Neutral Citation No. [2011] NIQB 121

Ref: **McCL8360**

Judgment: approved by the Court for handing down
*(subject to editorial corrections)**

Delivered: **18/11/11**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION [COMMERCIAL LIST]

BETWEEN:

RESOURCE (NI)

Plaintiff:

and

NORTHERN IRELAND COURTS AND TRIBUNALS SERVICE

Defendant:

McCLOSKEY J

I INTRODUCTION

[1] This challenge under the Public Contracts Regulations 2006 (as amended) arises out of the latest chapter in the attempts to procure a new contract for the provision of security and ancillary services for 23 courts throughout Northern Ireland, representing the whole of the court estate in this jurisdiction. This is, self-evidently, a major contract, generating substantial employment (in excess of 200 full-time equivalent employees) and of importance to the population of Northern Ireland as a whole. The protagonists are:

(a) Resource (NI) Limited ("*Resource*"), the Plaintiff, a bidder which secured second place in the contract procurement competition.

(b) Northern Ireland Courts and Tribunals Service, ("*NICTS*"), the contract procuring authority and Defendant

(c) G4SUK Limited ("*G4S*"), the successful bidder.

The first and second of these parties were legally represented at all stages of the proceedings. By this challenge Resource impugns the decision of NICTS to award the contract to G4S. The challenge is mounted on the grounds outlined in paragraph [6] below and relief is sought accordingly.

II THE FRAMEWORK OF THE LITIGATION

[2] The context of the procurement exercise and this litigation is conveniently illuminated in the following passage extracted from the NICTS "Information Memorandum", prepared for the assistance of interested bidders:

> "*The NICTS is responsible for providing security and ancillary services in support of 25 locations across the Province. Prior to 2001 these services were provided by an in-house team supported by a police presence at each courthouse. As part of the Criminal Justice Review responsibility for security throughout the estate was transferred to* [NICTS]. *In 2001* [NICTS] *undertook a procurement exercise to source a third party service provider to cover security and ancillary services throughout the estate. This procurement exercise appointed Maybin Support Services as the single contracted provider*".

NICTS is a statutory entity, established by Section 69 of the Judicature (Northern Ireland) Act 1978, which describes it as "*a unified and distinct civil service of the Crown*". It is charged with the responsibility of facilitating the conduct of the business of the Court of Judicature, County Courts, Magistrates' Courts and Coroners' Courts throughout Northern Ireland. Its officers and other staff are appointed by the Lord Chancellor and it is accountable to the Westminster Parliament through the Department of Constitutional Affairs Parliamentary Secretary and the Lord Chancellor. NICTS is now a statutory agency within the Department of Justice, pursuant to the Transfer of Functions [NI] Order 2010 [SR No. 133].

[3] The recent history of the provision of the services in question can be gauged from the judgment in this court in ***Federal Security Services –v- Northern Ireland Court Service and Resource (NI) Limited*** [2009] NIQB 15, paragraphs [6] – [7] particularly. While Maybin secured the relevant contract following the 2001 procurement exercise and there has been no subsequent completed exercise of this kind, the Plaintiff in the present proceedings, Resource, is Maybin's successor. The mechanics and details of this succession are immaterial for present purposes. It would appear that, making due allowance for the maximum permitted contractual extensions, the contract was scheduled to expire in November 2006. This stimulated the first competition designed to generate the award of a new contract, giving rise to the ***Federal Security Services*** litigation. Following the court's decision in ***Federal Security Services***, a new contract procurement exercise was conducted by and on

behalf of NICTS, culminating in the contract award decision giving rise to the present challenge. In the events which have occurred, it appears that the Maybin/Resource contract has been the subject of successive extensions.

[4] The other agency of which mention should be made is the Central Procurement Division ("*CPD*") of the Department for Finance and Personnel. It is apparent from the evidence that CPD routinely provides procurement services to public authorities such as NICTS. It seems uncontroversial to describe these services as of a specialised advisory and supervisory nature. The evidence establishes that CPD was involved in the instant procurement exercise from an early stage. According to the NICTS witness (Mr. Radcliffe), the role of CPD was "*… to make sure the process was run properly, to ensure we applied the marking criteria … to gather the final marking frames and comments …*". While it is clear from all the evidence that this is an incomplete description of the CPD role, it nevertheless provides a flavour of the substance thereof. The services provided by CPD included the attendance of two representatives at Evaluation Panel meetings, including a crucial meeting on 13th April 2011. This represented virtually the last crucial event in the procurement exercise. By this stage, the "Pre-Qualification Questionnaire" phase had been completed, giving rise to an invitation by NICTS to five economic operators, including Resource, to submit tenders. This was duly achieved by the relevant deadline, 5th April 2011. The impugned decision, signalling an intention to award the contract to G4S, was published on 22nd April 2011. The competition between the Plaintiff and G4S was plainly very close in nature. This is graphically illustrated by the undisputed fact that if the G4S score for the sub-criterion of *cash collection* [a prominent feature in the Resource challenge – *infra*], which was 5/5, had been less than 4/5, the Resource tender would have been successful.

[5] The outcome of the procurement exercise was notified by CPD to Resource by letter dated 22nd April 2011, which stated, *inter alia*:

> "*Our evaluation resulted in your tender receiving a score of 98.909% compared with the winning tenderer who scored 100%. Your tender was ranked second out of five.*
>
> *Attached to this letter are the allocated scores and comments of the Evaluation Panel.*

The corresponding letter from CPD to G4S, also dated 22nd April 2011, stated, *inter alia*:

> "*Central Procurement Directorate on Behalf of Northern Ireland Courts and Tribunals Service is pleased to advise you that it intends to award G4S Security Services (UK) Limited the above contract subject to final business case approval which is anticipated to be received by the end of May/early June 2011 …*

> *As indicated in the tender documents, the evaluation of tenders was conducted against the criteria and weightings detailed in Annex A …* [which] *… also details your weighted score against each of the criteria and includes the comments of the evaluation panel. Your tender received a score of 100%."*

These letters stimulated an exchange of pre-litigation correspondence (paragraph [24], *infra*).

[6] These proceedings were initiated by Writ of Summons issued on 20th May 2011. Under the present statutory regime, the initiation of proceedings had the immediate effect of imposing an automatic contract award moratorium. NICTS counter attacked by making an application for an order pursuant to Regulation 47H of the Public Contracts Regulations 2006 terminating the contract award prohibition. Following an *inter-partes* hearing, the court refused this application. In very brief compass, it was held that the Plaintiff had raised certain serious issues qualifying for adjudication at a substantive trial. This was followed by the exchange of pleadings and witness statements and discovery of documents. The refined challenge now pursued by Resource focuses on three specific aspects of the impugned contract award decision:

(a) The evaluation by NICTS of the *cash collection* dimension of the G4S tender.

(b) The evaluation by NICTS of the *key performance indicators* and *service credits* aspects of the Resource and G4S tenders.

(c) The evaluation by NICTS of the *efficiency savings measures/mechanisms* aspect of the Resource and G4S tenders.

In brief summary, Resource makes the case that the aforementioned factors, individually or collectively, operate to vitiate the impugned contract award decision, as they give rise to infringements of the procurement rules and principles in play, warranting an appropriate remedy in consequence.

[7] It is common case that although the contract being procured was one for the provision of "Part B" services, NICTS was committed to applying the criterion of the most economically advantageous tender and was legally obliged to procure the contract accordingly. With reference to the formulation of the Resource challenge as outlined above, it is contended that the legal standards which have been infringed are the principle of equality of treatment, the principle of transparency and the requirement to avoid manifest error. There is no discernible controversy between the parties that these legal standards in particular [amongst others] governed the contract procurement process under challenge. It is also undisputed that the procurement of the contract had two distinct elements. The first entailed a

qualification/selection ("PQQ") stage. The second involved evaluation of tenders submitted by invited bidders and a contract award decision, purportedly giving effect to the statutory criterion of most economically advantageous tender.

III THE EVIDENCE

[8] The evidence considered by the court was a mixture of documentary materials, affidavits, witness statements and the cross-examination of certain deponents. The affidavits and witness statements were admitted as examination-in-chief. The cross-examination of deponents was limited – in a sensible and focused way – as the parties saw fit. The documentary evidence was characteristically bulky and the court also heard oral evidence during a period of two days. I have reviewed the evidence in its totality and reproduce below its most salient features only.

CPD Guidance for Tender Evaluation

[9] It was acknowledged by the main NICTS witness (Mr. Radcliffe, Chairman of the Evaluation Panel) that all Panel members received this guidance. Some of its more prominent instructions and admonitions to Panel members included the following:

> "*The role of the Evaluation Panel is to evaluate each tender in an open, proportionate and transparent manner for evidence of how the tender meets the requirements of the award criteria and Statement of Requirement and, in doing so, determining which is the most economically advantageous tender …*
>
> *Panel members should assess tenders independently of other Panel members, in the first instance and assign their own individual scores with appropriate commentary to substantiate these scores on the Evaluation Matrix …*
>
> *These records will provide an audit trail leading up to the decision to award the contract and form the basis of any debrief or response to legal challenge from any unsuccessful tenderer …*
>
> *Evaluation Panel members must be careful to preserve equity between tenderers. Bids must be strictly scored against the published criteria only and not against each other. Panel members must only consider information received as part of this procurement and not be influenced by any other factors …*
>
> *The tender evaluation process must not be based on irrelevant considerations, that is anything outside the*

> *evaluation criteria or information requested.* ***If information provided by the tenderer is considered irrelevant, the reason must be stated in the evaluation marking frame ...***
>
> ***The consensus assessment will be recorded by CPD during the process of evaluation against the relevant criteria with agreed comments to substantiate the scores. These comments will provide an audit trail leading up to the decision and form the basis of any debrief.***"

[My emphasis].

A further description of the roles and responsibilities of the Chairperson and Evaluation Panel members is contained in the CPD Guidance Note 02/09. The instructions to Evaluation Panel members are further reinforced in Section E of the "Tender Initiation Document", which re-emphasizes the obligation on Panel members to "*… individually evaluate and record their scores with appropriate commentary to substantiate these scores on the Evaluation Marking Frame*", which, in turn, will "*… provide an audit trail leading up to the decision to award a contract and form the basis of any debrief or response to legal challenge and will assist in the provision of additional information to unsuccessful tenderers*".

