JV. The use of the JV's quotation in response to PCN 1 and PCN 2 is inappropriate in circumstances where it was rejected but, even if added with consequential adjustments to the WLVM, the JV's Assessed Price as revised would not have been material to the tender outcome.

687. The relief sought is based on hypothetical events, namely, alleged substantial modifications to the design of the trains that have not been defined, agreed or instructed. In the absence of a defined scope or estimated value, the court is not in a position to determine whether the potential modifications, if instructed, would amount to a breach of regulation 88.

688. This part of the challenge to the Contract Award Decision was raised by Claim 6, issued on 13 May 2022. Although that was after the agreed lifting of the suspension on 23 November 2021, and after the Contract was entered into between HS2 and the JV on 30 November 2021, it is said by Siemens that the issue of Claim 6 engaged the automatic suspension in respect of the alleged substantial modification because the effect of an unlawful modification would be to create a new contract, that would be subject to a fresh procurement procedure. HS2 disputes that the proposed modification, if instructed, would constitute a breach of regulation 88 and therefore disputes that there would be any requirement for a fresh procurement process.

689. Siemens is tilting at windmills. There is no defined modification, substantial or otherwise, that HS2 has instructed, or presently intends to instruct. Therefore, there is no notional contract or contractual change to which the automatic suspension could apply.

690. The court has considered whether it would be appropriate to grant declaratory relief as to the lawfulness or otherwise of the proposed modification alternatives under discussion. The court has wide, discretionary powers to grant a declaration: section 19 Senior Courts Act 1981. The principles applicable when considering whether to grant such relief were summarised by Aikens LJ in *Rolls-Royce Plc v Unite the Union* [2009] EWCA Civ 387 at [118]-[120]:

> "(1) the power of the court to grant declaratory relief is discretionary.
>
> (2) There must, in general, be a real and present dispute between the parties before the court as to the existence or extent of a legal right between them. However, the claimant does not need to have a present cause of action against the defendant.
>
> (3) Each party must, in general, be affected by the court's determination of the issues concerning the legal right in question.
>
> (4) The fact that the claimant is not a party to the relevant contract in respect of which a declaration is sought is not fatal to

> an application for a declaration, provided that it is directly affected by the issue.
>
> (5) The court will be prepared to give declaratory relief in respect of a "friendly action" or where there is an "academic question" if all parties so wish, even on "private law" issues. This may particularly be so if it is a "test case", or it may affect a significant number of other cases, and it is in the public interest to decide the issue concerned.
>
> (6) However, the court must be satisfied that all sides of the argument will be fully and properly put. It must therefore ensure that all those affected are either before it or will have their arguments put before the court.
>
> (7) In all cases, assuming that the other tests are satisfied, the court must ask: is this the most effective way of resolving the issues raised. In answering that question it must consider the other options of resolving this issue."

691. In this case, although the court would have power to grant a declaration based on hypothetical facts, namely the proposed modification, it would serve no useful purpose. The design changes set out in PCN 1 and PCN 2 have not been instructed. There is no certainty that any change will be instructed. If a change is instructed, it is likely that it will be different to the design changes set out in PCN 1 and PCN 2. Therefore any declaration based on the current proposal will be obsolete. For that reason, the court declines to grant declaratory relief based on such hypothetical scenario.

Issue 9 – Conflict of interest (Claims 7 and 8)

692. Siemens' case is that in breach of regulation 42 of the UCR and its obligations of equal treatment, HS2 appointed two individuals, Mr Sterry as Lead Technical Assessor and Mr Williamson as a member of RP1, for the Procurement, despite a conflict of interest by reason of their continuing membership of a Bombardier pension scheme.

693. HS2's defence is that the facts and matters relied on by Siemens did not give rise to any conflict of interest and in any event the claims are time-barred.

Material circumstances

694. Mr Williamson and Mr Sterry are both former employees of Bombardier. It is common ground that the mere fact of their prior employment by Bombardier does not of itself create a conflict of interest or appearance of bias.

695. Both Mr Williamson and Mr Sterry enrolled in the Bombardier Transportation UK Pension Plan ("the Scheme") during the course of their employment with Bombardier. Following changes of employment, both remained enrolled in the Scheme as deferred members. The pensions under the Scheme are defined benefit, final salary pensions, with protection against inflation.

696. The Scheme is independent from Bombardier and administered by a board of trustees. The Scheme's assets are invested in various sub-funds of the Bombardier Trust (UK) Common Investment Fund ("the Fund"). Bombardier provides partial funding to the Scheme through contributions. The Fund cannot be invested in Bombardier, there is no impact on the Fund if Bombardier's profitability increases or decreases, and the assets are managed separately. Bombardier is the sponsoring company for the Scheme. If Bombardier were to become insolvent and the Fund had a deficit of assets to meet its liabilities, the Scheme would be transferred to the Pension Protection Fund. If the Scheme could not be rescued by another employer or the shortfall in assets could not be recovered, the Pension Protection Fund would pay compensation to the Scheme members. Those who had reached the Scheme's normal pension age would receive full pension benefits; those who had not reached the Scheme's normal pension age would receive 90% compensation, which would increase for inflation subject to a cap of 2.5%.

697. In cross-examination, Mr Bennett agreed the position as follows:

> "Q. Now, if Bombardier went insolvent, the pension scheme was not rescued by another employer and the pension scheme did not have enough assets to buy benefits equal to or higher than PPF levels, then and only then it would go into the PPF. That's right, isn't it?
>
> A. Yes, that's my understanding, yes.
>
> Q. And if the pension scheme went into the PPF, Mr Sterry and Mr Williamson wouldn't lose their whole pensions, would they? They would lose out by 10% and a potential loss on inflation?
>
> A. Yes, that's my understanding, yes
>
> Q. But the potential loss on inflation only occurs if inflation is more than 2.5% because that is the level at which inflation in the PPF is capped?
>
> A. That is my understanding…"

698. On 13 May 2016, before joining HS2, Mr Sterry completed a Register of Interest form ("ROI") in which he did not identify any potential conflicts of interest. As he noted in his witness statement, the questions were directed to conflicts that might affect his employment at HS2. This ROI was not in connection with the Procurement, which did not commence until a year later.

699. By emails dated 22 May 2017, HS2 circulated to all staff involved in evaluating or moderating the PQP process, including Messrs Sterry and Williamson, an 'Internal Undertaking' form and a further copy of the ROI, to be completed to establish any possible conflicts of interest with the potential applicants, which included Bombardier.

700. On 22 May 2017 Mr Williamson completed an ROI in which he declared his membership of the Bombardier UK Pension Scheme as an interest "that a member of the public, knowing the facts, might reasonably think are significant and relevant".

701. By email dated 5 June 2017, Mr Sterry raised with Amy Parker, the rolling stock procurement officer at HS2, his and others' membership of the Bombardier UK Pension Scheme:

> "Tom [Williamson] … and I have filled out the forms and confirmed that we believe we have no conflict of interest. All three of us have final salary pensions in one of the Bombardier UK pension schemes. These schemes are independent of Bombardier and not invested in Bombardier. However, the pension schemes do receive contributions from Bombardier and so we have some interest in Bombardier remaining a going concern in the UK, but not specifically in whether Bombardier is involved in the HS2 project. Therefore, we do not think this is a conflict of interest."

702. Ms Parker passed on this query to Sarah Coverley in the compliance team, who responded on 7 June 2017, stating:

> "Due to the nature of the industry we often have staff who have pensions with previous employers who are part of the HS2 supply chain - this is not viewed as a material conflict that requires action but it is worth the individuals recording the pension on the Register of Interest Form for transparency and the form being held on their staff record."

703. At the ITT stage of the Procurement, those involved in the assessment process were required to complete a Conflict of Interest Declaration ("COID") Form.

704. On 10 April 2019 a query raised by Mr van Haeften was sent to Ms Coverley:

> "If someone who is going to be an assessor (and has to sign the COI declaration form) has previously worked at a company involved in the procurement process, but may not necessarily [have] been involved with anything over there that makes them a conflict of interest, what happens if they were just an employee but had a pension with that organisation or was part of a share scheme which results in them still having shares at that company?"

705. Ms Coverley's response was as follows:

> "I think the risk is low as the individual hasn't been involved in the area of the business submitting the bid and presumably s/he left the business before the HS2 procurement started (worth checking). Is the organisation part of a bidder or some involvement in the procurement?
>
> If yes bidder I don't believe this is something that should prevent the individual from being an assessor but couple of controls that can be in place:

> - assessor training reminds about avoiding bias, ie don't take into account anything you know about supplier that isn't in bid
>
> - more than one assessor for each question so reduces any impact
>
> - make moderator aware of assessors link with bidding organisation so that can ensure parity
>
> - assessor avoids contact with anyone from previous employer whilst procurement in progress.
>
> If scenario different let me know and I'll call you to talk through."

706. On 29 May 2019 Mr Sterry signed a COID Form, declaring his previous employment at Bombardier, one of the bidders, but not his pension. On that basis, it was sent to HS2 compliance for review.

707. On 30 May 2019 the HS2 compliance department provided advice in respect of assessors who formerly worked for bidders in the Procurement, including former employees of both Bombardier and Siemens. In respect of Mr Sterry, the advice was:

> "Please see mitigations, measures below provided on the basis the individual's Lead Design Assurance Engineer related undertakings whilst employed by Bombardier is unrelated to the Rolling Stock bid, therefore no advantage could be provided to the individuals previous employer.
>
> Please can you confirm the above.
>
> 1. Recommend the HS2 procurement team ensure that the moderator is made aware of the individuals disclosure (at evaluation/assessment stage).
>
> 2. Recommend the responses be anonymised (if applicable).
>
> 3. Recommend that at least one of the two assessors be an individual [who] has no associations with the bidding organisation.
>
> 4. Recommend the individual be reminded of unconscious bias and to treat all responses equally.
>
> 5. Recommend the individual complies with HS2's 10 golden rules.
>
> 6. Recommend the HS2 procurement team ensure the individual is reminded of their confidentiality obligations.

