APPROVED **[2026] IEHC 70**

THE HIGH COURT

COMMERCIAL

IN THE MATTER OF COUNCIL DIRECTIVE 2014/24/EU

AND IN THE MATTER OF THE EUROPEAN UNION (AWARD OF PUBLIC AUTHORITY CONTRACTS) REGULATIONS 2016 (SI 284 OF 2016)

AND IN THE MATTER OF COUNCIL DIRECTIVE 89/665/EEC AS AMENDED

AND IN THE MATTER OF THE EUROPEAN UNION (PUBLIC AUTHORITIES' CONTRACTS) (REVIEW PROCEDURES) REGULATIONS 2010 (SI 130 OF 2010) AS AMENDED

Record No.: 2024/882JR

Between:

KERRIGAN SHEANON NEWMAN UNLIMITED COMPANY

Applicant

-And-

SUSTAINABLE ENERGY AUTHORITY OF IRELAND

Respondent

-And-

ABTRAN UNLIMITED COMPANY

Notice Party

JUDGMENT of Mr Justice Rory Mulcahy delivered on 12 February 2026

Introduction

1. In March 2023, the respondent ("**SEAI**") issued notification of a proposed competition ("**the Competition**") for a contract for the provision of management agent services in connection with the provision of surveys, building energy ratings, and inspections of domestic and non-domestic properties. The tender process was to be by way of competitive dialogue. The contract value was estimated to be in excess of €75 million. The applicant ("**KSN**") was, at the time, the provider of those services, having been appointed by the SEAI following earlier competitions in 2012, 2016, and 2019.

2. Following completion of the Competition, by decision dated 14 June 2024 ("**the Decision**"), SEAI awarded the contract ("**the Contract**") to the notice party ("**Abtran**").

3. KSN issued proceedings challenging the Decision on 9 July 2024. The original Statement of Grounds identified four separate grounds of challenge. The initiation of the proceedings automatically stayed the award of the Contract. The relevant services, therefore, continue to be provided by KSN on foot of a contract awarded in 2019.

4. KSN subsequently filed an amended Statement of Grounds on 11 October 2024 ("**the first amended Statement of Grounds**"), and a further amended Statement of Grounds on 6 June 2025 ("**the final Statement of Grounds**").

5. The final Statement of Grounds identified eight separate grounds of challenge. However, in KSN's detailed written submissions, it stated that it would focus on "*two straightforward propositions*", that:

a. SEAI had erred in its interpretation of the tender documents and accepted a tender from Abtran which proposed a methodology which differed from that prescribed in the tender documents ("**the methodology claim**"); and

b. SEAI had erred in concluding that Abtran's bid was not abnormally low ("**the pricing claim**"). SEAI had identified Abtran's bid as one which appeared abnormally low. However, following engagement with Abtran, it concluded that Abtran had satisfactorily accounted for its pricing rates.

6. In respect of the first of those propositions – the methodology claim – KSN alleges that the Abtran bid departed from the prescribed methodology in two material respects. First, it provided for the combining of services by Abtran, in particular, the combining of BER (Building Energy Rating) assessments with other services in a single visit to a person's home. Second, it included a proposal for a pilot scheme of what was termed "uberisation", and had provided a price for core services on the assumption of a successful pilot.

7. At the hearing of the case, KSN also argued, in the alternative to its methodology claim, that if the court was not satisfied that SEAI had misinterpreted the tender documents, then the tender documents lacked clarity, or were ambiguous, and were, accordingly, in breach of the requirements of equal treatment and transparency.

8. As regards its pricing claim, KSN's principal complaints are that Abtran failed, when requested, to provide clear answers regarding the number of personnel it proposed to engage, and that SEAI failed to determine that the productivity assumptions made by Abtran in its tender were unrealistic.

9. In its opposition papers, SEAI denies KSN's claims and argues that the tender from Abtran was in accordance with the requirements of the Competition, and that it was entitled to conclude that Abtran had adequately justified its tender prices, such that SEAI was not obliged to reject its tender as being abnormally low. SEAI also disputes that the argument regarding lack of clarity has been adequately pleaded, and argues, in any event, that that complaint is time-barred.

10. Abtran also filed opposition papers, supporting SEAI's position. It did not, however, participate in the substantive hearing other than to make submissions regarding the extent to which its confidential information should be disclosed in open court.

11. KSN and SEAI both relied on expert evidence. The experts gave oral evidence during the course of the hearing.

12. Although, as will be seen, there are aspects of KSN's methodology complaint which are relevant to its pricing complaint, it is helpful to assess each in turn. The parties are broadly agreed that the error alleged in the methodology complaint involves the alleged

misinterpretation of the tender documents, the correct interpretation of which is a matter for the court, whereas what is alleged in relation to the pricing complaint is a manifest error by SEAI in the assessment of Abtran's explanation for its apparently low pricing. Accordingly, the assessment of each complaint gives rise to quite different considerations. I propose, therefore, to consider the methodology complaint, before turning, if necessary, KSN's complaint in relation to pricing.

13. Before turning to those matters, however, I will address the issues raised by the parties regarding confidentiality, and the *ex tempore* ruling I made on 9 December 2025, the opening day of the hearing.

Ruling on Confidential information

14. On the eve of the hearing, Abtran brought an application, that certain of the evidence in this case should be heard otherwise than in public. Abtran's application was supported by SEAI, and, unusually, its competitor, KSN.