The "Instructions to Tenderers"

[10] This is a CPD document, which clearly co-existed with the "Statement of Requirements" (paragraph [15], *infra*. Amongst other things, it highlighted the risk of rejection of a tender omitting "*the required information*". It also alerted bidders to the permissible mechanism for seeking clarification. It further stated:

> "*Tenderers must not make assumptions that either* [CPD] *or the client have prior knowledge of their organisation or their service provision. Tenderers will only be evaluated on the information provided in their response. Hyperlinks must not be used.*"

In paragraph 16, bidders were informed that their tenders would be evaluated by reference to specified criteria, weightings and sub-weightings, all designed to identify the most economically advantageous tender. The four overarching criteria were security (25%), ancillary (15%), methodology (25%) and costs (35%). Within each of these umbrella criteria there was a series of specified sub-criteria, to each of which a specified weight was accorded. Within the "security" criterion, which accounted for 25% of the total marks, there were six sub-criteria. One of these was "**cash collection**", which was accorded a "sub-weight" of 15%. Within the "methodology" criterion, also qualifying for 25% of the overall marks, there were four sub-criteria: these included "**transition and workforce management**" (15%)

and "**service management**" (30%). I have highlighted these sub-criteria, as they feature in the Resource challenge.

[11] Within the "Instructions to Tenderers", a "scoring key" for each of the evaluation criteria (excluding cost) was also provided. The possible scores ranged from 0, denoting "*failed to address the requirement*", to 5, denoting "*excellent response that meets the requirements … no weaknesses*". Bidders were instructed as follows:

> "*Within the technical envelope tenderers must provide full details of their proposed delivery model/method describing in full how they will deliver the requirement and taking account of each of the criteria and sub-criteria listed … above.*"

The "*technical envelope*" was addressed in the following terms:

> "*Within the technical envelope tenderers must provide full details of their proposed delivery model/method describing in full how they will deliver the requirement and taking account of each of the criteria and sub-criteria listed in Section 16 above. As a minimum tenders* [sic] *should structure their response using the criteria and sub-criteria as per the headings below*".

The "*headings below*" were:

- Security requirement.
- Ancillary requirement.
- Methodology.

These constituted three of the four contract award criteria (the fourth being costs). Under each of these three headings, a series of sub-criteria was listed. I have already adverted to the most significant of these in paragraph [13] above.

The "Statement of Requirements"and Conditions of Contract

[12] The "Instructions to Tenderers" must be considered in conjunction with the document entitled "Security and Ancillary Services Statement of Requirements". ("*the SOR*"). This document contains the detailed outworkings of the basic contract award criteria. The detailed requirements in relation to **cash collection** are arranged in Section 2, under the umbrella title "**Security Requirement**", specifically in paragraph 2.9:

> *"2.9.1 The contractor must ensure all lodgments are collected and safely delivered from all courthouses to local branches of the client's bank on a daily basis Monday to Friday) unless otherwise agreed with the client …(*
>
> *2.9.2 The contractor must ensure that lodgments are collected and safely delivered to the client's bank on a daily basis from the following central Belfast locations …*
>
> *2.9.3 The contractor must deliver a proposal on how it will ensure the daily collection and deposit of bank lodgements as detailed above*".

The formulation of paragraph 5.6 (in Section 5 – "Contract Price") and Annex B ("Cash Collection Service – Price Schedule") reiterated the requirement of daily cash collection from each of the specified premises and lodgement thereof at the relevant local bank. This was expressed unequivocally in paragraph 5.6:

> "***Cash Collection Service ...***
>
> *This cost should include the price charged for a daily cash collection from each of the premises and lodgement at the local branch of the client's banking service provider. Prices should be based on the requirements in Section 2.9 of the SOR.*"

Annex B was formulated in like terms.

[13] In the SOR, the NICTS specification relating to "Key Performance Indicators" was initially formulated in the following terms, in the Introduction section:

> "*1.1.3 Suggested key performance indicators (KPI) are to be enshrined in the contract and will be monitored and renewed as part of the client's monthly contract process. Suggested KPIs are included in Schedule 3 of the Conditions of Contract for information. The client would like to discuss and agree final KPI monitoring procedures and service credits with the contractor as part of service transition. …*
>
> *1.1.4 Agreed KPIs will be subject to a bi-annual review and can be amended through agreement by the client and contractor*".

The structure of the "SOR" allocated "KPIs" to the realm of "**service management**". The latter was one of the "**methodology**" sub-criteria qualifying for 30% thereof. Under the rubric of "service management", it was stated, *inter alia*:

> "*4.3.4 The contractor must deliver a service management report, at least three days before the monthly service management meeting, including statistics and a performance review against predetermined KPIs in line with the following …*
>
> *4.3.5 The contractor will agree formal KPIs, a supporting monitoring system and performance report with the client as part of the transition plan.*
>
> *4.3.6 The contractor should note the initial suggested KPIs included in Schedule 3 of the Conditions of Contract. The contractor should provide an initial view on these proposed KPIs, include any additional KPIs or measurements it would propose would support the effective management of the contract and propose how a supporting monitoring and reporting regime could be operated.*
>
> *4.3.7 The contractor should also note the client's intention to establish a service credit regime to support the agreed KPIs and set out any initial proposals for consideration*".

On one tenable construction, these passages appear to describe an envisaged KPIs contractual regime of a provisional, or tentative, nature only. The KPIs are described as "suggested", the bidder's "*initial view*" is requested and further discussions between NICTS and the successful bidder seem to be contemplated. It would also appear that this topic is linked to the formulation of a "*transition plan*" (by definition something impermanent) which would follow upon the award of the contract.

[14] The next port of call is, logically, Schedule 3 of the "Conditions of Contract", which bears the title "Monitoring Schedule". In its preamble, it states:

> "*The client has identified the performance indicators detailed in Table 1 below as potential KPIs to support the delivery of the security and ancillary services contract …*
>
> [These] *are based on areas of service where a weakness or failure could result in a major impact. The purpose of the KPIs is to ultimately drive future improvements in the service provision delivery …*
>
> *The client will finalise KPIs with the contractor as part of the transition plan and will agree a final version before the service commencement date. The contractor should note the client's intention to link agreed KPIs to a service credit regime …*

> *The contractor should also suggest any additional KPIs it believes are relevant to the delivery of the services and any initial suggestions on delivering a service credit regime.*"

The themes of fluency and lack of finality identifiable in the relevant passages of the SOR (*supra*) re-emerge in this quotation. This preamble is followed by Table 1, which is entitled "Proposed Key Performance Indicators" and consists of three columns. The first is "Key Performance Indicator", of which there are thirteen in total. The second column is headed "Number of Service Credits" and is blank throughout. The third column, which is fully completed, is entitled "Proposed Measurement". The ninth of the KPIs in this schedule is formulated thus:

> "*All lodgements appropriately delivered to local branches of the client's bank on the same day unless otherwise agreed*".

The "*proposed measurement*" is specified in the following terms:

> "*Monthly performance report and incident reporting by Court Administrator and Local Premises Officers*".

Accordingly, by its terms, Schedule 3 of the Conditions of Contract contained (in Table 1) a total of thirteen "*proposed*" KPIs, with a series of "*proposed*" measurements relating to each.

[15] While the third of the four umbrella contract award criteria was described as "**Methodology**" in the Instructions to Tenderers, this appears to have been supplanted by "**Service Delivery**" in Section 4 of the SOR. The discrete topic of **efficiency savings** was addressed in the following terms:

> "*4.1.14 The contractor must clearly detail how it will support the client in identifying and realising efficiencies during the contract period for example through a revised service model, more innovative working practices, or continuous improvement targets*".

This requirement, under the umbrella of "*Service Delivery*", can be linked to one of the pre-tender clarifications which, as already noted, informed bidders that the "SOR" and "Pricing Models" were based on *a fixed requirement* as regards the requisite number of employees required to perform and deliver the contract services being procured. In short, each of these requirements was inflexible. Subject thereto, by virtue of paragraph 4.1.14 of the SOL it was *obligatory* for each tender to address *in detail* its proposed efficiency savings in its tender.

The Procurement Process

[16] The Contract Notice was published in the Official Journal of the European Union on 15th December 2010. In an information notice, potentially interested bidders were informed, *inter alia*:

> "*8.1 The contractor must have an appropriately skilled and resourced team to manage the contracted service provision …*
>
> *10.1 The provision of security and ancillary services is considered critical to the delivery of strategic objectives and as such the client* [NICTS] *is contracting for a high standard of comprehensive and flexible service provision.*
>
> *10.2 The capability to deliver to the specification and work with the client in a fair and flexible fashion is very important and cannot be overstated.*"

This Notice provides some limited illumination of the issue of *transition* (which features to some extent in the second of the Resource grounds of challenge):

> "*8.2 The contractor must have an appropriately skilled and resourced team to manage any transition period between the existing and the proposed contract* ".

The contract being procured is to be of three years' duration, with the possibility of two one year extensions. The envisaged contract commencement date of 1st September 2011 has been overtaken by these proceedings. A CPD publication [dated 8th October 2009] highlighted that the contract would be procured by the so-called "Restricted Procedure", as a result whereof "*post-tender negotiations are strictly prohibited*". One of the specific CPD responsibilities was formulated in the following terms:

> "*Ensure the procurement process is compliant and the evaluation of the PQQ and tenders is carried out in accordance with the agreed evaluation criteria and weightings. CPD will not participate in scoring during the qualitative evaluations* ***but they will record comments for feedback*** *and advise the panel where appropriate to ensure equity and consistency throughout the evaluation. CPD will carry out a cost analysis …*
>
> [CPD will] *issue award regret letters …* [and] *… conduct any debriefing sessions.*"

[Emphasis added].

The significance of the highlighted words will become apparent presently.

[17] There were three events of note during the tender preparation phase. The first of these was a presentation by NICTS representatives (including Mr. Radcliffe), attended by representatives of all five selected bidders, on 28th February 2011. During this presentation the following question was recorded:

> "*In relation to flexibility, would NICTS consider alternative delivery models or models beyond the scope of the SOR?*
>
> ***Response:*** *Under workforce management is where suppliers can provide proposed efficiency methods. NICTS are looking for efficiencies and can take on board ideas but only within the scope of the SOR*".

In response to a further question, the opportunity was taken to highlight that the cash collection service would entail the delivery of cash from NICTS premises **to banks**. Finally, and notably, the following was stated emphatically:

> "*Any additional services offered must be within the scope of the SOR. No variant bids will be accepted.*"

[18] The second noteworthy event during this period entailed a subsequent request for clarification, which raised a question concerning the number of employees required to deliver the services in question. The first question related to the size of the workforce required. The response provided was:

> "*The price should be based on a fixed FTE* i.e. *requirement as specified in the Statement of Requirement and the Pricing Model*".

[This is a reference to one of the contract requirements, which specified a fixed number of employees to provide the services being procured].

An ancillary question asked the following:

> "*If the 229 includes non-effective staff how will you evaluate innovative bidders who can reduce the number of heads required while maintaining the same level?*"

The answer provided was:

> "*The Statement of Requirement and Pricing Model are based on a fixed FTE requirement. If there is any innovation or efficiencies proposed, bidders should refer to the Statement of Requirement and specifically to Section 4 – Service Delivery …*".