> 7. Recommend the individual to remain transparent and update HS2 procurement team compliance team accordingly."

708. HS2's '10 Golden Rules' were:

   i) keep HS2 information secure;

   ii) keep control of confidential documents and only share on a need to know basis;

   iii) do not discuss or read confidential or sensitive information or documents in public places;

   iv) get approval from your line manager and Public Affairs before speaking at an industry event;

   v) if you have any communications with bidders or potential bidders outside of your day-to-day HS2 activities, tell the Commercial Compliance team;

   vi) do not accept any gifts or hospitality from HS2 bidders or potential bidders;

   vii) obtain written permission before accepting gifts or hospitality;

   viii) do not use or allow others to use HS2's name or logo in any endorsements, case studies or publicity;

   ix) if any bidders or potential bidders contact you about business opportunities, direct them to the supply chain management team;

   x) contact the Commercial Compliance team with any concerns about possible breaches of confidentiality or conflicts of interest.

709. On 17 June 2019 Mr Williamson provided a COID, declaring his membership of the Bombardier Transportation Pension Scheme. The following day, after Mr Williamson had submitted his form, Mr van Haeften informed him that there was no reference to legacy pensions in the HS2 policy so that pensions did not need to be declared.

710. On 20 June 2019 Mr Sterry re-submitted his updated COID Form, declaring his previous employment at Bombardier but stating that he did not have any personal, financial or other interest in any of the tenderers (including parties to a joint venture), which might cause an actual, potential or perceived conflict.

711. Proceedings were first issued by Siemens against HS2 on 18 June 2021.

712. In a letter dated 20 October 2021 to HS2's solicitors ("HSF"), Siemens' solicitors ("OC") referred to Mr Sterry's role as Lead Technical Assessor and his past employment with Bombardier, stating:

> "We understand from TOEP paragraph 5.1.1.c that all Procurement Project Team Members (including Mr Sterry) ought to have completed Conflict of Interest Declaration Forms as part of the evaluation preparation process and that any declared conflicts (real or perceived) should have been referred

> to the Compliance Team for further instructions (TOEP paragraph 5.1.2).
>
> Given the significance of Mr Sterry's opinion in the context of this Procurement and the prima facie appearance of a conflict of interest in this situation, please therefore provide Mr Sterry's Conflict of Interest Declaration Form and all other conflict of interest documentation relating to him."

713. In a further letter dated 22 October 2021 to HSF, OC referred to the Shortfall Tender Decision and stated:

> "The Lead Technical Assessor who provided this opinion was Tim Sterry, HS2's Head of Rolling Stock Engineering, who had spent 15 years working at Bombardier and was until 2016 employed as its Lead Design Assurance Engineer. None of the disclosure that has been provided to Siemens to date gives any indication that any consideration was given to the apparent conflict of interest in these circumstances, despite the fact that because of the content of the JV's testing plan (referring inter alia to its partners' previous projects and identity of testing locations) it would have been impossible to anonymise their submission to someone who has Mr Sterry's inevitable knowledge of his long term employer or detailed knowledge of the industry."

714. Under cover of a letter dated 29 October 2021, HSF provided disclosure of documents into Tier 2 of the confidentiality ring, including Mr Sterry's Conflict of Interest Declaration Form.

715. On 26 July 2022, HS2 served its witness statements, including the first witness statement of Mr Sterry.

716. By letter dated 28 July 2022, OC wrote to HSF in the following terms:

> "In his statement, Mr Sterry acknowledges his sixteen years of employment at Bombardier and details the extent of his role in the evaluation process. He also admits that he *"knew the identities of tenderers and pseudonyms throughout Stages 2 and 3 of the evaluation process"*...
>
> While your client has previously disclosed Mr Sterry's 'Availability, Competency, Conflicts of Interest and Confidentiality Declaration' ("COID") from June 2019 … this did not particularise the actual extent of Mr Sterry's ongoing interests in and/or connections to his previous employer.
>
> Please therefore now provide details of any interests Mr Sterry continues to hold (directly or indirectly) in Bombardier Transportation, Bombardier Inc or any related company … This should include details of:

> (a) Interests in any shares, share options, or other securities;
>
> (b) Interests in any company pension scheme or pension scheme linked to the performance of any such company;
>
> (c) Any other financial interests connected to any such company.
>
> Please also confirm that … Mr Sterry held (directly or indirectly) no other financial interests in Bombardier Transportation or any related company at any point during the currency of the Procurement, or else provide details of the same.
>
> Further … Mr Sterry held a number of roles at Bombardier and worked across a range of different projects. Please therefore give full details of the extent to which Mr Sterry had worked with, collaborated or otherwise knew any members of the JV's bid team, and the extent to which he has continued to communicate with any members of the JV's bid team since joining HS2."

717. The same information was requested in respect of Mr Williamson, together with a copy of his COID.

718. By letter dated 2 August 2022, HSF replied, taking issue with the lateness of the requests and stating that any conflicts claim would be statute-barred. A copy of Mr Williamson's COID was provided. In answer to the questions regarding Mr Sterry, HSF responded:

> "a. Mr Sterry is a member of the Bombardier Transportation UK Pension Plan from his prior employment. He has no stock/shares or other financial interests in either member of the JV;
>
> b. It is unclear what your 28 July letter means when it refers to the JV's bid team or who was in this. It is likely that Mr Sterry would have worked at some point in his career with one or more of the engineers who contributed to the technical aspects of the JV's bid, but Mr Sterry had no communication with any past contacts regarding the JV's tender during the course of the procurement;
>
> c. In relation to the steps taken to manage the risk of conflict, the process set out in the TOEP in respect of the conduct of evaluation itself protects against any single individual having undue influence over the outcome of assessment."

719. On 15 August 2022 Claim 7 was issued, alleging that HS2 was in breach of its obligations to prevent, identify and/or manage the risk of conflicts of interest in respect of key individuals in the procurement team. A judicial review claim was issued on the following day, based on the same grounds and on 16 September 2022 Claim 8 was issued, alleging that HS2 was in breach of its obligations in erroneously failing to recognise and/or take steps to remedy conflicts of interest in respect of key individuals in the procurement team.

720. On 18 August 2022 HS2 issued an application seeking to strike out Claim 7 on the ground that it was time-barred by reason of the fact that Siemens knew or ought to have known of the matters alleged more than 30 days (and, insofar as relevant, more than 3 months) prior to issue of the claim, together with other pleading objections.

721. The strike out application came before Eyre J on 21 September 2022. On 14 October 2022 the Judge handed down judgment (reported at [2022] EWHC 2451 (TCC)), striking out Siemens' claim that HS2 failed to conduct the Procurement in accordance with the provisions of the TOEP, together with the claim in respect of Mr Rowell's involvement in the Procurement. The Judge found that HS2 had not established that Siemens had the relevant knowledge in respect of the conflict claim regarding Mr Sterry and Mr Williamson at any time before it received the letter of 2 August 2022, which was less than 30 days before issue of Claim 7. Therefore, HS2 failed to establish that the alleged breach of regulation 42 of the UCR was out of time. Accordingly the court dismissed the application to strike out that part of Claim 7 or to grant reverse summary judgement.

722. There was no appeal against the judgment of Eyre J but HS2 seeks to persuade me that, on the full evidence now before the court, Claim 7 and Claim 8 are time-barred.

Pleaded case on Claims 7 & 8

723. The alleged breaches are set out in paragraph 30 of the Claims 7 & 8 Consolidated Particulars of Claim:

> "In breach of its obligations, including its duties of equal treatment, transparency, proportionality and those arising under Regulation 42 of the UCR and its duty to take appropriate measures to prevent conflicts of interest, the Defendant erroneously considered that there was no conflict of interest arising upon being notified by Mr Sterry of his and Mr Williamson's membership of the Bombardier UK Pension Scheme on 7 June 2017. In particular, as set out above, the Defendant's compliance team erroneously advised Mr Sterry on 7 June 2018 that his Bombardier pension was "not a material conflict that requires action". The Defendant therefore failed to take any steps to identify and/or manage and/or remedy that conflict in respect of Mr Sterry and also Mr Williamson. The need to remedy such a conflict became particularly acute in light of the deterioration as to the financial standing of Bombardier, following the PQP stage, as particularised above. The Claimant relies upon the following facts and matters in support of its claim of breach:
>
> a. both individuals had worked at one or other of the JV partners, in two cases for a substantial part of their careers, and the Defendant was aware of this; Mr Sterry in particular was therefore likely to have worked alongside a number of the engineers who contributed to the technical aspects of the JV's bid;

> b. Mr Sterry and Mr Williamson were both members of the Bombardier pension scheme and therefore had an ongoing financial interest in the company's success;
>
> c. Mr Sterry failed to declare that interest on his COID; moreover, the Defendant failed to advert to that failure at the time, despite Mr Williamson having declared his Bombardier pension on his own COID;
>
> d. Mr Sterry's role (at least) involved him assessing and/or evaluating bids on a non-anonymised basis;
>
> [e. deleted]
>
> f. Mr Sterry occupied a position of particular influence in respect of the Procurement; in view of his role, his advice, recommendations, opinions, or decisions were critical for its outcome, including in particular the advice he gave in respect of the Shortfall Tender Decision and the Award Recommendation Decision;
>
> g. Mr Sterry (at least) relied on his knowledge of Bombardier's products from his previous employment when scrutinising the JV's bid, including (but not limited to) when advising on the Shortfall Tenderer Decision and conducting the Sterry Pre-Contract Checks; and
>
> h. Mr Williamson was a member of RP1, a key decision-making panel."