15. The circumstances in which the application arose, while unusual, were not perhaps novel. Part of KSN's challenge in the proceedings is to the manner in which SEAI assessed Abtran's tender, having identified it as appearing abnormally low. In order to pursue that claim, KSN sought and obtained discovery from SEAI, including, following a ruling from the Court of Appeal, discovery of parts of Abtran's tender. It also obtained documents surrounding the assessment of Abtran's bid by SEAI. The Court of Appeal ruled ([2025] IECA 196) that the documents were relevant and necessary and should be discovered notwithstanding the court's acknowledgement that the documents were highly confidential.

16. In recognition of the confidential nature of the documents, the parties agreed that access to all discovery documents would be confined to a so-called "confidentiality club". comprising the parties' legal representatives and the experts engaged by each side. Part of the appeal to the Court of Appeal involved KSN's application that one of its executives be permitted access to the confidentiality club, on the basis of undertakings that he would not disclose the contents of the discovery documents, including within KSN.

17. In its judgment, the court refused this aspect of the appeal, noting that setting up a confidentiality club which includes the parties is, in most cases, self-defeating.

18. Thus, KSN obtained discovery but under conditions of such confidentiality that even KSN was not permitted access to the documents. In refusing the order to admit a representative of KSN to the confidentiality club, the Court of Appeal remarked that the failure to have a client representative will obviously "*lead to complications (to put it mildly) in the obtaining of instructions and the running of a case*." I cannot but agree.

19. Since the making of discovery, two streams of affidavits have been exchanged between the parties, one 'confidential' and one 'open'. KSN itself has not had access to the confidential affidavits. It bears remarking that there is something slightly extraordinary about the fact that the case proceeded, at least in part, on the basis of evidence of which the moving party is not even aware.

20. Abtran advanced arguments, supported by SEAI and KSN, acknowledging the constitutional imperative that justice be administered in public but contending that the Supreme Court in *Gilchrist v Sunday Newspapers* [2017] 2 IR 284 has recognised that there can be a departure from that default position where there is an interest very clearly affected by the possibility of a hearing in public and the circumstances demanding a derogation from that requirement are pressing. It argued that those criteria were met here. Reference was also made to the decision of McDonald J in *BOC Aviation (Ireland) Ltd v Lloyds* [2024] IEHC 162 in which he confirmed that *Gilchrist* did not require an applicant to show that justice could not be done unless the hearing was otherwise than in public. Abtran sought to distinguish *Sandoz v Bayer* [2025] IEHC 500 in which I had refused, post-hearing, an application to treat material as confidential in a patent case.

21. Abtran's counsel relied on the inherently confidential nature of its tender documents, a characterisation not disputed by the other parties, and highlighted the confidential nature of public procurement processes. She referenced observations of the Supreme Court and Court of Appeal to the effect that confidentiality is fundamental to the effectiveness of public procurement tendering. She noted that a hearing in public would, in effect, render otiose the confidentiality club put in place and endorsed by the High Court and Court of Appeal, not to mention the efforts to which the parties had gone to respect its limits. Counsel emphasised Abtran's position in the proceedings, that it was not a protagonist, and did not choose to be part of this case, but that its confidential information was nonetheless at the heart of KSN's claim.

22. In supporting the application, SEAI's counsel noted that the Court of Appeal decision excluding any representative of KSN from the confidentiality club contained a recognition of a countervailing interest warranting protection which he contended was sufficient to satisfy the test in *Gilchrist*.

23. *Gilchrist* mandates that the court approach any application for a deviation from open justice with a high degree of scepticism, and that was the frame of mind with which I approached the application by Abtran. Notwithstanding that scepticism, I was persuaded that in the very particular circumstances of this case that I should make an order, at least *pro tem*, which protected the confidentiality of Abtran's information.

24. First, I was satisfied that the information at issue, in particular, in relation to how Abtran priced its tender, was inherently confidential. This was not disputed by any party, and was accepted by the High Court and Court of Appeal in the context of the discovery application. Thus, there was an interest of Abtran, characterised by the CJEU in Case C-450/06, *Varec*, at §28, as "*a substantive right*", which would clearly be impacted by a hearing in public.

25. A second, and significant consideration, concerned the circumstances in which Abtran provided the documents to SEAI and they thus became relevant for the purpose of these proceedings. The documents were given in confidence as part of a public procurement process. Confidentiality is an essential feature of public procurement. In *Word Perfect Translation Services Ltd v Minister for Public Expenditure and Reform* [2020] IESC 56, the Supreme Court observed (at §6.13), by reference to *Varec*, that:

> "*The whole point of public procurement law is to enhance the public interest in ensuring effective competition for public contracts while at the same time affording a level playing field for those who might wish to tender for such business. If there were to be a significant risk of a very high level of disclosure of significantly confidential details from tender documents, this could, as the CJEU pointed out, discourage appropriate tendering and thus defeat one of the very purposes of the public procurement regime.*"

26. Article 21(1) of the Public Procurement Directive imposes an obligation on contracting authorities not to disclose information provided to them as part of a tender process which is designated as confidential.

27. As noted by the CJEU in *Varec* the effectiveness of that protection would be severely undermined if in an appeal against a decision, the tenderer was required to disclose that information.

28. Accordingly, a successful tenderer's documentation cannot readily become available to a competitor by the simple expedient of that competitor challenging an award. That would undermine the public procurement process.