In response to further clarification questions, a description of the standard cash collection and banking arrangements was provided. This placed some emphasis on the daily banking of cash collected from courts. The third event of note concerned the final clarification issued to tenderers, which stated that daily NICTS cash collections from the relevant locations are conveyed to the local Northern Bank branch, with each collection "*normally lodged in the night safe and therefore credited the following banking day*". The night safe banking mechanism was reiterated in a subsequent reply to a question about "*specified time window for cash collections*".

The Cash Collection Issue

[19] The subject matter of Section 2.9 of the SOR is "Cash Collection". The essential requirement which this enshrines is expressed in paragraph 2.9.1 as follows:

> "*The Contractor must ensure all lodgements are collected and safely delivered from all courthouses to local branches of the client's bank on a daily basis (Monday to Friday) unless otherwise agreed with the client …*
>
> *Details of cash lodgement figures per venue are included in the supporting documentation.*"

Paragraph 2.9.3 continues:

> "*The Contractor must deliver a proposal on how it will ensure the daily collection and deposit of bank lodgements as detailed above.*"

In "Clarification No. 4", responding to the question "*Is there a specified time window for cash collections across the courts estate?*", NICTS repeated the substance of the standard cash collection and banking arrangements which had already been conveyed in reply to one of the earlier clarification questions (paragraph [18], *supra*]. In formulating its proposals in response to this element of the SOR, it was incumbent on each bidder to address separately and specifically (a) the specified "out of Belfast" courthouses and (b) the four identified central Belfast locations.

[20] In response to Section 2.9 of the SOR, the G4S tender stated:

> "*We will ensure that all lodgements are collected and safely delivered … to the NICTS bank on a daily basis (Monday to Friday) unless otherwise agreed with NICTS.*"

The two separate proposals required were framed in virtually identical terms. The details of the "Solution" focussed on *inter alia*, the availability of secure vehicles and

a proposed audit trail, coupled with a claim that G4S is "*the largest cash solutions organisation in Northern Ireland and across the UK*". Appropriate insurance was also proposed. At this point, under the rubric "*Enhancing the Security of the Service*", the G4S proposal continues:

> "*We would be pleased to deliver NICTS lodgements to local bank branches as specified. However, we believe that a far more secure solution is collection by armoured G4S cash in transit vehicles and delivery of all monies directly to the Northern Bank Cash Servicing Centre, housed in G4S facilities in Mallusk. Lodgements will be automatically credited against individual bank accounts (branch and/or service area), using the G4S lodgement tracking system. This approach avoids cash being handled by court officials and then deposited in the designated bank's night safe and is therefore a far more secure and robust solution …*
>
> *As a consequence, cash will be transported from court to the serving centre at the end of one day and then directly counted and credited to the NICTS account on the morning following collection. This solution – cash direct from NICTS to cash servicing centre – provides the highest level of reassurance in relation to cash security*".

This is followed immediately by a section entitled "Benefits", which is clearly related to the passage reproduced above. In the next section, entitled "Evidence", there are further references to the G4S high security cash centre in Mallusk. In Section 2.9.3 of the tender, the bidder was required to "*deliver a proposal on how it will ensure the daily collection and deposit of bank lodgements as detailed above*". G4S responded:

> "*We detail our proposals on how we will ensure the daily collection and deposit of bank lodgements on behalf of NICTS".*

Next, the following "Solution" was proposed:

> "*As noted in Section 2.9.1, while we can deliver the lodgements to local bank branches as specified by NICTS, we believe that a far more secure solution is collection by G4S cash in transit vehicles and delivery of all monies directly to* [the Mallusk cash servicing centre] …

Delivering all cash directly from NICTS sites to the high security G4S cash servicing service centre in Mallusk … will mitigate against the risks of attack, theft and loss. As a consequence, cash will be credited to the NICTS account on the morning after collection. This solution – cash direct from NICTS to cash servicing centre – provides the highest level of reassurance in relation to cash and personal security".

[21] Full marks of 5 were allocated by both Mr. Radcliffe, Evaluation Panel Chairman, and the Panel collectively. In his individual marking frame, Mr. Radcliffe stated:

> "*Excellent response – proposing cash in transit vehicles for all collections – delivered to provider's cash servicing centre. Copy SIA Licence provided.*"

The final collective comment of the Evaluation Panel was:

> "*Excellent response that meets the requirements, indicates an excellent response with detailed supporting evidence and no weaknesses. Proposing cash in transit vehicles for all collections – delivered to provider's cash servicing centre. Removes risk and reduces time off site. Fully comprehensive, processes and level of security clearly detailed. Copy of SIA Licence provided.*"

Another Panel member, allocating a full score, commented:

> "*Fully meets the requirements. Removes the risk from contracted staff on premises and reduces time off sites.*"

A third Panel member allocated a score of 4 out of 5, with the somewhat cryptic accompanying comment "*added value*". The fourth Panel member, awarding a full score of 5, stated, rather inscrutably:

> "*Excellent response – good cash collection proposal*".

In common with G4S, Resource also received full marks for its cash collection proposal – which made no mention of a cash collection/servicing centre or anything comparable.

[22] The topic of cash collection arrangements also arose under a different guise in the SOR. Section 4 of the latter is concerned with the "Service Delivery" contract award criterion and, under this umbrella heading, one of the sub criteria was "Service Management" [paragraph 4.3], which [in paragraph 4.3.6] required bidders to provide their "*initial view*" of the Key Performance Indicators proposed in Schedule 3 of the Conditions of Contract. There were thirteen of these in total. The ninth was framed in the following terms:

> "*All lodgements appropriately delivered to local branches of the client's bank on the same day unless otherwise agreed*".

In its tender, G4S responded in the following terms:

> "*G4S is very happy with this key performance measure. G4S recommends 100 points score for achievement and 0 for any failure.* ***The proposed G4S solution in relation to cash in transit includes transporting all NICTS cash directly back*** [to?] ***the G4S cash processing hub that locally houses the Northern Ireland Bank Cash Processing for Northern Ireland. G4S wishes to amend this KPI to reflect this more secure and robust proposed solution.***"

[My emphasis].

The highlighted passage exposes is of relevance to both the first and second of the three Resource grounds of challenge. As noted *infra*, the relevant appendix in the "Conditions of Contract" bears the title "Proposed Key Performance Indicators".

[23] I have already adverted (in paragraph [5] above) to the CPD letters of decision addressed to both Resource and G4S, each dated 22nd April 2011. The solicitors engaged on behalf of Resource then corresponded, ventilating a series of complaints and concerns. This elicited a letter from the Departmental Solicitor's Office, written on behalf of both NICTS and CPD, dated 17th May 2011, containing the following passages:

> "*You base your complaint on the fact that the panel awarded the successful tenderer high marks on this sub-criterion when that tender did not offer any collection from courthouses and delivery to client banks on a daily basis but rather offered delivery to a cash processing service. This is misconceived. In fact the successful tenderer did offer the service required in the applicable sub-criterion. Indeed the submission in that regard was considered to deserve a high mark. The question of the use of a cash processing centre related to* ***a suggested additional facility that could be offered in the future***".

[My emphasis].

Bearing in mind the contours of this challenge, the treatment of the cash collection sub-criterion in this letter emerged as the most important aspect of its contents. On its re-issue of KPIs, the letter stated:

> "*It is considered that it is perfectly appropriate to agree the detail of the same at a later stage. The importance of the KPIs at the award stage was to have a proper appreciation of the proposed manner in which they will operate … in order to make an assessment of the most economically*

> *advantageous tender. Further it is in the very nature of KPIs that they will change at various times over the lifetime of the contract.*"

This exchange of letters also addressed certain other issues which, ultimately, were not pursued when the Resource legal challenge materialised.

[24] Mr. Radcliffe, Evaluation Panel Chairman, has been the NICTS main deponent throughout these proceedings. He swore two affidavits in support of the initial application for an interim order terminating the contract award prohibition. The first of Mr. Radcliffe's affidavits describes the proceedings of the Evaluation Panel in the following terms:

> "*The Evaluation Panel and the Chairman … confirmed that they had each completed an individual assessment of the tender submissions …*
>
> *The Panel then proceeded to assess each tender alphabetically against the published criterion and agree a consensus score and supporting comments for each criterion. CPD recorded comments and scores on behalf of the Panel. A record of the evaluation meeting and the consensus scores and comments* … [is exhibited]*".*

It is convenient to record here that, at the trial, it emerged from the combined evidence of Mr. Radcliffe and Ms Williams (of CPD) that, in fact, the Evaluation Panel did *not* proceed in accordance with the description provided in Mr. Radcliffe's first affidavit , as the collective Panel comments were not finalised at this meeting. In this affidavit Mr. Radcliffe further avers:

> "*The Panel also agreed comments to support the agreed score in each section of the evaluation model summarising the tender proposal, highlighting potential strengths and any weaknesses. The final score reflected the most economically advantageous tender after assessing the full tender proposals against the published evaluation criteria and marking scheme*".

Each of Mr. Radcliffe's affidavits addressed the specific topic of the G4S tender cash collection proposal. With regard to the words "*delivered to provider's cash servicing centre*" in the Evaluation Panel's comments, Mr. Radcliffe deposes:

> "*The G4S proposal offers delivery to a cash servicing centre as a potential service enhancement. However, the G4S bid also confirms that they will comply with the requirement to ensure all lodgements are collected and safely delivered from all courthouses to the NICTS bank on a daily basis…*

> *It is important to note that the proposed service enhancement of delivering cash to a central processing service did not attract any additional marks as this was not a requirement of the procurement*".

With specific requirement to the Evaluation Panel's comment "*removes risk and time off site*", Mr. Radcliffe deposes:

> "*This comment is a direct reference to the proposed cash collection methodology whereby lodgements would be collected from court premises by a formal cash and valuables in transit service. The Panel agreed that such a proposal would allow the on site security staff to focus on providing services at each venue without the need to allocate staff to daily lodgement arrangements.*"

In his second affidavit, Mr. Radcliffe deposes that the Evaluation Panel "*… did note the* [cash servicing centre] *offering as part of the agreed comments.*" In the affidavit, there follows a rationalisation of the inclusion of this 'suggested enhancement' in the Evaluation Panel's comments. There is no suggestion anywhere in these averments of any aberration or error in Mr. Radcliffe's individual evaluation comments *or* in the collective comments of the Panel, nor is there any hint of any 'underlying story'.