724. Footnote 1 to the pleading stated:

> "For the avoidance of doubt, the Claimant does not allege that the mere fact of the previous employment of any employee by one of the bidders, without more, gave rise to a conflict of interest. Rather, the Claimant's case is that the Defendant breached its obligations by failing to take adequate steps to identify and manage the financial conflict of interest in respect of Mr Sterry and Mr Williamson arising as a result of their membership of the Bombardier UK Pension Scheme."

725. Footnote 2 to the pleading stated:

> "For the avoidance of doubt, the Claimant does not allege that this is a breach of the anonymisation requirements in the TOEP."

Issues raised by Claims 7 & 8

726. The issues for determination by the court are:

i) whether the claims are barred for limitation;

ii) whether membership of the Bombardier UK Pension Scheme by Mr Sterry and Mr Williamson gave rise to a conflict of interest;

iii) whether HS2 took adequate steps to identify, manage or remedy any such conflict of interest;

iv) the impact of any breach on the lawfulness of the Shortfall Tender Decision, the Lead Tenderer Decision, the Award Recommendation Decision and the Award Decision.

Limitation

727. Regulation 107(1) provides:

> "This regulation limits the time within which proceedings may be started where the proceedings do not seek a declaration of ineffectiveness."

728. Regulation 107(2) provides:

> "Subject to paragraphs (3) to (5), such proceedings must be started within 30 days beginning with the date when the economic operator first knew or ought to have known that grounds for starting the proceedings had arisen."

729. Regulation 107(4) provides:

> "Subject to paragraph (5), the Court may extend the time limit imposed by this regulation … where the Court considers that there is a good reason for doing so."

730. Regulation 107(5) provides:

> "The Court must not exercise its power under paragraph (4) so as to permit proceedings to be started more than 3 months after the date when the economic operator first knew or ought to have known that grounds for starting the proceedings had arisen."

731. There is no dispute as to the legal principles that are applicable in ascertaining the date when an economic operator first had actual or constructive knowledge of the material grounds. The formulation of the relevant test was considered in *Sita UK Limited v. Greater Manchester Waste Disposal Authority* [2011] EWCA Civ.156 by Elias LJ:

> "[19] … what degree of knowledge or constructive knowledge is required before time begins to run? The knowledge must relate to, and be sufficient to identify, the grounds for bringing proceedings …"

732. Elias LJ adopted with approval the test formulated by Mann J in the first instance judgment (at [30]), namely:

> "There are dangers in dealing with this question in the abstract, and prescribing something which purports to be a formulated standard for something like knowledge of the grounds of a claim. However, some sort of boundaries need to be set. It cannot sensibly be the case that a claimant has to have great detail of how any breach came about before he has knowledge for present purposes. Many claimants do not have full knowledge until after a trial, because additional facts emerge throughout a piece of litigation. Claimants start actions (and are expected to start actions, for limitation purposes) at a time when their knowledge is incomplete, and when detail is not known. I do not see why actions under the Regulations should be any different. Any attempt to require levels of detail would be likely to run counter to the principle that challenges should be indicated swiftly and mounted swiftly.
>
> The standard ought to be a knowledge of facts which apparently clearly indicate, though they need not absolutely prove, an infringement."

733. Further guidance on the application of this test was set out by Eyre J in *Bromcom United Computers plc v United Learning Trust* [2021] EWHC 18 (TCC):

> "[16] … what is needed is knowledge of material which does more than give rise to suspicion of a breach of the Regulations but that there can be the requisite knowledge even if the potential claimant is far from certain of success. Answering the question whether the facts of which a potential claimant was aware were such as to 'apparently clearly indicate' a breach of duty by the contracting authority will require consideration of the nature of the procurement exercise; of the nature of the particular breach alleged; and of the nature and extent of the particular factual material.
>
> …
>
> [18] … If the allegations are on proper analysis different breaches of the same duty then a potential claimant has the requisite knowledge when it knows or ought to have known of facts clearly indicating a breach of that duty. The time period is not extended simply by the potential claimant learning at a later stage of further separate breaches of the same duty even if they occurred "before or after the breaches already known". If, however, the potential claimant learns of facts indicating a breach of a different duty then it may be the position that time begins to run anew in respect of a claim alleging a breach of that duty."

734. In the event that any of the claims were started outside the period of 30 days from the date when Siemens first knew or ought to have known that grounds for issuing the

additional claim had arisen, the court has discretion to extend the time limit in accordance with the regulations.

735. In *Amey Highways Limited v. West Sussex County Council* [2018] EWHC 1976 (TCC) Stuart-Smith J (as he then was) provided guidance as to the exercise of the court's power to extend time at [35]:

> "A number of authorities have considered what may be a good reason for extending time limits, either in principle or on the facts of a particular case. Many have said that it would be unwise to try to provide a definitive list of what the court will or will not take into account in assessing what may be good reason for extending time limits. I agree, for the simple reason that the regulation does not impose any fetter or limitation upon what may be brought into account. For that reason I would not accept that the claimant must show good reason for not issuing in time as a necessary prerequisite to the exercise of the court's discretion … although the absence of good reason for not issuing in time is always likely to be an important consideration. And when considering what other factors *may* be brought into account if appropriate in a given case … relevant considerations will include: (a) the importance of the issues in question; (b) the strength of the claim; (c) whether a challenge at an earlier stage would have been premature, the extent to which the impact of the infringement is unclear and the claimant's knowledge of the infringement; and (d) the existence of prejudice to the defendant, third parties and good administration. For the reasons I have already given, I do not think that this should be regarded as an exhaustive catechism, even in general terms."

736. On the facts of this case, as HS2 submits, no extension could be granted. HS2's position is that Siemens had actual, alternatively constructive, knowledge of the essential facts sufficient to constitute a cause of action by 29 October 2021, shortly thereafter and/or by 1 April 2022 (when disclosure was given). Siemens' position is that it did not have actual or constructive knowledge until 2 August 2022, the date of the HSF letter. If HS2 fails to establish its case on this issue, Siemens does not need any extension of time because Claims 7 and 8 were issued in time. If HS2 establishes its case, the circumstances must be that more than three months elapsed from Siemens' requisite knowledge under the regulations to the issue of Claims 7 and 8, in which case, regulation 107(5) prohibits an extension.

737. HS2's position is that by the end October 2021 (or at the latest by beginning April 2022), Siemens had sufficient knowledge for the purposes of the test in *SITA* (whether actual or constructive). Siemens knew that Mr Sterry and Mr Williamson had been employed by Bombardier, one of the JV bidders in the Procurement, and that they had significant roles in the Procurement. Given the dates of their employment with Bombardier, it was very likely, almost inevitable, that they had defined benefit pensions with Bombardier, as accepted by Mr Bennett in cross examination. From the correspondence in October 2021, Siemens was aware that HS2 relied on the processes set out in the TOEP as the steps taken by HS2 to manage any conflict of interest for the purpose of the Procurement.

738. Siemens' position is that although it knew that Mr Sterry and Mr Williamson had been employed by Bombardier, and therefore were very likely to have defined benefit pensions, for the reasons explained by Mr Bennett, it was not inevitable that they would have retained such pensions. Both Mr Scrimshaw and Ms Hensher at Siemens transferred out of pension arrangements with their former employers. Siemens raised very broad questions concerning conflicts of interest arising out of Mr Sterry's and Mr Williamson's longstanding employment with Bombardier. It would be to impose too high a burden upon Siemens to require it to identify all potential causes of conflicts of interest, or to ask specifically whether or not Mr Sterry or Mr Williamson held a Bombardier pension. Siemens did not have knowledge of Mr Sterry's and Mr Williamson's membership of the Scheme until HSF's letter to OC dated 2 August 2022.

739. In my judgment, Claims 7 and 8 are not time-barred for the following reasons.

740. Firstly, the pleaded case is now clear that the alleged conflict of interest is not said to arise out of the mere fact of former employment of Mr Sterry and Mr Williamson at Bombardier. The alleged breach of the regulations is that HS2 failed to take adequate steps to identify and manage the financial conflict of interest in respect of Mr Sterry and Mr Williamson arising as a result of their membership of the Scheme.

741. Secondly, Siemens did not have actual knowledge of their continued membership of the pension scheme until HSF's letter of 2 August 2022.

742. Thirdly, although in October 2021 Siemens was aware that Mr Sterry was a former employee of Bombardier, and therefore could be taken to know that it was very likely that he had been a member of the Bombardier pension scheme, it did not follow that he must have continued to hold that pension. It was just as likely that any such pension had been transferred or cashed in.

743. Fourthly, the information provided by HS2 to Siemens in October 2021 did not disclose Mr Sterry's continued membership of the Bombardier pension scheme. In response to Siemens' concern regarding a potential conflict of interest, HS2 provided Mr Sterry's COID form, which disclosed his previous employment with Bombardier, but the COID form did not refer to his membership of the Scheme.

744. Fifthly, I do not consider that it was incumbent on Siemens to raise specific questions as to any legacy pension held by Mr Sterry or Mr Williamson. In October 2021, having identified its concern that there appeared to be a conflict of interest based on Mr Sterry's former employment with Bombardier and his role in the Procurement, Siemens requested that HS2 should provide Mr Sterry's COID form, together with all other conflict of interest documentation relating to him. Following receipt of the COID form, it was reasonable for Siemens to assume that all such documentation had been supplied.

745. Sixthly, it was not until August 2022, following a specific request by Siemens in relation to legacy pension schemes held by Mr Sterry and Mr Williamson, that HS2 provided the information now relied on by Siemens as giving rise to a financial conflict of interest and an alleged breach of the regulations.

746. Accordingly, I arrive at the same conclusion reached by Eyre J, namely that the alleged breach of the regulation 42 obligation in respect of a financial conflict of interest, has not been shown to be out of time.