29. The complicating factor in this case is that notwithstanding the protection afforded to confidential documents submitted as part of a public procurement process, discovery was ordered in this case of documents which were acknowledged to be highly confidential. In this regard, the court applied established authority that an assertion of confidentiality does not necessarily defeat an application for discovery.

30. In ordering discovery, the Court of Appeal determined that the documents were relevant and necessary for the fair disposal of the proceedings. A requirement to make discovery must typically carry with it the implication that the discovered documents will (or at least can) be deployed at trial. Since a trial in public is the default, an order for discovery typically means that the confidential material disclosed can be referred to in open court.

31. That, of course, may depend on the conditions attaching to the exchange of discovery. In this case, the parties agreed that the documents would be exchanged within a confidentiality club. The Court of Appeal not only endorsed the confidentiality club, but refused KSN's application for its representative to join it. The clear implication of the Court of Appeal's ruling was that the confidentiality of the documents should be maintained to the greatest extent possible notwithstanding the requirement to discover those documents. The fact that the discovery order was made did not, therefore, carry with it the implication that I should not consider steps to continue the protection of Abtran's confidential documents, quite the reverse.

32. I also bore in mind that Abtran was not the instigator of these proceedings, and had not taken any step to expose its confidential material. It provided them to SEAI on the basis that they would be kept close, and there would be an inherent unfairness in allowing its

competitor access to the documents – the inevitable consequence of refusing the order sought – simply because that competitor had challenged the SEAI decision.

33. One factor not addressed by the parties in any detail – other than in acknowledging the constitutional imperative for open justice – was the countervailing public interest in these proceedings being heard fully in public. Although there is an interest in *all* proceedings being heard in public, for the reasons highlighted in *Gilchrist*, it did not seem to me that there was any additional imperative in this case. The public procurement process permits documents to be furnished in confidence to a contracting authority, and for the assessment of that documentation by the contracting authority in making its decisions. The public policy behind affording this protection has been recognised in *Word Perfect*. Thus, the public, typically, would not have access to the documentation on which a contracting authority bases its decision and the exclusion of the public from that process is justified on public policy grounds. The fact that the decision is being challenged by a competitor of the successful tenderer does not create any particular imperative that the public now be able to review that from which they have previously been lawfully excluded.

34. Of course, it is in the public interest that the manner in which justice is administered is open and understandable. That is necessarily compromised if any part of proceedings is heard other than in public. It was necessary, therefore, to consider whether the measures proposed were justified, or whether any lesser measures could achieve the same result.

35. From my review of the papers and my understanding of the case in advance of the hearing, it did seem to me that that part of the applicant's case which was concerned with whether Abtran's tender was abnormally low was so bound up in a consideration of confidential information, that there was no lesser effective measure than that the evidence in relation to that part of the case would likely have to be heard otherwise than in public. It was less obvious that this was necessary in relation to the part of the case in which KSN argues that Abtran's tender was non-compliant. On its face, this appeared to be a case of interpretation of SEAI's documentation, which was not confidential.

36. In the circumstances, I made an order *pro tem* in the terms requested by Abtran, subject to review throughout the hearing. As it happened no member of the public or press sought to attend the hearing, and no application was made by any party to vary or lift the order. The

only people who were affected by the order, therefore, were representatives of KSN who voluntarily absented themselves from court during certain portions of the evidence.

37. As I noted at the hearing, it was unfortunate that the parties when setting up the rules of the confidentiality club did not anticipate what would happen if one of the parties wished to deploy the documents exchanged and make provision for it, or that this wasn't addressed either as part of the application for discovery or in light of the Court of Appeal's order. The application made on the eve of the hearing was prompted by the court following a case management hearing. Given the importance of justice being administered in public, this is an issue which, where it arises, should be addressed at the earliest stage possible in proceedings.

38. In light of the order made, I provided this judgment to the parties in draft form and invited submissions on whether any redactions should be made. Following constructive engagement between the parties, very limited redactions were agreed between them. In line with the approach adopted by this court in *White Mountain Quarries Limited v Mayo County Council* [2024] IEHC 259, I was satisfied that what was proposed was consistent with the principles identified above, and this judgment incorporates those limited redactions.

The parties

39. KSN is a construction consulting firm specialising in quantity surveying, project management and other real estate-related services. It has approximately 170 employees.

40. It has been providing the management agent services which were the subject of the Competition challenged in these proceedings to SEAI since 2012. It participated in all stages of the Competition. It was notified that its bid was unsuccessful and of the scoring for its tender and the successful tender by letter dated 14 June 2024.

41. SEAI is Ireland's national energy authority, established by the Sustainable Energy Act 2002, as amended. Its purpose is to promote the reduction and replacement of fossil fuel usage to help Ireland's transition to a clean energy future. SEAI works with the public, businesses, communities and the Government to achieve this, providing expertise, insights, fundings, educational programs, policy advice and research. It operates a number of

schemes for which the management agent services the subject of the Competition are required. It was the Contracting Authority for the Competition the subject of these proceedings ("**the Contracting Authority**").

42. Abtran is part of the Org Group group of companies and is a provider of business processing outsourcing ("**BPO**"). It has provided BPO services in Ireland over the past 27 years, across the energy, transport, financial services, telecommunications, media, technology and government sectors. It was the successful tenderer in the Competition.

The Competition

43. On 28 July 2023, SEAI published a contract notice ("**the Contract Notice**") on 'eTenders', an online portal which connects public sector buyers with suppliers, regarding a proposed competition for management services. The notice identified that the procedure for the Competition would be the competitive dialogue procedure. The Contract Notice was accompanied by documents entitled 'Descriptive Document (Competitive Dialogue)' and 'Request to Participate (Competitive Dialogue)'.