[25] While Ms Williams, CPD Procurement Manager, did not swear any affidavits, she provided a written witness statement for the trial. In this, she reiterates that the contract procurement competition was of the "restricted" variety. With reference to the Evaluation Panel meeting on 13th April 2011, she states:

> *"It is my role to bring together individual panel members' assessments into the agreed or consensus comments of the panel. Initially I draft the comments notes in longhand …*
>
> *The draft comments are then read to the panel members to confirm their acceptance of the same or to point out areas where they had concerns. In this case, as is usual, I was advised by the panel where I lacked detail in comments and where I needed to check the individual marking frames and add details from them …*
>
> *Following the evaluation meeting, I returned to my office and proceeded to type up all of the comments and to check all the scoring. I did copy some comments from Mark Radcliffe's marking frame to add more detail to the marking frames, as Mark's was the most detailed of the panel members. Part of my rationale for including as much detail as possible in the comments was to give the respective*

> *tenderers assurance that the panel had read each of their bids in detail, particularly as these were very substantial, weighty bids …*
>
> *Once I had typed up the marking frames I e-mailed these and an evaluation report to the Evaluation Panel for review on 15th April 2011. Some minor revisions were required … advised 19/04/11. The evaluation marking frames and report were formally signed off by the Evaluation Panel following presentation of the evaluation results to the Project Board on 20th April 2011."*

Ms Williams' witness statement also contains the following noteworthy passage:

> "*And some comments were included in the marking frames as a statement of fact e.g. G4S's suggested enhancement of the cash collection centre and Resources suggested enhancements including access to interpreting services. These statement* [sic] *of facts did not contribute to either tenderer's score.*"

The relevant e-mails were attached to Ms Williams' witness statement. These demonstrate that Ms Williams circulated to Panel members, *inter alia*, her composition of the final collective Panel comments. She attached this and other items "*for careful review*" and exhorted the Panel members in these terms:

> "*Please ensure you are fully content with the comments and scores*".

This elicited one response only, from Mr. Radcliffe, who submitted "*a couple of very minor comments for consideration*", apparently relating to the "*comments on the scoring frames*". It is clear that the two comments in question are unrelated to any of the Resource grounds of challenge.

[26] In his evidence, Mr. Radcliffe, Evaluation Panel Chairman, did not dissent from the suggestion that the material entries in both his individual comments and the collective Panel comments called for an explanation. He claimed that the Panel viewed the offending portion of the G4S cash collection proposal as a possible future enhancement. He readily agreed with the description of the comments under scrutiny as an error. He attributed this to inattention on the part of (presumably all) Panel members. He accepted a failure on his part to review this document carefully. He was asked to explain when this error, or aberration, first came to his attention. His answer was that this occurred following the completion of the first phase of this litigation, when the court refused the Department's initial application (paragraph [6], *supra*]. Mr. Radcliffe was asked particularly about paragraph 40 of his first affidavit, in which he averred:

> "*The Panel also agreed comments to support the agreed score in each section of the evaluation model summarising the tender proposal, highlighting potential strengths and weaknesses. The final score reflected the most economically advantageous tender after assessing the full tender proposals against the published evaluation criteria and marking scheme*".

He agreed, in terms, that he could not stand over the first of these averments, as the Panel had **not** engaged in any exercise of agreeing its collective comments at the crucial meeting. Nor could he proffer any adequate explanation for his failure to address this discrete issue in either of his affidavits or in his witness statements. He went so far as to suggest that the Panel marked this discrete aspect of the G4S tender on the basis of the first part of Section 2.9 only, *disregarding the remainder.* He conceded that a substantial proportion of the G4S cash collection bid should properly be viewed as irrelevant. He accepted that, in assessing the G4S cash collection proposal, the Panel did not consider any matters of detail relating to night safe bags, receipt books, receipted documents, confirmation of lodgements, the disarming of cash boxes or the deactivating of dyes. He further accepted that the omission of certain details from the G4S cash collection proposal was inexplicable. Mr. Radcliffe was asked whether the omission of these details supported the view that G4S was putting forward a "non-compliant" proposal (my shorthand). In response, he pointed to paragraphs 2 and 3 of his second affidavit. [I would observe that these do not really sound on the question posed]. When asked about the various elements of Mr. Jordan's robbery risk critique in his witness statement, Mr. Radcliffe accepted that these issues had not been considered by the Panel. Notwithstanding the entries in his personal comments and the collective Panel comments, Mr. Radcliffe suggested that, at the Panel meeting, there was no deliberation about the G4S "enhancement" proposal. This contradicts flatly the evidence of Ms Williams (paragraph [27], *infra*). Mr. Radcliffe also agreed with the court that G4S was, plainly, strongly promoting its "enhancement" proposal.

[27] In their evidence to the court, both Mr. Radcliffe and Ms Williams were disposed to accept that the comments of individual Panel members and those of the Panel corporately should, in principle, be confined to perceived strengths and weaknesses of the proposal concerned, omitting everything else. When asked to account for the comments under particular scrutiny, viz. those of Mr. Radcliffe and the Panel collectively, quoted in paragraph [21] above, the witnesses suggested that these were simply recording **the fact** of the enhanced service offered by G4S in its tender. Ms Williams, when questioned about Section 2.9 of the G4S tender, replied that she read this as "*a two pronged solution*", adding that G4S were "*riding two horses*". With reference to the Evaluation Panel's final collective comments, she agreed that there had been two breaches of the CPD Guidance Rules. She testified that she first discovered these breaches following the initial letter from Resources' solicitors (viz. before the initiation of these proceedings). She confirmed that she had been one of the contributors to the Departmental Solicitor's letter of 17th May

2011. As regards the G4S cash collection proposal, she claimed that at the Evaluation Panel meeting there had been comments such as "*Is that something we would want?"* and *"We did not ask for that*", giving rise to consideration of the relevant element of the Statement of Requirements and a conclusion by the Panel that this was an "enhancement" proposal which was irrelevant. How, then, did the enhancement feature in the Evaluation Panel's final collective comments? How to account for the offending entries? Ms Williams could only reply that she cut and pasted the relevant passages from Mr. Radcliffe's individual marking frame.

Key Performance Indicators

[28] I have already touched on this discrete issue in paragraphs [13] – [14] above. I have also quoted above the G4S tender proposal in relation to the discrete KPI dealing specifically with the cash collection contractual requirement. G4S responded to the KPIs section of the SOR in paragraph 4.3.6 of its tender. In relation to each of the specified KPIs, G4S expressed itself "*very happy*". In each instance, the G4S tender elaborated on this generic response, by incorporating certain comments and recommendations. G4S clearly felt itself at liberty to respond in a manner which contemplated further discussions with NICTS, involving the possibility of finalised KPIs differing from those "*proposed*" in the SOR. In some specific instances, G4S also suggested a score of 100 points for achievement and 0 points for any failure. This was followed by (in paragraph 4.3.7) the G4S proposed service credit regime to support the agreed KPIs. This was formulated, broadly, in terms of percentages and service credits computed in money terms. The express rationale included the introduction of a regime which both penalised under performance and gave incentive to provide added value. In addition, the mechanism of formal monthly reviews and reports was proposed.

[29] With regard to the issue of KPIs, Mr. Radcliffe's commentary on the G4S tender included the following:

> "*KPIs to be agreed during transition and reported monthly using a dashboard model. Suggested service credit regime, detailed customer service response, six monthly intervals, include as a KPI, tailor for specific user groups.*".

These formed part of Mr. Radcliffe's broader comments relating to the sub-criterion of "Service Management", which he described as an "*excellent response with detailed supporting evidence and no weaknesses*". The collective comments of the Evaluation Panel were a mirror image of Mr. Radcliffe's individual comments. In his sworn evidence, Mr. Radcliffe was asked particularly about the statement "*KPIs to be agreed during transition …*". In response, he claimed that this referred to ***additional*** KPIs only. In his main affidavit, he deposed as follows:

> "*The intention to finalise KPIs during transition and agree a final service credit regime was clearly published in the Invitation to Tender …*
>
> *It is perfectly appropriate to agree the detail of the same at a later stage. The importance of the KPIs at the award stage was to ensure that the tenderer had a proper appreciation of the proposed manner in which they will operate (including monitoring systems, performance measurement and reporting) in order to make an assessment of the most economically advantageous tender. It was not considered necessary that the KPIs should be set out at that stage.*"

In his written witness statement (prepared in compliance with the court's trial management directions), Mr. Radcliffe revisited the issue of KPIs. Describing them as "*the most critical service areas to NICTS",* he continues:

> "*These KPIs were included as mandatory requirements, however it was open to tenderers to submit any additional measurements they may want to bring forward as part of an overall service solution. Tenderers were also asked to note the intention to establish a service credit regime to support the agreed KPIs and set out any proposal for consideration …*
>
> *The Panel had no intention to allow the successful bidder to renegotiate their tender proposal and accepted the KPI proposal of both* [Resource] *and G4S as part of their tender submission. There have been no negotiations with G4S and the Evaluation Panel were aware that in following the Restricted procedure any such negotiations would not be permissible*".

[30] In his evidence, Mr. Radcliffe agreed that the KPIs had the character of a series of concrete requirements. He further agreed that the Evaluation Panel made no attempt to assess the economic/cost differences between the bidders' respective KPI proposals. Both Resource and G4S received full marks for the sub-criterion in question. Mr. Radcliffe was questioned by the court concerning the following passage in his witness statement in particular:

> "*These KPIs were included as mandatory requirements …*".

When asked to rephrase this in a simple, meaningful way, Mr. Radcliffe was unable to do so. This linguistic formulation had not appeared in either of Mr. Radcliffe's two sworn affidavits. In cross-examination, Mr. Radcliffe agreed that a tender containing a superior KPIs and service credit proposal would be more economically

advantageous than one which did not. He further conceded that NICTS had made no attempt to assess, by some economic mechanism, the parties' KPIs and service credit proposals. When questioned about the various labels "*suggested … proposed … for information … an initial view*", Mr. Radcliffe suggested that KPIs were a mandatory tendering requirement which would give rise to a binding agreement with the successful bidder, leaving nothing to be agreed between the parties post-award. Ms Williams, for her part, failed to provide any coherent explanation of the transitional period and, in particular, how service credits would operate during this period. Mr. Radcliffe agreed that in assessing the two tenders in question, NICTS did not undertake any evaluation of the substance of the KPI proposals. Simultaneously, he conceded that if these two tenders were otherwise indistinguishable in merit and quality, it would follow that if one contained a KPI and service credit proposal superior to the other the former would be the more economically advantageous of the two.

Efficiency Savings

[31] I refer to paragraph [15] above. As already noted, "**Methodology**" was one of the four main contract award criterion, accounting for 25% of the marks. Within this criterion there were four sub criteria. One of these was entitled "Transitional Planning and Workforce Management", qualifying for 15%. This discrete sub-criterion encompassed a total of 26 specific requirements. The first of these was a requirement to provide "*a detailed Transition Plan, with supporting methodology, setting out the respective roles and responsibilities*". This, in its final form, was to be agreed with NICTS. Of these 26 requirements, six were concerned with service transition. The subject matter of the remaining 20 was workforce management. Within these, paragraph 4.1.14 stated:

> "*The contractor must clearly detail how it will support the Client in identifying and realising efficiencies during the contract period for example through a revised service model, more innovative working practices or continuous improvement targets*".