Conflict of interest

747. Regulation 42 provides:

> "(1) Utilities that are contracting authorities shall take appropriate measures to effectively prevent, identify and remedy conflicts of interest arising in the conduct of procurement procedures so as to avoid any distortion of competition and to ensure equal treatment of all economic operators.
>
> (2) For the purposes of paragraph (1), the concept of conflicts of interest shall at least cover any situation where relevant staff members have, directly or indirectly, a financial, economic or other personal interest which might be perceived to compromise their impartiality and independence in the context of the procurement procedure.
>
> (3) For the purposes of –
>
> > (a) paragraph (2), "relevant staff members" means staff members of the contracting authority, or of a procurement service provider acting on behalf of the contracting authority, who are involved in the conduct of the procurement procedure or may influence the outcome of that procedure;
> >
> > (b) sub-paragraph (a), "procurement service provider" means a public or private body which offers ancillary purchasing activities on the market."

748. Regulation 42 imposed on HS2 a positive obligation to investigate, identify and remedy any conflicts of interest: *Case C-538/13 eViglio Ltd*:

> "[42] ... the contracting authorities are to treat economic operators equally and non-discriminatorily and to act in a transparent way. It follows that they are assigned an active role in the application of those principles of public procurement.
>
> [43] Since that duty relates to the very essence of the public procurement directives (see judgment in *Michaniki*, C-213/07, EU:C:2008:731, paragraph 45), it follows that the contracting authority is, at all events, required to determine whether any conflicts of interests exist and to take appropriate measures in order to prevent and detect conflicts of interests and remedy them. It would be incompatible with that active role for the applicant to bear the burden of proving, in the context of the appeal proceedings, that the experts appointed by the contracting authority were in fact biased. Such an outcome would also be contrary to the principle of effectiveness and the requirement of an effective remedy laid down in the third subparagraph of Article 1(1) of Directive 89/665, in light, in particular, of the fact

> that a tenderer is not, in general, in a position to have access to information and evidence allowing him to prove such bias.
>
> [44] Thus, if the unsuccessful tenderer presents objective evidence calling into question the impartiality of one of the contracting authority's experts, it is for that contracting authority to examine all the relevant circumstances having led to the adoption of the decision relating to the award of the contract in order to prevent and detect conflicts of interests and remedy them, including, where appropriate, requesting the parties to provide certain information and evidence."

749. It is common ground that the reference to any interest which might be perceived to compromise the impartiality and independence of those involved in the Procurement raises the test of the fair-minded and informed observer by analogy with the test for apparent bias at common law.

750. The common law test for apparent bias was formulated by Lord Hope (citing Lord Phillips of Worth Maltravers MR in *In re Medicaments and Related Classes of Goods (No 2)* [2001] 1 WLR 700) in *Porter v Magill* [2002] 2 AC 357 at [102]-[103]:

> "The court must first ascertain all the circumstances which have a bearing on the suggestion that the [decision maker] was biased. It must then ask whether those circumstances would lead a fair minded and informed observer to conclude that there was a real possibility, or a real danger, the two being the same, that the [decision maker] was biased."

751. The "fair minded and informed observer" is a person who reserves judgment until both sides of any argument are apparent, is not unduly sensitive or suspicious, and is not to be confused with the person raising the complaint of apparent bias: *Helow v Secretary of State for the Home Department* [2008] UKHL 62 per Lord Hope at [1]-[3]; *Almazeedi v Penner and others (Cayman Islands)* [2018] UKPC 3 at [20]; *R (Good Law Project) v Minister for the Cabinet Office* [2022] EWCA Civ 21 at [64]-[65].

752. The fair minded and informed observer does not act on the basis of first impressions or preconceptions but considers the evidence carefully, distinguishing between what is relevant and irrelevant, having particular regard to the specific factual circumstances: *Gillies v Secretary of State for Work and Pensions* [2006] UKHL 2 per Lord Hope at [17].

753. The court should have regard to admissible evidence about what actually happened in the course of the decision-making process: *Flaherty v National Greyhound Racing Club Ltd* [2005] EWCA Civ 1117 at [72]-[76]; *DM Digital v OFCOM* [2014] EWHC 961 per Stuart-Smith J (as he then was) at [36]-[38].

754. As set out in *Virdi v Law Society* [2010] 1 WLR 2840 at [38]:

> "The ultimate question is whether the proceedings in question were and were seen to be fair. If on examination of all the relevant facts, there was no unfairness or any appearance of

> unfairness, there is no good reason for the imaginary observer to be used to reach a different conclusion."

755. In my judgment Mr Sterry's and Mr Williamsons' continued membership of the Bombardier pension scheme did not give rise to a conflict of interest within the meaning of regulation 42 for the following reasons.

756. I accept that, as submitted by Siemens, there is a distinction to be drawn between the past financial interest in Bombardier, through former employment of Mr Sterry and Mr Williamson, and the future financial interest in Bombardier, through continued membership of the Scheme. It is common ground that the fact of their previous long-term employment with Bombardier did not give rise to a conflict of interest. However, absence of a conflict of interest arising out of former employment does not necessarily indicate the absence of a conflict of interest arising out of ongoing membership of the Scheme. Therefore, it is necessary to consider the nature of their financial interest through the Scheme.

757. The material circumstances are that the pensions are not held with Bombardier but in a separate, independent Scheme. The Scheme is held within the Fund, which is administered by the Fund's trustees. The assets of the Fund are held separate and apart from the operations of Bombardier and its affiliated companies. The Fund cannot be invested in Bombardier and the value of the Fund's assets is not linked to Bombardier's profitability or losses. The Fund is administered to meet long-term pension liabilities to past and present employees and the trustee directors are required to act in the best interest of the Fund's beneficiaries, rather than the sponsoring employer's interests.

758. The sequence of events that would have to unfold before any impact on the value of their pensions is: first, Bombardier would become insolvent as a result of not winning the competition; second, the Scheme would not be rescued by another employer taking on responsibility for it; third, the Fund would have a deficit of assets and cash to meet its liabilities or to buy benefits with an insurance company at the Pension Protection Fund levels of compensation; fourth, the shortfall in assets could not be recovered from Bombardier or others held responsible for the shortfall; fifth, the Scheme would be transferred to the Pension Protection Fund, which would pay compensation to the Scheme members, limited in the case of Mr Sterry and Mr Williamson to 90% compensation and a cap on increases for inflation of 2.5%. Therefore, although it could be said that Mr Sterry and Mr Williamson had an indirect financial interest in the outcome of the Procurement, such interest is so remote as to be immaterial.

759. In those circumstances, the fair-minded and informed observer would conclude that the indirect financial interests held by Mr Sterry and Mr Williamson through their ongoing membership of the Scheme would not compromise their impartiality and independence in the context of the Procurement.

760. In conclusion, I find that the pension interests of Mr Sterry and Mr Williamson did not give rise to a conflict within the meaning of regulation 42.

Steps to identify, manage or remedy any conflict of interest

761. Although not necessary in the light of the above finding, I have considered whether HS2 took adequate steps to identify, manage or remedy any conflict of interest. In my judgment, HS2 took adequate steps to comply with this obligation.

762. Firstly, both Mr Sterry and Mr Williamson properly raised the issue of their continued membership of the Bombardier pension scheme as a potential conflict of interest, although neither considered that it amounted to such conflict. Mr Williamson identified his membership of the Scheme on his COID form. Mr Sterry did not do so. For transparency reasons it would have been better had he recorded it on his COID form. However, he explicitly referred the issue of his final salary pension with the Scheme to Ms Parker for consideration by his email dated 5 June 2017.

763. Secondly, their continued membership of a legacy pension scheme was considered by the HS2 compliance team who, correctly, determined that there was no material conflict of interest posed by the Scheme.

764. Thirdly, adequate measures were taken by HS2 to avoid any distortion of competition and ensure equal treatment arising from the interests of any individual employees. Those involved in the evaluation of the tenders, including Mr Sterry and Mr Williamson, received specific training on confidentiality and conflict issues. The evaluation of each question to be scored in Stages 2 to 4 was carried out by three assessors independently, prior to a consensus reached in moderation meetings chaired by separate moderators. All assessments were reviewed by three levels of Review Panels to ensure that the rules of the Procurement were followed and the process was fair. The tenders were anonymised to ensure that the members of the Review Panels and other decision-makers were unaware of the identity of the tenderers affected by key decisions.

765. As summarised in *Virdi*, the ultimate question is whether the procedure in question was and was seen to be fair. The process of assessment and evaluation in this Procurement has been subject to careful and detailed scrutiny as set out earlier in this judgment. Having examined all the relevant facts, this court has found no unfairness or any appearance of unfairness.

Impact

766. Even if the above findings were wrong, Siemens has failed to show that any breach had an impact on the lawfulness of the Shortfall Tender Decision, the Lead Tenderer Decision, the Award Recommendation Decision or the Award Decision. Although they participated in the assessment exercises and reviews that fed into those decisions, Mr Sterry and Mr Williamson were not decision makers for any of them. The governance structure that was built into the procurement process was designed to ensure that no individual had undue influence at any stage of the process and all decisions were subject to review to ensure due process and fairness.

767. Finally, Siemens has not established that there was any real prospect that the above decisions would have been any different had Mr Sterry and Mr Williamson not participated in the Procurement assessment process.

Conclusion on Claims 7 & 8

768. For the above reasons, the challenge raised in Claims 7 and 8 fails.

Issue 10 – Conflict of interest (Claim 9)

769. Claim 9 was issued on 29 December 2022, after completion of evidence in the trial, and served on HS2 on 5 January 2023. Siemens' case is that, in a further conflict of interest, during the Procurement Mr Sterry had informal contact with ex-colleagues at Bombardier.

770. HS2's primary position is that Claim 9 amounts to an abuse of process and should be struck out. Further, its defence is that the facts and matters relied on by Siemens did not give rise to any conflict of interest and in any event the claims are time-barred.