44. The Descriptive Document identified the core services which would form part of the Contract, and the schemes operated by SEAI in which the services would be provided. Those schemes include the 'Better Energy Warmer Homes Scheme' ("**the BEWH Scheme**") which was the focus of the submissions in these proceedings. Under the BEWH Scheme, SEAI provides assistance to homeowners in the retrofitting of domestic homes to improve their energy efficiency.

45. The core services applicable to the BEWH Scheme include the following:

(i) A pre-BER assessment: this involves the assessment of the energy performance of a home carried out prior to energy efficiency upgrade works being carried out, in order to establish the energy efficiency baseline of the home. All homes on the BEWH Scheme must have a pre-BER assessment before the energy upgrade works are carried out. Currently, approximately 20% of applicant homes already have a valid pre-BER assessment that pre-dates their application. The remaining 80% require a pre-BER assessment to be carried out by the Managing Agent.

(ii) A home energy survey: this involves a visit to the relevant home identifying and recommending energy upgrade works that can usefully be carried out to improve energy performance. The outcome of the survey is a preliminary works order indicating the works to be carried out by a contractor selected from SEAI's panel of contractors. As with the pre-BER assessment, a survey must be carried out prior to the energy upgrade works being carried out.

(iii) A post-BER assessment: this is a BER assessment which is carried out to identify the BER rating of the home after the energy upgrade works are completed. Necessarily, a post-BER assessment can only be carried out subsequent to the energy upgrade works being carried out.

(iv) An inspection: this involves a visit to the relevant home to provide assurance as regards the standard of work completed by contractors and to identify quality matters that require attention. In the case of the BEWH Scheme approximately 30% of homes are subject to an inspection.

(v) A quantity check: this involves a visit to the relevant home to compare the quantity of material installed by the works contractor with the amount claimed by the works contractor.

46. The Descriptive Document referred to a requirement for "*continuous improvement*" on the part of the appointed agent. At part 4.5 of the document, this was described in the following way:

In parallel with this ethos is a culture of continuous improvement, characterised by an ongoing effort to improve products, services and processes. These efforts are both incremental improvement over time and "breakthrough" or step-change improvements.

...

Improvements are sought within both established programmes as they mature and require further development to match market demands, and new and pilot programmes which may require considered, careful support to bring them to market, develop and establish robust processes and procedures.

47. Participation in continuous improvement was one of the technical services the appointed agent was required to provide.

48. The document concluded with the following statement highlighted:

> *Candidates should note that through a series of dialogue sessions during the Procurement Process (dealing with financial, legal and technical issues), which may include Tenderers submitting outline solutions to the Contracting Authority and commentary on the draft contract provided by the Contracting Authority, the Contracting Authority will work with Tenderers to develop potential solutions for the Contract against which all final tenders will be submitted.*

49. The Request to Participate ("**RTP**") document defined the dialogue stage of the Competition in similar terms to the Descriptive Document, as meaning the period of discussions and negotiation between tenderers and the Contracting Authority to identify the solution that best meets the Contracting Authority's requirements, commencing with the issue of the Invitation to Participate in Dialogue ("**ITPD**") and ending with the issue of the Invitation to Submit a Final Tender ("**ISFT**") by the Contracting Authority.

50. The ITPD was issued on 26 September 2023 to tenderers who had been shortlisted by SEAI on the basis of responses to the RTP. This commenced the dialogue stage of the Competition. The purpose of the dialogue stage was described as being to "*work with Tenderers to identify a solution that will meet the needs of SEAI*." Tenderers were permitted to submit an outline solution in response to the ITPD. As made clear in the ITPD, it was open to them to submit, as part of their outline solution "*alternative or improved processes to deliver the Services (as outlined in the two statement of requirements), with the aim of achieving value for money and the objectives described in this ITPD*". Statements of requirements were included as appendices to the ITPD.

51. The ITPD also indicated SEAI's intention to operate by way of an "*activity/task based pricing model*".

52. SEAI provided various clarifications following requests from proposed tenderers, including issuing, on 23 October 2023, a document entitled 'Additional Information for

Tenderers'. This included information on productivity rates for BER assessors, surveyors and inspectors, and on average distances travelled by each in the years 2022 and 2023. It was based on information provided to SEAI by KSN.

53. SEAI referred in its submissions to its response to Requests for Clarification 55 and 76. The query at 55 was as follows:

> *How many pre-assessments are completed that do not follow through into works completed? Can this be provided broken down by county?*

54. SEAI's reply was:

> *The approach to targeting homes for energy upgrades will change over time as Department priorities evolve. Since 2022, the BEWH Scheme targets properties with the lowest performing BER rating by prioritising homes that were built and occupied before 1993 and have a pre-works BER of E, F or G. Such homes will receive energy upgrade works sooner, whilst properties with a better BER rating and / or are newer will likely be upgraded later. As such it is difficult to be prescriptive as to what the fall-out rate is as the intent is to carry out upgrades on all eligible properties.*

55. Request 76 was in the following terms:

> *To understand utilisation rates and SLA's for inspections, surveys and BER's can you provide an indication of size of homes, distance between homes and how efficiently these can be scheduled? Can it be assumed that it would be unusual to have homes ready for BER, Inspection or Survey within the same housing estate or town given SLA requirements for payment etc?*

56. SEAI clarified:

> *Efficient scheduling is a key responsibility of the Managing Agent. SEAI does not readily have detailed information on the distance travelled between homes by Field Agents. The spread of energy upgrades on domestic schemes is shown on the following link: https://www.seai.ie/grants/home-energy-grants/home-upgrades/*

As our Schemes are demand-led, there is no guarantee that past upgrades will be replicated in the future. It is not unusual to have homes ready for BER assessment, inspection and survey in the same housing estate or town. Indeed, surveys and pre-BER assessments could be combined as could inspections and post-BER assessments, subject to segregation of duty requirements.