As already noted, in one of the pre-tender clarification responses, NICTS stated that any innovation or efficiencies proposed by bidders should be included in this part of the tender and would be evaluated accordingly. In the event, the topic of efficiency savings was duly addressed in paragraph 4.1.14 of the G4S tender. The technique employed was to particularise the relevant proposals in narrative form, without any financial quantification. [**The G4S efficiency savings proposals have been edited from this version of the judgment**].

[32] The form and content of the relevant section of the Resource tender differed notably from its G4S counterpart. This, *inter alia*, identified and differentiated

between fixed service requirements and variable service requirements within individual courts. This was addressed and illustrated in both narrative and tabular forms. The narrative included the following:

> "*We would however like to underline that we recognise that over the total contract period the scale of the savings or re-appropriation of hours which could be achieved are significant; we estimate in the region of £…**[edited]….** per annum.*"

This was followed by tables illustrating the potential savings, on a court by court basis. [**The Resource efficiency savings proposals have been edited from this version of the judgment**].

[33] For completeness, I record that as regards the third of the Resource grounds of challenge, which relates to **proposed efficiency savings measures and mechanisms,** neither party relied on any specific aspect of either the commentaries of individual panel members or the collective Panel comment. I have already adverted to the evidence concerning the presentation and the clarification response bearing on this discrete issue: see paragraphs [17] and [18] above.

IV ANALYSIS AND CONCLUSIONS

First Ground of Challenge: the G4S Cash Collection Proposal

[34] The relevant portion of the G4S Statement of Claim is framed as follows:

> "*The Defendant failed to properly evaluate the G4S bid in respect of cash collection*".

The outworkings of this omnibus pleading consist of complaints that NICTS committed a manifest error and infringed the principles of equality of treatment and transparency. Section 2.9 of the SOR was, in my view, framed in unambiguous terms. It conveyed unequivocally to all tenderers that all lodgements are to be collected from the relevant courthouses daily, from Monday to Friday, and delivered to "*local branches of the client's bank on a daily basis*". This requirement was repeated several times in Section 2.9. In its tender, the G4S approach entailed representing that it would comply fully with this requirement while, simultaneously, emphasizing strongly and devoting substantial space and attention to a quite different mechanism which, it claimed, was demonstrably superior in various respects. As recorded in paragraph [22] above, G4S repeated this proposed solution under a different guise, in the context of the "Service Management" sub criterion and the KPIs. In formulating, in its tender, these discrete proposals in this way, G4S was, plainly, seeking to secure an advantage over other bidders, by portraying its credentials and services in what it presumably considered to be the best possible light. Nothing else can rationally explain the inclusion of the passages

in question. This strategy is, humanly and commercially, understandable. However, the fundamental question for the court is whether, as a result, the Evaluation Panel was lured into prohibited territory and committed a legally actionable error in consequence.

[35] Much of the sworn evidence of Mr. Radcliffe and Ms Williams bore on the discrete issue of the G4S cash collection proposal. I had the opportunity to assess these two witnesses during relatively lengthy periods and, further, to address various questions to them. I observe, first of all, that they provided accounts of the crucial Evaluation Panel meeting which were notably different. This inspired little judicial confidence in either version. I interpose here the observation that, under the current statutory and jurisprudential regime, meetings of contract procurement evaluation panels are something considerably greater than merely formal events. They are solemn exercises of critical importance to economic operators and the public and must be designed, constructed and transacted in such a manner to ensure that full effect is given to the overarching procurement rules and principles. Where, in any given case, a disappointed bidder's legal challenge focuses on the activities and deliberations of an evaluation panel, the evidence bearing thereon will, inevitably, be carefully and objectively scrutinised by the court. Any failure by the court to scrutinise with particular care the contents of relevant individual and collective marking frames would be in dereliction of the judicial duty.

[36] In her evidence, Ms Williams provided an elaborate account of deliberations relating specifically to the G4S cash collection proposal. Her sworn account contained a series of details and embellishments strikingly absent from that of Mr. Radcliffe. There was no dispute that the offending passages in Mr. Radcliffe's individual comments and the Panel's collective comments had the character of a substantial aberration. The court's description of this aberration as "glaring" was uncontested. Neither witness provided a satisfactory explanation of how, when or in what circumstances the offending passages in the contemporaneous records of the Panel ultimately emerged. Insofar as inattention or oversight might be the explanation, both witnesses were unable to account for the manifest lack of care and attention reflected in key passages in the Panel's final collective comments, particularly in circumstances where the initiating e-mail had exhorted Panel members to undertake a "*careful review*" and to ensure that they were "*fully content with the comments and scores*". Mr. Radcliffe did not address this aberration in any of his affidavits or in his witness statement, nor did he deal with it proactively in his evidence. Rather, the material revelations did not emerge until the stage of cross-examination. These material failings must be viewed in the context of his evidence that he became aware of the error following completion of the first phase of this litigation. Bearing in mind his leading role *during* the first phase and taking into account also the very recent nature of the events under scrutiny, his failure to offer any explanation for not having discovered this error sooner is surprising. The proposition that this discrete issue should have been proactively and comprehensively addressed in these witnesses' affidavits and written statements

seems to me incontrovertible. I consider that this combination of factors, *per se*, gives rise to an inference adverse to the case advanced by NICTS at trial.

[37] Admittedly, Ms Williams did address this issue in her witness statement. However, she did so in far from satisfactory terms. In particular, the treatment which this discrete issue receives in her witness statement is manifestly incomplete. It omits a series of highly relevant facts, events and factors relating to the circumstances in which the Panel's final collective comments were generated. I consider that every witness statement, in common with every affidavit, should, in contemporary litigation, be full and frank. This proposition I consider unimpeachable and the citation of supporting authority is unnecessary. It is quite unacceptable that highly material evidence should be left to emerge only when the author of a witness statement or affidavit is cross-examined or questioned by the court.

[38] In their sworn evidence, both Mr. Radcliffe and Ms Williams advanced a series of explanations and rationalisations. I found the explanations and rationalisations which both witnesses purported to provide under oath to account for the aberrant entry in the contemporaneous records unpersuasive. In demeanour and engagement with the court, both witnesses were hesitant, uncertain and unimpressive. With regard to the Evaluation Panel's handling of the G4S cash collection proposal, I find that the evidence of these witnesses was demonstrably flawed, frail and infected clearly (though not necessarily intentionally) by a visible and persistent tendency towards *ex post facto* rationalisation. Both witnesses failed, repeatedly, to acknowledge that they could not provide concrete and conclusive answers to various questions put to them by counsel and the court. Instead, they preferred to offer responses which were manifestly vague and speculative. They further failed to acknowledge their inability to deal with certain questions. Moreover, in answering particular questions, they failed to articulate the limitations of their respective recollections or the qualifications which should properly have attached to their answers. Each displayed a tendency to provide answers to questions which they felt were expected or desired by the court. Both witnesses consistently failed to distinguish between the actual deliberations and conclusions of the Evaluation Panel (on the one hand) and their respective individual current views, assertions and interpretations (on the other). They continually blurred the critical distinction between these two matters.

[39] The main claim advanced by Mr. Radcliffe and Ms Williams in their evidence to the court was that the Evaluation Panel identified the relevant portion of the G4S cash collection proposal as an impermissible enhancement and disregarded it accordingly. For the reasons elaborated above, I find this evidence implausible and unpersuasive. The witnesses' attempts to explain and rationalise the material passages in the Evaluation Panel's final comments were singularly unimpressive. I am satisfied that substantially greater weight must be accorded by the court to the contemporaneous records than the evidence of the NICTS witnesses. These records, in my view, confound the corresponding sworn evidence of the two NICTS

witnesses. The records fall to be construed by the court fairly, rationally and objectively. Prior to finalisation of these records, there was ample opportunity to correct the erroneous /aberrant entry. None of the six persons concerned did so. The court is inevitably unimpressed by a process which involved a key player, Ms Williams, (by her own evidence) "*cutting and pasting*" significant portions of Mr. Radcliffe's individual comments into the final version of the Panel's collective comments *following the critical meeting*. There was a clear failure to compile a comprehensive and final *contemporaneous* record of the Panel's deliberations and to agree same there and then. Furthermore, there were manifest and serious breaches of the CPD rules. Specifically:

(a) It was incumbent in the Panel to disregard entirely "*anything outside the evaluation criteria or information requested*". I find that the Panel failed to do so.

(b) Where information provided by the tenderer was considered irrelevant, the Panel was required to state the reason in the evaluation marking frame. The Panel, indisputably, failed to do so.

(c) There was a failure by the CPD representative to record, at the Evaluation Panel meeting, the Panel's final collective comments and to ensure, *at that stage*, that all Panel members subscribed to them. The exercise which post-dated the Panel meeting was incompetent and unimpressive and, in my view, was in clear breach of the substance, spirit and ethos of the CPD guidance.

[40] I turn now to consider how the material entries in the marking frames should be construed by the court. Since the collective Panel comments did not contain any rejection (reasoned or otherwise) of the G4S cash collection centre proposal and since G4S was accorded full marks for its cash collection proposal, all of the accompanying comments should, in principle, relate to perceived strengths and merits – and nothing else. The allocation of full marks can only be construed as an assessment by the Panel that this aspect of the G4S tender was flawless. The comments in the individual and corporate marking frames must be construed by the court *in this context*. In my opinion, it is trite that the meaning of any document is a question of law for the court. I acknowledge that in performing this exercise, the court must guard against construing the words in question as if they were a statute or some legal instrument. Furthermore, these comments are in the nature of summaries and are not designed to provide a verbatim record. On the other hand, their importance is indisputable, when viewed from the perspectives of the CPD guidance, the duty to provide reasons to unsuccessful bidders and the overarching procurement rules and principles, particularly those of transparency and equality of treatment. It follows that the exercise of compiling and recording comments is one of some solemnity: see my observations in paragraph [35] above. Approached in this way, I consider that both the individual and collective comments in the marking frames under scrutiny convey unmistakably two things in particular. First, the

Evaluation Panel construed the G4S proposal as a proposal to deliver all cash collections to their G4S cash servicing centre, either with immediate effect or at some time subsequently. Second, the Evaluation Panel was plainly impressed by this aspect of the overall proposal, viewing it as a positive virtue. I consider that this is how the marking frames must be construed. This construction is then juxtaposed with the evidence of Mr. Radcliffe and Ms Williams. In my view, sworn evidence of a cogent and compelling nature would be required to displace the above analysis. I have already held that the evidence of the two NICTS witnesses was not of this calibre.