Material circumstances

771. On 11 December 2019 Mr Dawson sent a WhatsApp message to Mr Sterry with a link to a BBC News story regarding delayed delivery of new Bombardier trains in Greater Anglia. On the same date, Mr Sterry replied to Mr Dawson:

> "Mmm. Last I heard, the LDs on SWR are so high they would 'bankrupt the company', so emphasis is being switched between projects."

772. During cross-examination on 30 November 2022, Mr Sterry was asked about this exchange:

> "Q. … where have you heard that from?
>
> A. I'm not completely sure I think it was from some discussion with probably my former manager at Bombardier.
>
> Q. And who was that?
>
> A. Paul Carter.
>
> …
>
> Q. And where is he now?
>
> A. He's still at Bombardier.
>
> …
>
> Q. So when did you have that discussion with him?
>
> A. I don't recall. Sometime before the WhatsApp message.
>
> Q. What, during the procurement evaluation stage?
>
> A. It probably would have been during that time, yes.
>
> Q. So you were having discussions with people at Bombardier during the procurement evaluation period?

A. Some discussions, yes, not with people who were working on the procurement.

Q. So who were you speaking to apart from -

A. People who were my friends at the company.

Q. Can you tell us about who you were speaking to please?

A. So Paul Carter. I think one of the persons is Suzanne Hudson, who now works for HS2 but at the time probably at some parts of the tender process was working for Bombardier.

Q. Sorry, I should have asked you. Paul Carter, what's his job title?

A. … I don't know his exact job title at the moment but he is effectively the head of the approvals and assurance group for Bombardier in Derby.

Q. So approvals and assurance would relate to regulatory approvals and safety assurance and so forth?

A. Mainly regulatory approvals, less safety.

Q. Right. So an important person at Bombardier in Derby?

A. In Derby, yes.

Q. And sorry your colleague

A. Suzanne Hudson, so she also worked in the same group for Paul and with me at the time when I was there.

Q. I see. And who else?

A. The other person I can think of would be Andrew Childs, who also works in that same group.

Q. Were these contacts that you declared to HS2?

A. No.

Q. How regularly were you speaking to these people?

A. At first I would say once every three or four months. It varies.

…

Q. Mr Carter is sharing with you information which says that the liquidated damages on South Western Railway are so high they could bankrupt the company, so presumably what they're doing

is switching resource from other projects to that to try and head that off?

A. That's my understanding, yes.

Q. That's confidential information of Bombardier, isn't it?

A. Potentially, yes.

…

Q. But he trusted you sufficiently that he was prepared to entrust you with that kind of confidential information when he was an active bidder in this procurement?

A. Yes, but as I said, he had no part of the procurement as far as I'm aware.

Q. No. So I think we've just checked he's the design assurance and authorisation manager at Bombardier?

A. Yes, that sounds correct."

773. Mr Sterry's cross-examination continued on 1 December 2022 and on 8 December 2022 but he was not asked any further questions about his contacts at Bombardier until his final day of cross-examination on 19 December 2022, the last day of evidence in the trial:

"Q. When you spoke to Dr Carter, who initiated that contact?

A. I don't recall.

Q. Did you meet in person?

A. I'm not sure, sorry.

Q. Did you sometimes speak on the telephone?

A. Probably not, no.

Q. Did you message - do you do instant messaging, WhatsApp, texting?

A. He doesn't do WhatsApp, unfortunately, so I may have sent a text message or I think he may have … there are other times when he may have sent me text messages.

Q. Do you socialise with him?

A. Sometimes, yes.

Q. How often did you speak to him during [the] procurement?

A. Every three or four months, maybe every six months.

Q. When did you last speak to him?

A. Last week.

Q. During the procurement, can you recall the last occasion when you spoke to him?

A. No I can't.

Q. And how do you know he was not involved in the JV's bid?

A. Because he had told me.

Q. And when did he tell you that?

A. On one of the times we spoke.

Q. But you have never reported these contacts to –

A. No.

Q. And you can see now that the 10 golden rules and the policies that we've looked at required that you did?

A. They do. I think the contacts I had were all with people who worked for Bombardier Transportation UK, working in Derby. In the contact I did have with them, they were all clear that they had no involvement in the tender and that the work for the tender was not being done from Derby, and that later became apparent to us when we saw the tender. There was no obvious involvement from people working in Derby.

Q. So the next person that you told us about was Suzanne Hudson.

A. Yes.

Q. And she was a senior design assurance engineer at Bombardier until June 2019?

A. Yes.

Q. And she's now at HS2?

A. Yes.

…

Q. Again, who initiated contact with her?

A. It could have been either of us.

Q. OK how often do you speak to her?

A. Again probably every once in every few months.

Q. Did you meet in person?

A. Yes I would have done at some points yes.

Q. And by telephone?

A. Possibly at some points, yes.

Q. Did you WhatsApp or –

A. Yes, I would have done. I believe though messages with her were examined as part of the look through my messages. I think she's one of the names I gave who may have messages.

…

Q. Did you socialise with her?

A. Yes.

Q. During the procurement?

A. Yes.

Q. And did you report any of that contact to compliance?

A. No.

Q. When did you last speak to her?

A. Probably about two weeks ago.

Q. How do you know she was not involved in the JV's bid?

A. Because she told me she had no involvement.

Q. Right. Then finally Mr Childs. He is a senior design assurance manager at Bombardier yes?

A. Yes well I don't know his current role if that's his current role if you have searched then yes… I just knew him as a design assurance engineer.

Q. Again, who initiated contact with Mr Childs? Did he speak to you or did you speak to him?

A. I don't recall.

Q. Did you meet in person?

> A. I think I will have done at some point yes.
>
> Q. And did you have instant messaging contact, WhatsApps?
>
> A. Possibly, I'm not sure.
>
> Q. Did you socialise with him?
>
> A. I think at some point yes.
>
> Q. During the procurement?
>
> A. Yes.
>
> Q. Again, you say that he wasn't involved in the JV's bid.
>
> A. Yes. It was quite clear to me that nobody from - none of my former contacts that I met had any involvement with the bid and nobody would - it was clear to me that nobody was going to say anything to me about the bid or was asking me any questions about the bid … it was clear to me that they also understood that they should not talk to me about it."

774. On 29 December 2022 Claim 9 was issued.

Pleaded case in Claim 9

775. The alleged breaches are set out in paragraph 46 of the Claim 9 Particulars of Claim:

> "In breach of its obligations of equal treatment and/or transparency and/or proportionality, whether arising under Regulation 36 and/or otherwise, and/or in manifest error, the Defendant permitted, alternatively failed to take appropriate steps to prevent, a key individual involved in the Procurement (including in the evaluation of tenders and decisions relating to disqualification of tenders and the award of the Contract) from maintaining contacts with key individuals employed by Bombardier, an economic operator which participated in the Procurement and which, through its JV with Hitachi, submitted a tender. The same facts giving rise to those breaches also give rise to a specific breach of Regulation 42 of the UCR in that the Defendant failed to prevent and/or identify and/or remedy a conflict of interest arising out of Mr Sterry's contacts with his former colleagues at Bombardier during the Procurement, including in particular during the evaluation of the tenders submitted."

776. Further particulars of the alleged breach are set out in paragraph 47:

> "Without prejudice to the generality of the foregoing:

a. The conflict of interest that the Claimant has already pleaded in the COI Claim arises out of the relationships between Mr Sterry as the holder of a pension through his former employment with Bombardier, his employment by HS2, and the participation of Bombardier (through the JV) in the Procurement. Mr Sterry's evidence, as summarised at paragraphs 36 to 44 above, discloses a pattern of communication with key individuals at Bombardier, including during the trial of the Main Claim and the COI Claim, which gives rise to a different conflict of interest. That conflict of interest results from Mr Sterry's deliberate actions in maintaining contacts with individuals employed by Bombardier and/or Bombardier permitting its employees to maintain contact with Mr Sterry.

b. As indicated by the roles that they held at the relevant time, each of Dr Carter, Ms Hudson and Mr Childs held responsibilities that were closely connected to issues of design and/or assurance which were integral to the Procurement.

c. Mr Sterry's assertion that the three individuals were not involved in the preparation of the JV's tender discloses that there were clearly conversations concerning the Procurement otherwise Mr Sterry could not have known what roles those individuals played.

d. There is no evidence before the Court from the Defendant and/or Bombardier as to what roles those individuals actually held and/or what part they may have played (or, at the relevant time, may have played in the future) in any matter related to the development and submission of the JV's tender. In the absence of such evidence the Court is required to assume, at the very least, that the possibility of such involvement cannot be discounted.

e. Specifically in that regard, Mr Sterry's assertion on cross-examination that all of these individuals worked at Bombardier's facility in Derby and that "the work for the tender was not being done from Derby and that latter became apparent to us when we saw the tender" is controverted by the contents of the JV's tender which made clear that (unsurprisingly) a considerable amount of work on the train design and testing will be undertaken at those facilities. The Claimant refers in particular in that regard to Figure 7 of the JV's response to DP 1.1. which indicates that the largest number of activities (7) will be carried out at Bombardier's Derby facilities. Further and in any event, even if that were not the case there could be no assurance that any (or all) of those individuals might at some point become involved in development or delivery of the JV's tender.

f. Further or alternatively, regardless of whether or not Dr Carter and/or Ms Hudson and/or Mr Childs were involved, whether directly or indirectly with Bombardier's participation in the Procurement, the mere fact of regular contact during the course of the Procurement between Mr Sterry, who occupied a key role in relation to the evaluation of tenders, and individuals who held important roles at Bombardier, which through the JV was bidding in the process, was both:

   i. In breach of the Defendant's own internal rules (as to which see paragraphs 24 to 32 above) and the terms of the procurement documents (as to which see paragraphs 14 and 23 above) both of which were intended to provide assurance to bidders, including the Claimant, as to the integrity of the process. Mr Sterry should not have had contact with Dr Carter and/or Ms Hudson and/or Mr Childs; alternatively, even if he did so, he was required to record such contacts in accordance with the Defendant's own internal rules.

   ii. In any event sufficient in and of itself to give rise to at least a perceived conflict of interest. The processes and procedures put in place by the Defendant were evidently insufficient to prevent that conflict from arising. Furthermore, the Defendant failed to identify the possibility of that conflict or do anything to address it.

g. At various points in the Procurement, Mr Sterry's actions and interventions were such as to provide a positive benefit to Bombardier and/or a disbenefit to the Claimant such as to give rise to at least a perceived conflict of interest…"

The applications

777. There are three applications before the court regarding Claim 9:

i) Siemens' application dated 12 January 2023, seeking an order for disclosure of documents, including communications between Mr Sterry and Dr Carter, Ms Hudson and Mr Childs;

ii) HS2's application dated 20 January 2023, seeking an order that Claim 9 be struck out pursuant to CPR 3.4(2)(a) and/or CPR 3.4(2)(b); alternatively that summary judgment should be entered for HS2 against Siemens on Claim 9 pursuant to CPR 24.2; alternatively that Claim 9 should be stayed until judgment is handed down in claims 1 to 8;

iii) Siemens' application dated 8 February 2023 for an order that Claim 9 be jointly managed with Claims 1 to 8 and that directions be given for a further substantive hearing.