Efficient scheduling is a key function of the Managing Agent and at present typically results in fulfilment rates between 70 - 85% as some homeowners are not always available when the Managing Agent would prefer. Adequate notice is important in this regard.

*Emphasis added

57. The ISFT was issued on 23 February 2024.

58. The ISFT sought tenders on the basis of a combination of core services and value added services ("**Value Added Services**"), which are explained further in the Statement of Requirements ("**SoR**"). The core services were the same as those identified in the ITPD.

59. Part 19 of the ISFT addressed '*Abnormal Tenders*'. It stated that SEAI *will* reject any Tender which it considers to be an abnormal tender and where it considers the evidence supplied does not satisfactorily account for the price proposed

60. As regards clarifications, it was stated (at §17.4) that each "*request for clarification and SEAI's response shall form part of this ISFT and must be treated as such by Tenderers*."

61. In relation to pricing, the ISFT noted (at §20.1) that "*in recognition of the risk posed by volume, SEAI has decided to operate Core Services by way of a banded arrangements whereby the Managing Agent will price the delivery of services based on volume bands. After dialogue with Tenderers, SEAI has now concluded that the optimal commercial model is to move to a single unit activity rate that captures both fixed and variable costs… Tenderers must quote rates that reflect the full inclusive value of the item, service or works to which the rate relates to.*"

62. The ISFT addressed the possibility of ambiguities and/or conflicts in the documentation. It stated (at §27.1):

> *Tenderers shall notify SEAI immediately should they identify and ambiguity, discrepancy, error or omissions in this ISFT, or the documents attached to this ISFT. SEAI will, upon receipt of such notification, notify all Tenderers in writing of its ruling in respect of any such ambiguity, discrepancy, error or omission.*

63. In the case of a conflict not resolved by this method, the order of precedence was stated to be (i) the contract; (ii) the SoR, and (iii) the ISFT (at §27.2).

64. The SoR runs to over 200 pages, together with detailed annexes. In the introduction, it is stated that the SoR has been developed through the dialogue process and that the output of this process has resulted in an SoR that "*delivers the optimal solution for the SEAI*."

65. The SEAI identified the contracting model as involving the provision of a list of core services across fourteen SEAI schemes, together with Value Added Services, accessible to SEAI during the term of the Contract, at a cost, but on a no commitment basis. It noted the changed commercial model following dialogue with tenderers.

66. Value Added Services are described in section 1.5 of the SoR:

> "*The SEAI will require the Managing Agent to deliver a range of services/initiatives that are accessible to the SEAI during the term of the contract on a no commitment basis. These services may include but not necessarily be limited to access to advisory/consultancy services, design, development and deployment of initiatives to improve efficiency to Core Services or strategic, transformation initiatives which will transcend Core Services, applying typically cross-functionally, across Schemes or the wider SEAI business.*
>
> *It is expected that SEAI and the Managing Agent will collaboratively engage for the purposes of designing, developing and accessing any services offered through this arrangement. In any event, over the term of the Contract, SEAI expects the Managing Agent to proactively suggest and recommend value-add initiatives which will be considered by SEAI.*"

67. The SoR sets out that the successful tenderer will have to submit a business case for any proposed Value Added Service, and that SEAI will implement a Change Control Notice to regulate the provision of any approved Service.

68. The SoR includes similar statements regarding '*continuous improvement*' to those contained in the RTP and the ITPD. Tenderers were required to include in their unit rates all costs associated with delivering continuous improvement during the Contract.

69. The SoR addresses conflicts of interest and segregation of duties. It expressly prohibits the person who carries out surveys being engaged to carry out inspections or quantity checks. It also expressly provides that the person who carries out the survey *can* be the same person who carries out the pre-BER assessment and the post-BER assessment. If the person who conducts the pre-BER assessment does not conduct the survey, then that person can conduct the inspection, quantity check and post-BER assessment.

70. The SoR contains scheme specific information at Schedule 3, including information in relation to the BEWH Scheme. It is stated that the "*intent in offering the detail in these Schedules is to ensure that the Tenderer is clear as to the tasks that will be undertaken and their supporting methodology which are to be included within the tendered Unit Rates.*"

71. Schedule 3 also contains a statement regarding ambiguity, noting the obligation on Tenderers to bring any conflict or ambiguity to the attention of the SEAI during the Tender process before the appointment is made. It is stated that the principle is that the Contract will take precedence but that if this doesn't resolve any potential issues, it is for SEAI, acting reasonably, to choose which document or clause takes precedence. The inconsistency between what the SoR states about the resolution of ambiguities and what is stated within the ISFT was not addressed by the parties.

72. The scheme requirements for the BEWH Scheme are set out as a numbered list of ten items. The first requirement listed is pre-BER assessments, the second is home energy surveys.