[41] The principles bearing on the matter of manifest error in the realm of public procurement cases are well settled and, unsurprisingly, were not in dispute between the parties. I accept that where a manifest error is demonstrated, the court must be satisfied that this was operative, or material. This requires the court to scrutinise the scores awarded and the eventual outcome of the procurement competition. Thus the court must turn its attention to the "no error" scenario. This becomes a difficult exercise, given the limited role of this court, which is one of review and, further, taking into account the court's findings that the Evaluation Panel was misguided in its assessment of the G4S cash collection proposal and was impermissibly influenced and impressed by it. These findings lead inexorably to a further finding that the full score of 5 marks accorded to G4S was infected accordingly. By analogy, in conventional public law terms, it was the product of taking into account a wholly immaterial consideration. Bearing in mind the role of the court, coupled with Mr Radcliffe's concessions in cross examination – see paragraph [26] above - I am far from persuaded that, absent this material and substantial error, the Evaluation Panel would have awarded the same mark to G4S. The assessment which they should have performed was not carried out and is one which the court is ill equipped to undertake. I am instinctively reluctant to speculate that the error made no difference to the Evaluation Panel's score. I decline to embark on an exercise of second guessing what the Evaluation Panel would have done in the "no error" scenario. My construction of the Evaluation Panel's final collective comments is that the impermissible factor was plainly influential. I cannot exclude the real possibility that, viewed through a different – and correct – lens, the Panel could have awarded a lower mark to G4S. Full marks of 5 out of 5 were allocated. It is common case that if the mark assigned to G4S had been less than 4 out of 5, Resource would have won the competition. The margins could not conceivably have been tighter. Finally, I have found that the error was one of obvious gravity. Taking all of these factors into account, I conclude, borrowing the words of Silber J, that this error was, as a minimum, "*of some consequence to the result*": see ***Letting International –v- Newham LBC*** [2008] LGR 908, paragraph [128].

[42] Giving effect to the above findings and conclusions, I am in no doubt that in its assessment of the G4S cash collection proposal, the Evaluation Panel fell into serious error. This error consisted of giving credit to G4S for a specific aspect of its proposal which was irrelevant and alien to the contract being procured. This discrete aspect of the G4S proposal fell squarely outside the SOR. It qualified for

summary and unequivocal dismissal by the Panel accordingly. However, I find that, far from dismissing it as irrelevant, the Panel was influenced by it to the extent that it was viewed as a positive merit of the G4S bid. Moreover, this was not a matter belonging to the realm of expert evaluative assessment on the part of Panel members possessed of expertise and qualifications which the court cannot match. Rather, the applicable touchstone here is that of manifest error. In summary, I conclude that the Evaluation Panel committed an error which has been clearly demonstrated, is plainly material and cannot be characterised as other than grave. I consider this to be a clear case of manifest error.

[43] In my view, the analysis and findings rehearsed above must also give rise to the conclusion that an infringement of the principle of equality of treatment has occurred. In short, I find that G4S were given credit for one element of their cash collection proposal, impermissibly and erroneously. None of the other bidders was accorded this benefit. It follows that G4S have received preferential treatment, to the detriment of their competitors. It is impossible for the court to dismiss this detriment as minimal or inconsequential. I conclude that the principle of transparency was also infringed, as a result of G4S receiving credit for something which did not form part of the published contractual rules and award criteria. Properly analysed, G4S was the beneficiary of a concealed, unpublished contract award criterion. This is a classic illustration of infringement of the principle of transparency.

[44] It is possible to reduce the court's assessment and determination of the first of the Resource grounds of challenge to the following, hopefully intelligible, bare summary:

(a) The essence of this discrete challenge is that, in its understanding and assessment of the G4S cash collection proposal, the Evaluation Panel fell into serious error.

(b) The records of the Panel (collectively) and its chairman cry out for an explanation.

(c) An explanation has been advanced by NICTS in its evidence.

(d) The court finds this explanation frail, unreliable and unsustainable.

(e) The error found by the court is sufficiently demonstrated, grave and material to constitute a manifest error in procurement law terms.

Resource's first ground of challenge is made out accordingly.

Second Ground of Challenge: KPIs and Service Credits

[45] The Statement of Claim contains the following material pleading:

> "*The Defendant sought to engage in unlawful post tender negotiations in respect of* [KPIs]".

One of the particulars of this umbrella pleading sought to introduce what seems to me to constitute a quite different complaint:

> "*…The Defendant has not properly evaluated any rival proposals in an equal and transparent manner so as to identify the most economically advantageous tender*".

In the Statement of Claim, the relevant chapter heading is "Unlawful Post Tender Negotiations". It appeared to me that there were certain discrepancies in the formulation of the Resource pleading and associated written submissions and, in consequence, a supplementary written submission from both parties materialised. It appears to the court that, ultimately, the Plaintiff's ground shifted somewhat. Originally, the headline complaint was that the Defendant would unlawfully engage in post-tender negotiations regarding KPIs. This suggestion was resisted trenchantly by NICTS, in both evidence and argument. Perhaps unsurprisingly, the focus of the Plaintiff's complaint ultimately was the particularised pleading set out above viz. the contention that, in its assessment of this discrete aspect of both parties' tenders, NICTS failed to identify which of the tenders was the economically more advantageous. It is submitted that, in consequence, Resource risked suffering resulting loss or damage.

[46] I have already outlined above, in appropriate detail, the evidence bearing directly on this discrete issue. In my view, the treatment of this topic in the SOR and Conditions of Contract was unsatisfactory, as it lacked the desired levels of clarity and precision. However, there is no structural challenge before the court. Ultimately, I consider that the main infirmity advanced on behalf of Resource is that the NICTS approach to this aspect of the tenders failed to give effect to its duty to identify the economically most advantageous tender and award the contract accordingly. In advancing this freestanding complaint, Mr. Giffin QC highlighted Mr. Radcliffe's concession in cross-examination (see paragraph [30], *supra*). On behalf of NICTS, Mr. Williams QC [appearing with Mr McMillen QC] accepted, firstly, that having regard to the design of the procurement competition it would be impermissible for NICTS to engage in negotiations with any bidder at any stage. Mr. Williams' second submission was that the effect of Section 4 of the SOR was that the specified thirteen KPIs were mandatory, in the sense that they had to be accepted by the bidders, with no prospect of modification or negotiation. Thus, he argued, it was incumbent on each bidder to submit its proposals for the service credit regime based on these thirteen KPIs. This is what Resource and G4S did in their respective tenders. It was argued that bidders were also at liberty to propose additional KPIs, with attendant credit service regime proposals (which Resource did in their tender). Mr. Williams sought to reinforce this submission by reference to Section 1.1.13 of the SOR, the Conditions of Contract, the definition of "*contract*" in

these documents, the terms of the Form of Tender and, finally, the content of the intention to award letter transmitted by NICTS to G4S. Mr. Williams' submissions also placed substantial importance upon the obligation imposed on NICTS to evaluate all tenders in accordance with the published award criteria and weightings.

[47] Ultimately, the essential contention advanced on behalf of Resource was that NICTS failed to assess the parties' KPI and service credits proposals in such a manner as to identify which party's proposal was the more economically advantageous. The basic riposte on behalf of NICTS was that these proposals were evaluated strictly in accordance with the published contract award criteria and weightings. This, it was argued, precluded any economic evaluation of the parties' KPIs and service credit proposals. In determining this issue I observe, firstly, that the wording in Sections 1 and 4 of the SOR and Schedule 3 was infelicitous in places. In particular, the labels "*suggested … initial suggested … proposed …* [and] *… initial view*" were, in retrospect, unsatisfactory. However, Resource did not make the case that there was any lack of clarity in the passages under scrutiny. Nor did Resource mount any structural challenge to the contract procurement competition. This is how I construe the final written submissions, as augmented, on behalf of Resource. Furthermore, while neither Mr. Radcliffe nor Ms Williams had a clear understanding of the mechanics and details of the transitional phase and transitional plan, I am satisfied that this does not bear directly on the issue to be determined by the court.

[48] As regards governing principles, the starting point is that every contract award authority is obliged to evaluate the tenders received and make its decisions accordingly by fully and faithfully applying the published contract award criteria. This is an elementary requirement, dictated by the principle of transparency and the related principle of equality of treatment. Depending on the context, this may also engage the kindred principle which precludes the authority from taking into account any information or other material which does not bear directly on the contract award criteria. The next operative principle is, as formulated in the Resource written submissions, that the contract which is concluded must in all material and substantial respects reflect the terms of the successful tender. Thus post-award negotiations resulting in the revision or substitution of an essential contractual condition are impermissible, as this distorts the requirements of transparency and equal treatment. As stated by Lord Phillips MR in ***R (Law Society) –v- Legal Services Commission*** [2008] 2 WLR …:

> "[45] *It is clear that where amendments to the tender criteria or to the contract are made after an award to one party, such amendments are liable to infringe the principles in that, had the other tenderers been award in advance of the terms of the contract actually put in place, this might have affected the terms of their tenders. Such amendments can violate the principle of transparency and of equality of treatment*".

Ultimately, as the battle lines became clearer and, as noted above, it appeared to the court that this was not an issue of substance between the parties. I find, in any event, that the factual dimension of this complaint is not made out.

[49] In ***Concordia Bus Finland*** [2002] ECR I-7213 [C-51399], the European Court of Justice, in the context of Council Directive 93/38/EEC, stated:

> "[43] *Article 36(1)(a) cannot be interpreted as meaning that each of the award criteria used by the contracting authority to identify the economically most advantageous tender must necessarily be of a purely economic nature. It cannot be excluded that factors which are not purely economic may influence the value of a tender from the point of view of the contracting authority. That conclusion is also supported by the wording of the provision, which expressly refers to the criterion of the aesthetic characteristics of the tender.*"

I refer also to paragraphs [55] - [63] of this judgment. One juxtaposes all of these principles with the further, uncontroversial principle that, in furtherance of the criteria of transparency and equal treatment, a contract award authority is obliged to award a contract in conformity with its published award criteria. Such published criteria could, in principle, be susceptible to challenge on certain grounds. However, that is not the present case which, in my view, is clearly focussed on the *application* of the published award criteria. I consider it clear from the jurisprudence of the European Court of Justice that the criteria specified as governing the award of the relevant contract do not have to be expressed in quantitative terms and will be permissible, provided that they are capable of being applied objectively and uniformly and are related to the task of identifying the economically most advantageous tender: see ***Renco SPA –v- Council of the European Union*** [2003] ECR II-171, paragraph [68] especially. In ***Stabag NV –v- Council of the European Union*** [2003] ECR II-135, a related case, the Court of First Instance reiterated the flexibility which the contract authority enjoys in the realm of the selection of award criteria and the allocation of relative weights: see paragraphs [77] – [78]. Moreover, the court stated, in paragraph [73]:

> "*It is settled case law that the* [contract award authority] *has a broad discretion in assessing the factors to be taken into account for the purpose of deciding to award a contract following an invitation to tender and that the court's review must be limited to verifying that there has been no serious and manifest error …*".