778. Both parties have filed witness statements in respect of the applications: Mr McCarthy's sixteenth statement dated 8 February 2023 on behalf of Siemens; Ms Zar's fourteenth statement dated 20 January 2023 and her fifteenth statement dated 15 February 2023 on behalf of HS2.

779. HS2's position is that Claim 9 should be struck out and/or reverse summary judgment granted on the basis that the claim discloses no reasonable cause of action and/or for abuse of process. The claim is time-barred, it should have been brought prior to the close of evidence in the trial and the pleading is defective, in that it does not disclose any cause of action and is vague and incoherent. If the court refuses HS2's application, its position is that Claim 9 should be stayed pending judgments on Claims 1 to 8 in order to avoid a multiplicity of proceedings and having two sets of live proceedings afoot at the same time.

780. Siemens' position is that Claim 9 is not statute-barred, neither should it be struck out nor summary judgment given on any of the bases advanced by HS2. If HS2's application is unsuccessful, the appropriate course is not to stay the claim, as HS2 proposes, but rather to have it case managed with Claims 1 to 8 and heard prior to the court handing down judgment on those existing claims, given the obvious overlap of issues across the claims.

The applicable test

781. CPR 24.2 provides that:

> "The court may give summary judgment against a claimant … on the whole of a claim or on a particular issue if –
>
> (a) it considers that –
>
> (i) that claimant has no real prospect of succeeding on the claim or issue; … and
>
> (b) there is no other compelling reason why the case or issue should be disposed of at a trial."

782. The principles to be applied can be summarised as follows:

i) The court must consider whether the claimant has a 'realistic' as opposed to a 'fanciful' prospect of success: *Swain v Hillman* [2001] 1 All ER 91.

ii) A 'realistic' claim is one that carries some degree of conviction. This means a claim that is more than merely arguable: *ED & F Man Liquid Products v Patel* [2003] EWCA Civ 472 at [8].

iii) In reaching its conclusion the court must not conduct a 'mini-trial': *Three Rivers District Council v Governor and Company of the Bank of England (No 3)* [2003] 2 AC 1 at [95]; *Okpabi v Royal Dutch Shell* [2021] UKSC 3 at [110].

iv) The court must take into account not only the evidence actually placed before it on the application for summary judgment, but also the evidence that can

reasonably be expected to be available at trial: *Royal Brompton Hospital NHS Trust v Hammond (No 5)* [2001] EWCA Civ 550; *Okpabi* at [127]-[128].

v) The court should hesitate about making a final decision without a trial, even where there is no obvious conflict of fact at the time of the application, where reasonable grounds exist for believing that a fuller investigation into the facts of the case would add to or alter the evidence available to a trial judge and so affect the outcome of the case: *Doncaster Pharmaceuticals Group Ltd v Bolton Pharmaceutical Co 100 Ltd* [2007] FSR 63.

vi) If the court is satisfied that it has before it all the evidence necessary for the proper determination of a short point of law or construction and the parties have had an adequate opportunity to address the question in argument, it should grasp the nettle and decide it. It is not enough to argue that the case should be allowed to go to trial because something may turn up which would have a bearing on the question of construction: *ICI Chemicals & Polymers Ltd v TTE Training Ltd* [2007] EWCA Civ 725 at [11]-[14]; *Easyair Ltd (t/a Openair) v Opal Telecom Ltd* [2009] EWHC 339 (Ch) at [15].

783. CPR 3.4(2) provides that:

> "The court may strike out a statement of case if it appears to the court:
>
> …
>
> (a) that the statement of case discloses no reasonable grounds for bringing or defending the claim;
>
> (b) that the statement of case is an abuse of the courts process or is otherwise likely to obstruct the just disposal of the proceedings …"

784. The principles to be applied are as follows:

i) If the pleaded facts do not disclose any legally recognisable claim against a defendant, it is liable to be struck out. However, the application must assume that the facts alleged in the pleaded case are true.

ii) It is not appropriate to strike out a claim in an area of developing jurisprudence, since in such areas, decisions as to novel points of law should be based on actual findings of fact: *Barratt v Enfield BC* [2001] 2 AC 550 per Lord Browne-Wilkinson at p.557; *Philipp v Barclays Bank UK plc* [2022] EWCA Civ 318 per Birss LJ at [20].

iii) The court must be certain that the claim is bound to fail; unless it is certain, the case is inappropriate for striking out: *Hamida Begum v Maran (UK) Ltd* [2021] EWCA Civ 326 per Coulson LJ at [22]-[24]; *Rushbond v JS Design Partnership* [2021] EWCA Civ 1889 per Coulson LJ at [41]-[42].

Limitation

785. Regulation 107(2) of the UCR provides that proceedings must be started within 30 days beginning with the date when the economic operator first knew or ought to have known that grounds for starting the proceedings had arisen. The relevant test and principles are set out above.

786. HS2's position is that Siemens knew or ought to have known the essential facts sufficient to constitute the cause of action by 29 October 2021, when it knew that Mr Sterry had been employed for many years by Bombardier and that he had a significant role in the Procurement. From the correspondence in October 2021, or by 2 August 2022, the date of the HSF letter to OC, Siemens was aware that HS2 relied on the processes set out in the TOEP as the steps taken by HS2 to manage any conflict of interest for the purpose of the Procurement. Alternatively, it had the relevant knowledge by 28 October 2022, when disclosure was given in respect of Claims 7 and 8.

787. Siemens' position is that although it knew that Mr Sterry had been employed by Bombardier, and therefore was likely to still have personal contacts with former colleagues, it did not know that he maintained those contacts during the Procurement. The COID form disclosed in October 2021, the information provided in August 2022 and documents disclosed in October 2022 did not indicate that Mr Sterry had maintained those contacts with former colleagues. Siemens did not have such knowledge, and should not be deemed to have such knowledge, until cross-examination of Mr Sterry during the trial.

788. In my judgment, the allegation at paragraph 46 in the Claim 9 pleading is not time-barred for the following reasons.

789. Firstly, as for Claims 7 and 8, the alleged conflict of interest is not said to arise out of the mere fact of Mr Sterry's former employment, or the fact that he would have colleagues at Bombardier. The alleged breach of the regulations is that HS2 failed to take adequate steps to identify and manage the conflict of interest in respect of Mr Sterry arising as a result of his continuing contact with previous colleagues during the Procurement.

790. Secondly, the information provided by HS2 to Siemens in October 2021, August 2022 and October 2022 did not disclose that Mr Sterry had continuing contact with former colleagues at Bombardier.

791. Thirdly, Siemens did not have actual knowledge of Mr Sterry's contact with colleagues during the Procurement until his evidence at trial on 30 November 2022.

792. Claim 9 was issued on 29 December 2022, within 30 days of such knowledge, and therefore was within time.

Abuse of process

793. It is common ground that the court has the power to strike out a statement of case under CPR 3.4(2)(b) on the basis that it is an abuse of the court's process or is otherwise likely to obstruct the just disposal of proceedings: see Lord Diplock in *Hunter v Chief Constable of the West Midlands Policy* [1982] AC 529, 536C:

> "the inherent power which any court of justice must possess to prevent misuse of its procedure in a way which, although not inconsistent with the literal application of its procedural rules, would nevertheless be manifestly unfair to a party to the litigation before it, or would bring the administration of justice into disrepute amongst right-thinking people."

794. The rule in *Henderson v Henderson* (1843) 3 Hare 100 provides that a party must bring the whole of its case at the appropriate time or risk being excluded from doing so later – see Sir James Wigram V-C at pp.114–115:

> "… where a given matter becomes subject to litigation in a Court of competent jurisdiction, the Court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of a matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of res judicata applies, except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time."

795. The rule in *Henderson v Henderson* was explained by Lord Bingham in *Johnson v Gore Wood & Co* [2002] 2 AC 1 at p.31:

> "… *Henderson v Henderson* abuse of process, as now understood, although separate and distinct from cause of action estoppel and issue estoppel, has much in common with them. The underlying public interest is the same: that there should be finality in litigation and that a party should not be twice vexed in the same matter. This public interest is reinforced by the current emphasis on efficiency and economy in the conduct of litigation, in the interests of the parties and the public as a whole. The bringing of a claim or the raising of a defence in later proceedings may, without more, amount to abuse if the Court is satisfied (the onus being on the party alleging abuse) that the claim or defence should have been raised in the earlier proceedings if it was to be raised at all. I would not accept that it is necessary, before abuse may be found, to identify any additional element such as a collateral attack on a previous decision or some dishonesty, but where those elements are present the latter proceedings will be much more obviously abusive, and there will rarely be a finding of abuse unless the later proceeding involves what the court regards as unjust harassment of a party. It is, however, wrong to hold that because a matter could have been raised in earlier proceedings it should have been, so as to render the raising of it in later proceedings

> necessarily abusive. That is to adopt too dogmatic an approach to what should in my opinion be a broad, merits-based judgment which takes account of the public and private interests involved and also takes account of all the facts of the case, focusing attention on the crucial question whether, in all the circumstances, a party is misusing or abusing the process of the court by seeking to raise before it the issue which could have been raised before. As one cannot comprehensively list all possible forms of abuse, so one cannot formulate any hard and fast rule to determine whether, on given facts, abuse is to be found or not."