73. In relation to pre-BER assessments, it is explained that a BER Assessment Certificate is an indication of the energy performance of a home. It states (at §3.2.4):

All homes on the Scheme must have a Pre-BER Assessment. Approximately 80% of applications will require a Pre-BER Assessment. The BER Assessment establishes the energy efficiency baseline to measure the uplift in building performance before and after the works. The Pre-BER Assessment may inform decision making.

74. It then explains the following in relation to surveys (at §3.2.5):

Home Energy Surveys undertaken by the Managing Agent recommend energy upgrade works for Works Contractors. The survey process affirms the extent to which the home is eligible for energy upgrade works and makes recommendations on the measures to be installed by SEAI's panel of Works Contractors, See Schedule 9, Annex 3.2, section a.

Applicants to BEWH will have been pre-screened for eligibility by SEAI. Eligible applicants are assigned to the Managing Agent by way of a status update on the SEAI database, see Schedule 9, Annex 3.2.5a for sample screenshot of this database.

The following key steps are required to support the survey process:

- *Call Homeowners before the Survey takes place to ensure the property meets minimum eligibility requirements and update SEAI's database, see Schedule 9, Annex 3.2, Sections a & c for further details.*
- *Where the call indicates properties are eligible, allocate Surveys to surveyors using the SEAI database. Allocations are made in the context of pre-defined SEAI prioritisations, which seek to carry out surveys within prescribed periods of time. Reductions in the time from Application to Survey are frequently sought, so prioritisations are expected to change as the Homes are completed and the Scheme develops.*
- *Schedule the survey with the Homeowner.*
- *Issue notification and confirm survey appointments.*
- *Where the call indicates properties are ineligible, followed cancellation process, see Schedule 9, Annex 3.2, section c.*"

75. Scheme Requirement 8 is Technical Standards. At §3.2.11.2, Schedule 3 provides:

Technical standards relevant to this Scheme include but are not necessarily limited to those outlined in Schedule 1 and as outlined below.

76. The technical standards listed include the BEWH Application Guidelines ("**the Guidelines**") which are issued to homeowners, and a link to the relevant webpage is included. This section of the SoR concludes:

Services are to be delivered the Managing Agent in accordance with these standards. The Managing Agent staff will be expected to have a thorough, knowledge of these documents.

77. The Guidelines were not included within the SoR. They were exhibited by KSN and include provisions highlighted by it. There is a section entitled '*Eligibility – Who can apply*'. Next there is a section entitled '*Eligibility – What homes can be upgraded*'. It is in the following terms:

6. Eligibility – What homes can be upgraded?

Whether or not an applicant is eligible to participate in the Scheme will be determined at the Application Stage. In addition to having an eligible payment, your home must also be eligible. All the following conditions must apply to your home in order to qualify for works.

- *Your home must be located in the Republic of Ireland;*
- *You must own and live in your own home;*
- *Your home must be your principle/main residence;*
- *Your home must have been built and occupied before 1 January 2006;*
- *Your home must have a published BER.*

All applications will be automatically checked for a BER at the start of the application process. If you do not have a BER for your home, SEAI will carry one out at no cost to you. This will take place before your home is surveyed. Once your property has a published BER, the validation process will be completed, and the application will proceed if the eligibility and home criteria are met. Homes which do not meet the home criteria will be cancelled.

Pre-BER Assessment where applicable

For homes with no published BER, the energy assessment team will contact Eligible Applicants, arrange for a BER assessment to be carried out on the home. An Energy Assessor will visit the Eligible Home to assess the energy performance of your home subsequent to the completion of the Works. A BER Certificate and Advisory Report will be sent in the post to you and will also be published on SEAI's national BER Register.

78. The eligibility criteria for the BEWH Scheme are contained in Annex 3.2 which is referenced in Schedule 3 of the SoR:

"*In order to qualify for the Scheme, an Eligible Applicant must:*

- *Own and live in his/her own home;*
- *The home must be the Homeowner's main residence, where they live most days of the week*
- *The home must have been built and occupied before 2006*
- *The Homeowner must be in receipt of one of the following welfare payments from the state:*

  ✓*Fuel Allowance as part of the National Fuel Scheme*

  ✓*Job Seekers Allowance for over six months and have a child under seven years of age;*

  ✓*Working Family Payment*

  ✓*One-Parent Family Payment*

  ✓*Domiciliary Care Allowance*

  ✓*Carers Allowance and live with the person you are caring for*

  ✓*Disability Allowance for over six months and have a child under seven years of age*

Whether or not an applicant is eligible to participate in a Scheme will be determined at the Application Stage.

In addition to being an Eligible Applicant, the home must be suitable for the Work(s). A Surveyor will determine the suitability of the home at the Survey Stage.

79. It is then stated that the Managing Agent will be responsible for administering and updating the BEWH survey list issued from SEAI. It says that the following processes are required to support this service:

> *A survey list is issued to the Managing Agent through the changing of application status on the BEWH database by the SEAI. Allocation of the survey list to the Managing Agent is expected to take place approximately once a month.*
>
> *...*
>
> *SEAI required that the Managing Agent prioritise surveys in the context of pre-defined SEAI prioritisations, which seek to carry out surveys within prescribed periods of time. Both oldest applications and homes with a pre-BER value of E, F, or G are higher priority. SEAI will define the priority 1 and priority 2 homes and will inform the Managing Agent accordingly. The Managing Agent must survey homes in order of these priorities.*

80. Annex 3.2 then contains detail of what information a survey must include. A Surveyor's Manual, itself running to over 200 pages, is also appended to the SoR, explaining in detail how a survey must be conducted.