[50] Finally, in this brief review of the jurisprudence in this field, I refer to the decision of the Northern Ireland Court of Appeal in ***Henry Brothers –v- Department of Education*** [2011] NICA 59. It was submitted on behalf of Resource that this decision supports their contention that the impugned decision is vitiated by a failure to give effect of the most economic economically advantageous criterion. This

argument relies, firstly, on paragraph [25] of the judgment at first instance: see [2008] NIQB 105. As noted in the judgment of the Court of Appeal, paragraph [35], and as confirmed by paragraph [28] of the judgment at first instance, the manifest error which the trial judge found related to the *application* by the contract award authority of a fee percentage criterion. The gravamen of the misdemeanour which the learned trial judge found was an incorrect factual assumption amounting to a manifest error. This was duly noted by the Court of Appeal: see paragraph [35]. In my opinion, the decision in ***Henry Brothers*** is a fact sensitive one, giving rise to no direct analogy with the present case and deciding no point of legal principle binding on this court.

[51] While acknowledging that Mr. Giffin's submission was skilfully and attractively formulated, I prefer Mr. Williams' submissions on this discrete issue. The fundamental touchstone here may be described as that of *permissibility* viz. whether it was permissible for the Evaluation Panel to conduct some kind of economic appraisal of the tenderers' KPIs and service credits proposals. In this respect, the contract award criterion of **cost** was freestanding, attracting 35% of the overall marks, more than any of the other individual criteria. The topic of KPIs and service credits fell within the umbrella of the contract award criterion of "**methodology**" (25%) and, specifically, one of the four sub criteria "**service management**" (30%). It qualified for less than 1% of the overall score. Both bidders received full marks. In my opinion, the contract procurement competition, as designed, did not permit NICTS to conduct the kind of economic appraisal advocated on behalf of Resource. The relevant passages in Sections 1 and 4 of the SOR, in combination with Schedule 3, did not, in my view, contemplate that the KPIs and service credits proposals of bidders would be appraised in this way. It is common case that NICTS did not in fact conduct such an appraisal and I find that if it had done so this would have violated the principle of transparency. I find that NICTS's approach in this respect was in conformity with the SOR. I further find that the NICTS approach entailed no infringement of the principle of equality of treatment, as both bidders were treated in precisely the same way. Mr. Radcliffe's concession in cross-examination is of no avail to Resource. Ultimately, the threshold for intervention in the court's determination of this discrete ground of challenge is that of manifest error and I find that, in this respect, no such error has been demonstrated: see ***Evropaiki Dynamiki –v- Commission*** [2007] ECR II – 85, paragraph [89].

[52] I reject this ground of challenge accordingly.

<u>Efficiency Savings</u>

[53] In the G4S Statement of Claim, it is pleaded:

> "*The Defendant failed to properly evaluate efficiency savings offered by the Plaintiff* [and] *thus did not correctly evaluate the most economically advantageous tender*".

In the ensuing particular, this basic complaint is duly augmented and it is pleaded in particular:

> "*The Defendant's approach did not ensure that the bidder offering greater savings would be awarded higher marks and did not consider the impact of such savings upon the overall contract price*".

It is further pleaded that this approach gives rise to infringements of the principles of transparency and equal treatment. The final written submissions on behalf of Resource confirmed the court's provisional view that, at heart, the second and third grounds of challenge are in essence indistinguishable. Thus I note, but do not repeat, the parties' respective arguments, as outlined above.

[54] In my opinion, paragraph 4.1.14 of the SOR was framed in open textured and non-prescriptive terms. It required bidders to put forward efficiency savings proposals. It did not, however, require the submission of a detailed financial model. While it was open to a bidder to provide this it was not, in my view, compulsory. In the event, the proposals put forward by the two bidders in question were undoubtedly different. In the Resource proposal, there was emphasis on financial figures and computations, whereas in the G4S proposal there was not. I remind myself that there is no structural challenge to this aspect of the contract award competition. Rather, this aspect of the Resource challenge focuses on how the bidders' respective proposals were *assessed* by the Evaluation Panel. I also remind myself that "Costs" was a separate contract award criterion, accounting for the largest score. Having considered the arguments and all the relevant evidence, I find that no actionable error occurred. Firstly, there was no breach of the principle of transparency. Secondly, both parties were treated equally, taking into account particularly the intrinsic breadth and elasticity of the requirement in question. While, in the abstract, there might be legitimate competing views about the best way of handling this aspect of the procurement exercise, the ultimate touchstone for the court is that of manifest error. I find no departure from this standard. I also take into account that this ground of challenge exposes a matter of evaluative assessment on the part of the Panel. This reinforces my conclusion that no manifest error has been demonstrated.

[55] To this I would add the following. Fundamentally, the second and third of the Resource grounds of challenge are fashioned around the proposition that NICTS, in awarding the contract, was obliged to accept the most economically advantageous tender. This proposition is unobjectionable as far as it goes. However, it is significantly incomplete. Properly formulated, in my opinion, the correct proposition is that *NICTS was obliged to award the contract by identifying the most economically advantageous tender,* ***in accordance with the published rules of the competition and contract award criteria.*** I am satisfied that, as regards the second

and third grounds of challenge, NICTS, in accordance with the margin of appreciation which it enjoyed, complied with this standard.

[56] It follows that the third, and final, ground of challenge is not made out.

V OMNIBUS CONCLUSION

[57] I have found that in its evaluation of the G4S cash collection and lodgement proposal, the Evaluation Panel was guilty of a clearly demonstrated, serious and material error, in the respects explained above. The effect of the above findings and conclusions is that the first ground of challenge succeeds in substance.

VI REMEDY

[58] The remedies pleaded in the Statement of Claim are:

(a) An order setting aside the impugned contract award decision.

(b) A declaration that the contract should have been awarded to Resource.

(c) A declaration framed in somewhat diffuse terms (referring obliquely to the grounds of challenge ultimately pursued).

(d) Damages.

Ultimately, the contest between the parties related to the proposed remedies (a) and (b). Resource contended that the court should make a declaration that it should have been awarded the contract. NICTS retorted that the appropriate remedy would be to set aside the impugned contract award decision.

[59] The central ingredients of the contention advanced on behalf of Resource are encapsulated in the following excerpts from the written submission of Mr. Giffin QC and Mr. Dunlop:

> "*Such a declaration will be appropriate where it is clear, without the court having to usurp the proper role of the contracting authority, what the outcome of a lawfully conducted process would have been …*
>
> *The court does not have to speculate about what mark would have been awarded on a legally correct basis. It can at any rate be certain that it would have been less than 4/5. That is because … Mr. Radcliffe agreed in his cross-examination that the* [G4S cash collection proposal] *would merit a score of only about 1/5* [or, generously, 2/5]".

Counsels' submissions further emphasized that there is no issue concerning the correctness of the evaluation and marking of the Resource cash collection proposal, a fact underlined by the terms of the Defence. The riposte of Mr. Williams QC and Mr. McMillen QC on behalf of NICTS placed emphasis on the court's analysis on paragraph [41] of this judgment. It was further submitted that, *pace* the Defence, the court, having regard to its findings and conclusions, cannot be confident that the Evaluation Panel subjected the Resource cash collection proposal to appropriate and correct scrutiny. The equality of treatment principle was also highlighted in this context.

[60] The alternative submission advanced on behalf of Resource was that if the court were to opt for a setting aside order, this judgment should spell out fully the implications thereof and, in doing so, should prescribe specifically that the ensuing reconsideration exercise be confined to re-evaluating the cash collection proposal of the G4S tender. It was submitted that no other part of the G4S tender should be reconsidered and, further, that there should be no reconsideration of any aspect of the Resource tender. The argument formulated was that, in light of the court's findings and conclusions, the only function of NICTS in the context of a setting aside order is to rectify the error found by the court. This approach, it was submitted, would have the further virtues of expedition and finality. It was common case that such reconsideration as may be appropriate must be undertaken by a newly constituted evaluation panel.

[61] Mr. Giffin did not dissent from the court's suggestion that, in principle, the approach to remedies in public procurement cases may properly be informed by the principles which apply in successful applications for judicial review. The court expounded on this issue recently in ***Re Loreto Grammar School's Application*** [2011] NIQB 36 :

> *"[3]…….In judicial review, the High Court is not a court of appeal. It does not hear and determine appeals on the merits against decisions of public authorities. Rather, the High Court exercises a supervisory jurisdiction. Stated succinctly, the function of the High Court is to ensure that public authorities observe all relevant legal rules, standards and requirements and act within the limits of their powers. In essence, the High Court conducts an audit of legality. Where, in judicial review proceedings, any material failing is demonstrated, the court is empowered to grant an appropriate remedy. In a very small minority of cases, the High Court can order the defaulting public authority to actively perform its legal duties. However, this occurs very rarely and is a reflection of the truism that, in judicial review litigation, the High Court is not the final decision maker. Rather, the power of final decision making remains with the public authority concerned."*

The court further observed:

> "[5] *In short, the power of further and final decision making continues to repose in the Minister and the Department, rather than the court. The new legal duties to which they will be subjected arise out of the judgment of this court and the remedies which it proposes to grant. One of the purposes of the judgment of the High Court in judicial review proceedings is to provide guidance, instruction and education to the public authority concerned, with a view to ensuring that it act henceforth in accordance with all relevant legal requirements and within the boundaries of its powers .*"

Mr. Giffin agreed with the court that the declaration sought by his client is akin to an order of mandamus. He submitted that it was not, however, a precise equivalent, since it would still be open to NICTS, at this stage, to abort the contract procurement principle for some legally sustainable reason (see ***Federal Security Services,*** *supra*). Properly analysed, in my view, Resource is indeed seeking a mandatory order which would admit of only one possible exception.

[62] In procurement cases, the function of the court is one of review. It does not act as an appellate court. This is confirmed by the limited grounds upon which a challenge can be advanced and the limitations on the role of the court in relation to matters of evaluative judgment and technical expertise. There is an evident analogy with the role of the court in judicial review proceedings. I am of the opinion that where a procurement challenge is successful, it will rarely be appropriate for the court to make a mandatory order requiring the authority concerned to award the contract in question to the successful challenging party. I further consider that, as a general rule, it will be equally inappropriate to make the kind of indirect mandatory order reflected in the declaration pursued by Resource in the present case. Neither of these forms of remedy would be appropriate, in my view, unless the court could confidently conclude that, by virtue of its findings and conclusions, the relevant authority now finds itself under a legal duty to award the contract to the successful litigant. In the generality of cases, it seems to me unlikely that the court will comfortably make this conclusion.