796. In *Dexter v Vlieland-Boddy* [2003] EWCA Civ 14 the principles to be derived from the relevant authorities were summarised by Clarke LJ at [49]:

> "i) Where A has brought an action against B, a later action against B or C may be struck out where the second action is an abuse of process.
>
> ii) A later action against B is much more likely to be held to be an abuse of process than a later action against C.
>
> iii) The burden of establishing abuse of process is on B or C as the case may be.
>
> iv) It is wrong to hold that because a matter could have been raised in earlier proceedings it should have been, so as to render the raising of it in later proceedings necessarily abusive.
>
> v) The question in every case is whether, applying a broad merits based approach, A's conduct is in all the circumstances an abuse of process.
>
> vi) The court will rarely find that the later action is an abuse of process unless the later action involves unjust harassment or oppression of B or C."

797. In most cases, the issue of 17 different claims by a claimant against the same defendant, in respect of the same dispute, arising out of the same procurement, would be considered to be an abuse of process, particularly where the last two claims were issued after both parties had concluded their factual evidence and 18 months after issue of the first claim. The claims do not raise new causes of action but identify new grounds in support of the case that key decisions in the Procurement were in breach of the UCR and unlawful. The justification for issuing new claims, rather than applying for permission to amend the existing pleadings, is the risk that the very short limitation period could expire before the amendment has been agreed by the defendant or allowed by the court. The well-established approach in procurement cases, in order to avoid the risk that a claim becomes time-barred, is to issue a fresh claim, which is then consolidated with the earlier claim(s) or case managed with them.

798. Having regard to the purpose for which Claim 9 was issued, to avoid limitation jeopardy, I do not consider that it amounts to an abuse of process solely by reason of the fact that the additional grounds were raised by a new claim. In the circumstances of this case, particularly where Siemens is asking the court to determine Claim 9 at the same time as Claims 1 to 8, I consider that, if the claim survived the strike out/summary judgment application, the appropriate course of action would be to consolidate Claim 9 with Claims 7 and 8, utilising the court's case management powers under CPR 3.1(2)(g). However, the real issue for the court is whether Siemens should be permitted to pursue the new claim at this late stage. Useful guidance can be found by analogy in the court's approach to late amendments.

799. The leading authorities on applications to amend where lateness is an issue are *CIP Properties (AIPT) Ltd v Galliford Try Infrastructure Ltd* [2015] EWHC 1345 (TCC) per Coulson J (as he then was) at [19] and *Quah Su-Ling v Goldman Sachs International* [2015] EWHC 759 per Carr J (as she then was) at [36]-[38].

800. The relevant principles enunciated in both authorities can be summarised as follows:

i) In exercising the court's discretion whether to allow an amendment, the overriding objective is of the greatest importance. Although the court will have regard to the desirability of determining the real dispute between the parties, it must also deal with the case justly and at proportionate cost, which includes (amongst other things) saving expense, ensuring that the case is dealt with expeditiously and fairly, and allocating to it no more than a fair share of the court's limited resources.

ii) Therefore, such applications always involve the court striking a balance between injustice to the applicant if the amendment is refused, and injustice to the opposing party and other litigants in general, if the amendment is permitted.

iii) The starting point is that the proposed amendment must be arguable, coherent and properly particularised. An application to amend will be refused if it is clear that the proposed amendment has no real prospect of success.

iv) An amendment is late if it could have been advanced earlier, or involves duplication of steps in the litigation, costs and effort. Lateness is not an absolute, but a relative concept. It depends on a review of the nature of the proposed amendment, the quality of the explanation for its timing, and a fair appreciation of the consequences in terms of work wasted and consequential work to be done.

v) It is incumbent on a party seeking the indulgence of the court to be allowed to raise a late claim to provide a good explanation for the delay.

vi) A very late amendment is one made when the trial date has been fixed and where permitting the amendment would cause the trial date to be lost. Parties and the court have a legitimate expectation that trial fixtures will be kept.

vii) Where a very late application to amend is made the correct approach is not that the amendments ought, in general, to be allowed so that the real dispute between the parties can be adjudicated upon. Rather, a heavy burden lies on a party seeking a very late amendment to show the strength of the new case and why

justice to him, his opponent and other court users requires him to be able to pursue it. The risk to a trial date may mean that the lateness of the application to amend will of itself cause the balance to be loaded heavily against the grant of permission.

801. The new claim is very late indeed, given that the evidence in the trial has concluded and a further hearing is now proposed by Siemens. As Lewison LJ famously stated in *FAGE UK Ltd v Chobani UK Ltd* [2014] EWCA Civ 5 at [114]:

> "The trial is not a dress rehearsal. It is the first and last night of the show."

802. Siemens should not be criticised for not raising the issue prior to Mr Sterry's oral evidence at trial because the factual basis of the new claim arose during his cross-examination on 30 November 2022. However, Siemens has failed to provide adequate explanation for the delay in issuing the claim between 30 November 2022 and 29 December 2022.

803. I do not underestimate the hard work and immense pressure on everyone involved in a trial of this size and scope. It would be unfair to expect any follow up on the initial cross-examination on this topic by 1 December 2022 and there were other more significant areas to be explored with Mr Sterry when he was cross-examined on 8 December 2022. However, Siemens maintained a very large legal team working throughout the trial. During the week of 12 December 2022 the court was hearing another case, because this matter was originally listed to be complete by then. That gap in the hearing provided an opportunity for Siemens to consider and make an application in respect of what must by then have been recognised as a potential new allegation or claim. By then, Siemens had requested, and been granted, an extension of time for written closing submissions from 20 December 2022 to 18 January 2023, thereby relieving pressure on the legal team. It is unfortunate that Siemens did not raise with the court the potential new conflict of interest issue prior to the close of evidence on 19 December 2022. Even if it could not then particularise its claim, the court could have given directions, including for any further disclosure or evidence, before the end of term. The court had already made available 19 to 21 December 2022 as additional time for the case, if needed.

804. Against that background, the burden is on Siemens to show the strength of the new claim sought to be advanced and why justice to it, HS2 and other court users requires it to be able to pursue it.

Conflict of interest

805. Siemens' position is that, just as it accepts that prior employment does not without more constitute a conflict of interest, it also accepts that where an employee of HS2 has previously worked for a tenderer, that person may still have personal contacts with former colleagues, whether through friendship or professional activities, such as membership of an industry body. However such relationships must clearly be carefully regulated and monitored to avoid actual, potential or perceived conflicts of interest. Mr Sterry's regular contact during the Procurement with Dr Carter, Ms Hudson and Mr Childs was in breach of HS2's internal rules and gave rise to at least a perceived conflict of interest.

806. In my judgment the pleaded case in Claim 9 has no real prospect of success and is bound to fail. Mr Sterry's continued contact with colleagues at Bombardier did not give rise to a conflict of interest within the meaning of regulation 42 for the following reasons.

807. The material circumstances are that during the Procurement Mr Sterry was in communication with his former colleagues from Bombardier, Dr Carter, Ms Hudson and Mr Childs. Mr Sterry made no attempt to conceal the contact that he continued to have with his former colleagues. His evidence in cross-examination was clear; the contact with those individuals was social; they did not work on the Procurement, they were not involved in the JV's bid and they did not discuss the bid with him or ask any questions relating to the bid. I found Mr Sterry to be an honest, candid and straightforward witness. I accept his evidence on this issue.

808. It is pleaded that Dr Carter, Ms Hudson and Mr Childs were closely connected to issues of design and/or assurance which were integral to the Procurement. No particulars are given of this assertion but it falls short of an allegation that they were involved in the Procurement itself (an allegation that could not be sustained in the light of Mr Sterry's evidence). It is further pleaded that a considerable amount of work on the train design and testing will be undertaken at the facilities in Derby. That may be correct but it does not impinge on the Procurement; future performance of the Contract is separate from involvement in the tender process.

809. A legitimate criticism pleaded by Siemens is that Mr Sterry should have reported his ongoing contact with former colleagues from Bombardier with the procurement operations team and entered it on the register for record and audit purposes. It would have been prudent for him to have disclosed such contact, given his significant role in the Procurement. I accept that he did not do so because the contacts were not with individuals involved in the Procurement and therefore there was no issue of impropriety. Even if this amounted to a breach of HS2's internal rules, that of itself did not amount to a breach of the rules of the Procurement.

810. It is alleged that at various points in the Procurement, Mr Sterry's actions and interventions were such as to provide a positive benefit to Bombardier and/or a disbenefit to Siemens. However, that ignores the fact that, in a number of the Section 2-4 challenges addressed earlier in this judgment, Siemens relied on Mr Sterry's identification of weaknesses in the JV's bid, including assessments of 'Weak' on some of the technical components. It is also significant that Mr Sterry was vociferous in identifying concerns regarding dwell time and his view that changes to the design were necessary. The matters pleaded in paragraph 47g of Claim 9 seek to add new substantive allegations attacking the technical compliance of the JV's bid with the Mandatory TTS Requirements but, as submitted by HS2, such allegations would be time-barred and, on that ground alone, should be struck out.

811. For the reasons set out above in relation to Claims 7 and 8, I consider that the training of those involved in the evaluation of the tenders, including Mr Sterry, on confidentiality and conflict issues, together with the tender evaluation procedures and oversight through the Review Panels, provided adequate safeguards to avoid and manage any potential conflict of interest.