81. The SoR also contains a draft Contract which contains, at Schedule B, the SoR.

82. Tenderers were permitted to seek clarifications of the ISFT. The deadline for so doing was 20 March 2024. As referred to above, the requests for clarification and responses given were deemed to form part of the ISFT. SEAI issued five separate sets of clarifications to Tenderers. Questions 1 to 56 were answered on 15 March 2024, questions 57 to 77 on 21 March 2024, questions 78 to 119 and questions 120 to 139 were both answered on 25 March 2024, and questions 140 to 152 on 26 March 2024. The closing date for submission of final tenders was 3 April 2024.

83. The parties identified clarifications which they consider relevant to the issues in these proceedings.

84. Request for clarification 7 was as follows:

Can you please confirm if the clarifications issued under the earlier sections of the competitive dialogue process still apply for this section of the tender? Or which clarifications still apply.

85. SEAI replied:

Tenderers are advised the Dialogue stage of the procurement closed at issuance of ISFT. Queries issued at Dialogue Stage were relevant to the Dialogue and the content of and specification of the ISFT is the basis on which Tenderers should submit their response and as such takes precedence. Any queries or clarifications relating to the ISFT should be submitted in accordance with the protocol set out in the ISFT.

86. At request 55, a tenderer raised the following query:

Re: Appendix 5 Pricing Schedule - the volume of Post BER assessments is greater in each year than the Pre BER Assessments. Is this because when pre BER assessments are done at the same time as surveys they are reflected within the Surveys row?

87. SEAI replied:

The volume of Post BER Assessments will be greater than Pre BER Assessments in any year. Section 3.2.4 of the Statement of Requirements states: "Approximately 80% of applications will require a pre-BER Assessment". This is because some homes will already have a valid Pre-BER Assessment in place before they apply to the BEWH Scheme. Having a valid Pre-BER Assessment at application stage will likely reduce waiting times for some Applicants.

88. Request for clarification 90 was in the following terms:

Currently what percentage of Pre-BER assessments and surveys are conducted during the same visit by the same person?

89. As will be discussed, SEAI place significant reliance on its reply to this query (and to query 55):

> *SEAI holds no data on this. SEAI does not mandate surveys and Pre-BER Assessments to be carried out at the same visit. Carrying both out at the same time is an opportunity for operational and cost efficiency for the Managing Agent and does improve the Customer experience as fewer people visit their home. Carrying both out at the same visit is at the Managing Agents discretion. Refer the Statement of Requirements, Section 1.12.1 Examples of SoD and CoI for restrictions surrounding the carrying out of these activities at the same visit.*

90. Finally, request for clarification 98 was the following:

> *Please can you provide further information about the system/s and processes that are used to manage the allocation and scheduling of work in respect of surveys, BER assessments and inspections for the BEWH scheme. Is the allocation of work to individual surveyors, assessors and inspectors directly and centrally controlled by the Managing Agent? Is the scheduling and allocation of this activity managed by the Managing Agent using SEAI provided systems. How will this be impacted by the introduction of MSFS?*

91. And SEAI replied:

> *Please refer to Annex 3.2., Section 3.2.c for details of allocation and scheduling of surveys through the BEWH Database. Annex 3.2, Section 3.2.i details the inspection information and Annex 3.2, Section 3.2.j for BER assessments. Allocation is by SEAI whereas scheduling is by the Managing Agent. The Managing Agent chooses whom it allocates work to in its' Field-based Staff, be it for surveys, BER Assessments or inspections. The Managing Agent uses its' own systems for scheduling Pre-BER Assessments and surveys. Inspections scheduling and allocation to Field-based Inspectors is managed through the SEAI inspections system, see Annex 3.1 Section 3.1.a Scheduling of Inspections for details. Post BER Assessments with inspection are managed through the inspections system. Post BER Assessment (without inspection) are managed through the Managing Agents' own system. The introduction of MSFS will not*

change the allocation & scheduling methodology set out above. SEAI would expect improved functionality in the future.

92. When assessing the submitted tenders, SEAI identified that KSN's total tender price appeared high by comparison to other tenderers, by reference to industry norms, prevailing market conditions, and the estimated value of the Contract stated in the Contract Notice. It sought confirmation that there were no errors in KSN's pricing schedule by letter dated 2 May 2024. KSN replied the same day, confirming that there were no errors and rejecting any suggestion that its tender should be regarded as abnormally high within the meaning of section 19 of the Regulations (this appears to be an incorrect reference to Regulation 69 of the European Union (Award Of Public Authority Contracts) Regulations 2016 (SI 284 of 2016. KSN's letter contained the following assertion:

We do not accept that a comparison to other tenderers is an appropriate basis for considering our Tender as "abnormal". Tenderers will undoubtedly be influenced by the estimated value of the contract which was published in the Contract Notice. As the incumbent supplier, we have a unique understanding of the actual cost involved in the contract and have tendered on the basis of SEAI's requirements for this tender competition (as further clarified and specified during the competitive dialogue process) as well as by reference to industry norms and prevailing market conditions. If our total price is "high by comparison to other tenderers", those tenderers may not fully appreciate the matters raised in this letter. This raises the genuine question as whether those lower priced tenderers could in fact perform the contract on the basis of their tendered prices. We would be concerned that the inaccurate pre-tender estimate may have influenced these tender submissions. We reserve our right to raise issues in relation to the abnormally low pricing in other tenders particularly given the relative scoring methodology for price in this tender competition.