[63] Turning to the present context and addressing directly the Resource argument, I cannot be certain that, but for the error found by this judgment, Resource would have been awarded the contract. I decline to speculate about what the thoughts, deliberations and conclusions of the Evaluation Panel would have been in the "no error" scenario. The territory which the court is invited to enter involves, in my view, impermissible speculation and obvious uncertainty. Secondly, I decline to attribute to the concession made by Mr. Radcliffe in cross-examination the weight canvassed on behalf of Resource. I take into account that this concession was made in the heat of battle. Furthermore, it entailed the expression of a purely personal, unilateral opinion and, given the circumstances in which it was made, it

cannot be regarded as the collective view of the Evaluation Panel. Finally, I refer to my analysis in paragraph [41] above. For these reasons, I consider the declaration sought by Resource to be inappropriate.

[64] Bearing in mind that only two competing remedies were canvassed before the court, I conclude that a setting aside order is appropriate. This raises the final question of the terms in which this order should be made. In this respect, as noted above, while both parties were agreed about the need to appoint a new evaluation panel, they joined issue on the exercise to be performed. In determining this issue, I take into account, firstly, the language of the Directives to which the 2006 Regulations (as amended) give effect in domestic law. One of the central themes of both the European and domestic legal regimes is that of contract *awards* and *decisions*. This is clear, for example, from the recitals of Council Directive 89/665/EEC. The subject matter of this measure (now amended, of course), was that of *decisions to award public contracts:* this is clear from a reading of the Directive as a whole. The regime established by the Amended Remedies Directive (2007/66/EC) is, of course, more expansive and intrusive. However, borrowing the language of recital (4), it continues to be predominantly concerned with "*the decision to award a contract*". In other provisions of the Directive, this is described as "*the contract award decision*": see, for example, recital (6) and Article 2/3. It is clear from Article 2a that the new standstill period procedure is inextricably linked with "*the contract award decision*". This mechanism acknowledges the distinction between two closely related events viz. the decision to award a contract and the actual execution of the contract. The possibility of a challenge resulting in the remedy of setting aside such decisions emerges, firstly, in Article 2/6.

[65] I consider that the regime established by the 2006 Regulations (as amended), consistent with the Directive, clearly envisages that the focus of any legal challenge initiated by a disappointed bidder will be the contracting authority's decision to award the contract in question. This is clear from a consideration of Regulation 47 as a whole. The remedies which the court is empowered to grant to a successful challenger vary according to whether the contract in question has been executed. Regulation 47I is concerned with available remedies where the contract has not been executed:

> "*(1) Paragraph (2) applies where –*
>
> *(a) the Court is satisfied that a decision or action taken by a contracting authority was in breach of the duty owed in accordance with regulation 47A or 47B; and*
>
> *(b) the contract has not yet been entered into.*
>
> *(2) In those circumstances, the Court may do one or more of the following –*
>
> *(a) order the setting aside of the decision or action concerned;*
>
> *(b) order the contracting authority to amend any document;*

(c) award damages to an economic operator which has suffered loss or damage as a consequence of the breach.

(3) This regulation does not prejudice any other powers of the Court."

Notably, each of the remedies in the Regulation 47I list is discretionary in nature. This may be contrasted with Regulation 47J, which applies where the relevant contract has been executed:

"*(1) Paragraph (2) applies if –*

(a) the Court is satisfied that a decision or action taken by a contracting authority was in breach of the duty owed in accordance with regulation 47A or 47B; and

(b) the contract has already been entered into.

(2) In those circumstances, the Court –

(a) must, if it is satisfied that any of the grounds for ineffectiveness applies, make a declaration of ineffectiveness in respect of the contract unless regulation 47L requires the Court not to do so;

(b) must, where required by regulation 47N, impose penalties in accordance with that regulation;

(c) may award damages to an economic operator which has suffered loss or damage as a consequence of the breach, regardless of whether the Court also acts as described in sub-paragraphs (a) and (b);

(d) must not order any other remedies.

(3) Paragraph (2)(d) is subject to regulation 47O(3) and (9) (additional relief in respect of specific contracts where a framework agreement is ineffective) and does not prejudice any power of the Court under regulation 47M(3) or 47N(10) (orders which supplement a declaration of ineffectiveness or a contract-shortening order)."

The concept of "*ineffectiveness*" is expanded in Regulation 47K and does not arise for consideration in the present context.

[66] I have highlighted the above provisions of the Directives and the transposing Regulations since, it seems to me, they demonstrate clearly that a contract award decision in this sphere is not divisible. It is, rather, an indivisible whole. Where a challenge is brought, the question for the court will always be whether an actionable defect in the impugned decision has been established. If so and if the court then opts, in the exercise of its discretion, for the setting aside remedy, its order will plainly set aside the contract award decision as in its entirety. There is nothing in the European or domestic legislation to suggest that a contract award decision might be set aside in part only, leaving the balance intact. Either the decision is lawful or it is not. No third possibility, in my view, exists.

[67] Returning to the present context, the significance of the analysis set out immediately above is as follows. In these proceedings, the matter under challenge is *the contract award decision* viz. the decision in its entirety. In the Statement of Claim, one of the remedies pursued is an order setting this decision aside. This is entirely consonant with Regulation 47I(2)(a). In the arguments advanced on behalf of Resource, it is contended that if this court should opt for the remedy of setting aside, the final order should prescribe that the newly appointed Evaluation Panel confine its task to re-evaluating and remarking the cash collection proposal contained in the G4S tender – and nothing else. Properly exposed, I consider the effect of this argument to be that the court should not set aside the contract award decision: rather, by the terms of its order, it should set aside this decision on the narrow basis that it has been found by the court to be contaminated in a single (though significant) respect. The decision is otherwise untainted and this should be reflected in the court's order, in the sense and to the extent that the legality of the balance of the decision is affirmed. In my view, correctly analysed, this resolves to a contention that the court should order the setting aside of the impugned contract award decision *in part*. I reject this argument as I consider that it finds no support in either the Directive or the 2006 Regulations, both of which clearly contemplate that where the court opts for this particular remedy, it should order the setting aside of *the whole* of the contract award decision. That this is the intention underlying the Directive and the 2006 Regulations is, in my estimation, clear. I conclude, therefore, that the alternative remedy espoused by Resource, as explained above, is not available to the court.

[68] The second objection to the Resource remedy contention is, in my view, the consideration that a public contract tender must be viewed as a composite unit. It is, of course, composed of many parts. However, all of these come together to form an overall whole. True it is that by virtue of the mechanisms of contract award criteria and sub-criteria discrete aspects of tenders receive individual, separate marks. However, this does not detract from the assessment that the contract award authority is engaged in a single exercise of evaluating the tender as a whole. It is incumbent upon the Evaluation Panel to maintain a broad horizon when examining and evaluating individual components. Every component of a tender must be scrutinised within its wider context and not in isolation. Furthermore, evaluative judgments in relation to discrete aspects of a tender are likely to inform comparable judgments and the scoring of other parts thereof. This, in my view, is the ethos of the European procurement law regime. To accede to the Resource contention would, in my view, be incompatible with this ethos.

[69] The third objection to the Resource contention is linked to the second. I find it difficult to imagine how, *in practice*, the task for the newly constituted evaluation panel would, giving effect to the Resource contention, be performed. If the newly appointed panel were to re-evaluate the G4S cash collection proposal only, an unmistakable air of unreality and artificiality would dominate this exercise. If the court were to accede to the Resource contention, the new panel would not reassess any other aspect of the G4S tender, nor would it even consider, much less evaluate,

any other bidder's tender. It is unclear to me how this exercise could be satisfactorily performed. Furthermore, it would entail no element of comparison. This, it seems to me, would be contrary to the ethos of the procurement regime, which clearly envisages that all qualifying tenders will be considered and evaluated before a contract award decision is made. This exercise, in my view, can permissibly entail comparisons. Furthermore, it seems to me that, in the real world, comparisons are unavoidable and I find nothing in the Directive or the 2006 Regulations which prohibits them. This analysis is reinforced by reflecting on the formulation of the overarching contract award criterion of the economically *most* advantageous tender.

[70] Moreover, I am of the opinion that a composite, rather than circumscribed, reassessment exercise would best promote the principles of transparency and equality of treatment. As regards the former principle, the two interested bidders would know exactly what the contract award authority is doing. The alternative scenario proposed by Resource would, in my view, be enshrouded in obscurity and uncertainty, for the reasons explained above. As regards the second of these principles, both bidders would receive precisely the same treatment.

[71] There is one further consideration which reinforces my rejection of the Resource contention. The proposition that, in pure domestic law terms, where a judicial review application results in a quashing order the impugned decision must be reconsidered and made afresh by the public authority concerned is unexceptional. Equally uncontroversial is the further proposition that when the authority concerned performs this exercise, it must do so in the light of all the circumstances *then* prevailing. To fail to do so could potentially be unlawful on the ground of failing to take into account all material considerations and/or taking into account immaterial factors. Furthermore, it is well settled that a public authority may change its mind, for good reason. Having conducted the analysis set out above, I find no reason for concluding that the EU procurement law remedy of setting aside a contract award decision differs in any material respect from its domestic law counterpart of a quashing order (or *certiorari*). The effect of the Resource contention is that the new Evaluation Panel should rewind the clock, disregarding completely supervening factors or developments which could be permissibly considered in the contract award decision. The mere possibility that such factors could exist is sufficient to undermine this contention. Finally, I find this contention misconceived on the further ground that it is in reality a mandatory order in disguise. The court is invited to order, in terms, that NICTS (via the newly appointed Evaluation Panel) reconsider the impugned contract award decision in a manner directed and circumscribed by the court. I consider this form of order more akin to an order of mandamus than one setting aside the impugned decision. In my view, the EU remedies regime does not contemplate that a setting aside order will be of this nature or will have this effect.

Conclusion: Remedies

[72] For all of these reasons I conclude that the final order of the court should recite simply that the impugned contract award decision be set aside. The course which these proceedings has taken ultimately has the merit that, in this forum, the parties have traded competing views and arguments on what the effect of such order should be. I have interpreted the Resource argument as a contention to the effect that any setting aside order should prescribe the exercise to be performed by the newly constituted Evaluation Panel in a particular way. I reject this contention. In my view, the lawful course for the new panel will be to re-evaluate both the Resource and the G4S tenders in full. The court has not been requested to adjudicate on whether the new panel should reassess any other bidder's tender and, accordingly, this judgment does not purport to determine this discrete question.

Costs

[73] Giving effect to the basic rule that costs follow the event, there will be an order for costs in favour of Resource. The only question for the court to determine is whether this should be something less than full costs, given that Resource succeeded on one of its grounds of challenge but failed as regards the other two. I have considered the arguments addressing this issue. It is common case that the successful ground of challenge formed the centrepiece of these proceedings and occupied most time and attention, from beginning to end. On the other hand, the court cannot overlook the reality that, from the inception of the proceedings, the espousal and pursuit of the two ultimately unsuccessful grounds of challenge has added to the costs and, further, gives rise to a "sub event" in favour of the Respondent, NICTS. A simplistic arithmetical approach is plainly inappropriate. I consider that the fair and reasonable exercise of the court's discretion is to award Resource 75% of its costs.