812. In those circumstances, the fair-minded and informed observer would conclude that the continued contact by Mr Sterry with his former colleagues during the Procurement

would not compromise his impartiality and independence in the context of the Procurement.

813. I have considered the guidance set out in the authorities, cautioning against a 'mini trial' on applications to strike out and/or for summary judgment. But in this case the substantive trial has already taken place. As explained in Ms Zar in her fifteenth witness statement, Mr Sterry's personal phone, including all messaging data, was searched and reviewed for relevance against Claims 1-6 and later against Claims 7-8. Therefore, in relation to those claims full disclosure has already been given of any relevant communications between Mr Sterry and personal contacts, whether HS2, Bombardier or other colleagues. Mr Sterry has already given evidence, and been cross-examined, in respect of the matters raised in Claim 9. In those circumstances, it would be oppressive and unjust to HS2 for it to be vexed with another trial, given the disruption, duration, expense and human resources that would be required, just on the chance that, on a further trail of inquiry, something might turn up.

814. In conclusion, I find that there is no real prospect of success on Claim 9 and it is bound to fail. For the above reasons, Claim 9 shall be struck out and summary judgment granted to HS2.

Issue 11 – Other breaches – adequacy of reasons

815. The only remaining 'other breaches' now in dispute is Siemens' case is that in breach of regulation 36 and/or regulation 104 and/or the principles of equal treatment, non-discrimination, transparency and good administration, HS2 has failed to provide to Siemens promptly the essential information and documentation relating to the Procurement and specifically the change consent, Shortfall Tender, lead tenderer, Award Recommendation and Award Decisions, so that Siemens can take an informed view of their fairness and legality.

816. Regulation 101 of the UCR provides:

> "(1) … a utility shall send to each … tenderer a notice communicating its decision to award the contract …
>
> (2) Where it is to be sent to a tenderer, the notice referred to in paragraph (1) shall include -
>
> (a) the criteria for the award of the contract;
>
> (b) the reasons for the decision, including the characteristics and relative advantages of the successful tender, the score (if any) obtained by -
>
> (i) the tenderer which is to receive the notice, and
>
> (ii) the tenderer (aa) to be awarded the contract …
>
> (c) the name of the tenderer (i) to be awarded the contract …"

817. Regulation 101 imposes a duty on a contracting utility to provide any unsuccessful tenderer, on request, with details of, and reasons for, its decision to reject such tender

that are sufficient to enable the unsuccessful party to understand the basis for such decision, to exercise its right to challenge the decision, and enable the court to exercise its supervisory jurisdiction: Case T-183/00 *Strabag Benelux NV v Council of the European Union* at [55]; *Healthcare at Home Limited v The Common Services Agency* [2014] UKSC 49 per Lord Reed, giving the judgment of the court, at [17]; *EnergySolutions (EU) Limited v Nuclear Decommissioning Authority* [2016] EWHC 1988 (TCC) per Fraser J at [278]-[297].

818. The level of detail which must be given in order to satisfy this duty will be context and fact specific. There is no obligation on the contracting authority to undertake a detailed comparative analysis of the successful and unsuccessful tenderers: Case 272/06 *Evropaiki Dynamiki* [2008] ECR-II 00169 at [25]-[27]; *Lancashire Care NHS Foundation Trust v Lancashire County Council* [2018] EWHC 1589 (TCC) per Stuart-Smith J (as he then was) at [49]-[50]; *Stagecoach East Midlands Trains Limited v Secretary of State for Transport* [2020] EWHC 1568 (TCC) per Stuart-Smith J (as he then was) at [75]-[76].

819. The award decision notice was sent by HS2 to Siemens by letter dated 29 October 2021:

> "1. The basis for HS2 Ltd's decision to award the Contracts to the Successful Tenderer is that the Successful Tenderer submitted the Most Economically Advantageous Tender (MEAT) from the point of view of HS2 Ltd, which is the Tender that offers the lowest Assessed Price of all Tenders remaining in the evaluation after Stage 5. The detailed evaluation criteria and methodology used to identify the lowest Assessed Price are set out in Section 11 - Stage 5: Whole Life Value and Section 12 - Ranking and Tie-Breaker Process of the IfT.
>
> 2. All submitted Tenders were evaluated in accordance with the evaluation criteria and methodology set out in the IfT.
>
> 3. The outcome of Stages 1 to 4 was based on Tenders meeting the mandatory requirements and Evaluation Thresholds as set out in Sections 7, 8, 9 and 10 of the IfT. The Tenders that met, were deemed to have met or exceeded, all of the relevant mandatory requirements and Evaluation Thresholds for Stages 1 to 4 proceeded to Stage 5: Whole Life Value. In accordance with paragraph 6.2.6 of the IfT, any scores awarded for Stages 1 to 4 are not carried forward to Stage 5. As such, other than in respect of Assessed Price, there are no 'relative advantages' of the Successful Tenderer's Tender against your Tender.
>
> 4. However, in the spirit of openness and transparency, HS2 Ltd has confirmed the characteristics of the Successful Tenderer's Tender and provided your scores alongside the scores of the Successful Tenderer in Appendix A. I further note that you already have access to the evaluation records for your Tender in Stages 2.2 to 4, provided to you via the HS2 eSourcing Portal on 2nd June 2021.

> 5. In accordance with the requirements of Regulation 102 of the UCR 2016, a standstill period will now be observed before the Contracts are entered into by HS2 Ltd.
>
> 6. The standstill period will end at midnight on 8th November 2021."

820. The appendices to the letter contained a breakdown of the scores of Siemens and the JV, the consensus rationale for each of the JV's scores, and the outcome of the Stage 5 evaluation.

821. Initially, there were disputes between the parties as to disclosure of the Assessed Price of the JV, redactions to the information and information provided within the confidentiality ring. At this stage, following a trial of the issues, including a full investigation of the key decisions challenged by Siemens, no useful purpose would be served by the court in any further analysis of these disagreements. Given the volume of documentation referred to by both parties during the course of this trial and the level of scrutiny applied to the decisions, I am satisfied that the appropriate level of information and documentation has been made available.

Issue 12 – Judicial Review Claims

822. Siemens has issued parallel Judicial Review claims in respect of this procurement challenge, namely, CO/2193/2021 (now Claim HT-2021-000391), CO/3119/2021, CO/3523/2021, CO/3897/2021 and CO/1729/2022, CO/2971/2022, CO/3470/2022 and CO/7/2023.

823. The Judicial Review claims seek to challenge the same decisions that have been challenged in the Part 7 claims, relying on the same allegations, albeit by reference to public law duties, rather than the UCR.

824. The relief sought in the Judicial Review claims is not identical to that sought in the Part 7 proceedings but there is very substantial overlap. In the Judicial Review claims, additional orders are sought, setting aside and/or quashing the key decisions in the Procurement. It is noted that the UCR also provides for remedies of declarations of ineffectiveness and setting aside but on the facts of this case they do not arise. Of significance, identical declaratory relief and damages are claimed in the Judicial Review claims and the Part 7 claims.

825. In my judgment, it would not be appropriate for this court to grant permission for judicial review for the following reasons.

826. Firstly, Siemens is not entitled to invoke public law duties in support of its claims pursuant to the UCR, for the reasons set out earlier in this judgment.

827. Secondly, the challenges raised in these proceedings concern a commercial competition and do not contain any public law element.

828. Thirdly, judicial review is a remedy of last resort. If there is another route by which the decision can be challenged, which provides an adequate remedy for the claimant, that alternative remedy should generally be used before applying for judicial review: *R*

(Cookson and Clegg Limited) v Ministry of Defence [2005] EWCA Civ 811. In this case, there is a suitable alternative remedy provided under the UCR that can be, and has been, claimed through the Part 7 proceedings.

829. It follows that permission to proceed with the Judicial Review claims is refused and they are dismissed.

Conclusions

830. For the reasons set out above:

i) Siemens has not established that HS2 was in breach of the principles of transparency and equal treatment, or made manifest errors, in its assessment of the JV's tender at Stages 2 and 3 of the Procurement;

ii) Siemens has not established that the Shortfall Tender decision was in breach of the UCR or amounted to a manifest error;

iii) Siemens has not established any material breach of its duties of equal treatment and transparency, or any manifest error or irrationality, in its decision to consent to the change of circumstances in respect of the JV;

iv) Siemens has not established any manifest error and/or breach of the principles of equal treatment, non-discrimination and transparency in the Stage 5 evaluation;

v) Siemens has not established any breach of regulation 84 of the UCR in HS2's 'abnormally low tender' review of the bids;

vi) HS2 did not have any obligation to carry out further verification of the JV bid prior to negotiation with the lead tenderer;

vii) Siemens has failed to identify any irrationality or manifest error in the pre-contract checks carried out in respect of the JV bid;

viii) Siemens has not established any breach of regulation 88 of the UCR; the Award Recommendation Decision and the Contract Award Decision were not unlawful by reason of the modifications considered but not instructed by HS2;

ix) the conflict of interest claims in Claims 7 and 8 are not time-barred but membership of the Bombardier UK Pension Scheme by Mr Sterry and Mr Williamson did not give rise to a conflict of interest and Siemens has not established any breach of HS2's duties of equal treatment, transparency, proportionality or regulation 42 of the UCR;

x) the conflict of interest claim in Claim 9 is not time-barred but it has no real prospect of success and is bound to fail; therefore, Claim 9 is struck out and summary judgment granted on the same to HS2;

xi) permission to proceed with the Judicial Review claims is refused and they are dismissed;

xii) Siemens is not entitled to any damages or other relief.

831. Following hand down of this judgment, the hearing will be adjourned to a date to be fixed for the purpose of any consequential matters, including any applications for costs or permission to appeal, and any time limits are extended until such hearing or further order.