93. SEAI also wrote to Abtran regarding what SEAI considered might be Abtran's abnormally *low* tender. As that engagement is at the heart of the second aspect of KSN's claim, it is detailed in a separate section below.

94. By notice dated 14 June 2024, KSN was notified that Abtran was the successful tenderer. The scores awarded under the previously identified award criteria were provided.

It was apparent therefrom that Abtran's tender had scored lower than KSN's in relation to all criteria other than cost, where Abtran scored a little over twice the marks of KSN's tender, but that the score in relation to cost had proved decisive.

95. On 18 June 2024, solicitors for KSN wrote to SEAI identifying their concerns regarding the outcome of the Competition. They identified that Abtran's score in relation to cost meant that Abtran's tendered cost must have been less than half KSN's tendered cost (in fact the letter says more than half, but, in context, it is clear that it was intended to suggest less than half). The solicitors' letter stated that in light of their client's "*considerable experience as incumbent in providing the Services*", their client was "*at a loss to understand how the services could be provided at such a low price*". The letter raised a number of queries, including the following:

> *h) If SEAI did raise clarifications with the Successful Tenderer, what elements of the Successful Tenderer's Cost submission required explanation?*
>
> *…*
>
> *j) Did SEAI compare the cost of requirements under the TUPE Regulations and Full-Time Equivalent contractors from 2023 volumes of work with the volumes of work required under the Pricing Schedule in the ISFT to establish the labour only costs?*

96. SEAI's solicitors replied by letter dated 21 June 2024. In response to the above-quoted questions, they replied:

> *h) In compliance with its obligations pursuant to Regulation 69(1) of the Procurement Regulations and in consideration of recent case law of the Irish High Court in this area, our client raised a number of clarifications with the Successful Tenderer regarding its pricing submission and sought a detailed breakdown of each of the cost components that make up the tendered unit rates for the Core Services.*
>
> *In addition, our client sought and obtained confirmation from the Successful Tenderer that:*
>
> *(i) it complies unconditionally and in all respects with all social, environmental and labour laws;*

(ii) the full costs associated with all activity and all proposed services were included in its pricing schedule; and

(iii) there were no other costs associated with their tender to which SEAI is exposed or would be expected to bear outside of the tendered price.

As noted above, the clarification process concluded to our client's satisfaction on 10 June 2024.

…

(j) Our client raised clarifications with the Successful Tenderer (as outlined by the response to point g) above) which sought specific details in relation to the cost components of the Successful Tender's pricing submission.

Specifically, the Successful Tenderer was requested by our client to provide a detailed breakdown of each of the cost components that made up the tendered unit rates for the Core Services including to:

a) clearly set out what cost components were included in each unit rate on a rate-by-rate basis; and

b) clearly identify the allowance in financial terms within each unit rate for each cost component together with the basis for that allowance.

Our client confirms that it compared the cost of requirements under the TUPE Regulations and fulltime equivalent ("FTE") contractors from 2023 volumes of work with the volumes of work required under the Pricing Schedule in the ISFT to establish the labour only costs. Our client was satisfied that the salary costs included in the Successful Tenderer's tendered price were consistent with current market salaries for the various roles included in its tender. The Successful Tenderer provided a resourcing profile for the term of the contract with confirmation that all contractor costs were included in the tendered rates. This included a detailed explanation of the basis on which these resourcing numbers were established and how the Successful Tenderer will deliver the services at the tendered price."

97. There was further correspondence between the parties prior to the institution of proceedings, regarding other alleged errors in the assessment of the tenders, largely relating to issues not relied on at the hearing of the action, such as compliance with the European

Communities (Protection of Employees on Transfer of Undertakings) Regulations 2003 (SI 131 of 2003) ("**the TUPE Regulations**").

98. On 9 July 2024, KSN issued proceedings challenging the Decision.

Other factual matters

99. Other factual matters were identified by the parties as relevant. As noted, KSN was the incumbent service provider at the time of the commencement of the Competition. It highlighted differences between the tender the subject matter of this Competition and the immediately preceding tender competition. In that competition, the tender documents had included a pricing schedule which expressly enabled pricing to be proposed on the basis that services might be combined.

100. Prior to the initiation of the tender, SEAI carried out a pre-tender market consultation ("**PMC**") process, including a town hall meeting which both KSN and Abtran attended (along with other tenderers). In her affidavit verifying the original Statement of Opposition, Marion O'Brien, director of corporate services with SEAI, avers that the PMC process was prompted, *inter alia*, by concern on SEAI's part regarding the paucity of tenderers in the previous competition. In that process, KSN had been the only tenderer. KSN was only appointed after that tender process following "*several months of negotiation in relation to service delivery and payment rates which resulted in a substantial reduction in the overall contract value.*"

101. Both parties highlight that there was, in fact, some combining of services under the previous contract. KSN notes that there has been a recent pilot confined to the combining of a *second* pre-BER assessment with a specialist survey for homes earmarked as suitable for heat-pumps. There was also a pilot in 2021 to combine post-BER assessments and inspections which KSN regard as having been unsuccessful. It argues that these pilots have no relevance to whether such combinations were permissible under the SoR.

102. A large number of affidavits were sworn by each side. None of the deponents were cross-examined on their affidavits. Michael Slevin, a director of KSN, swore no less than nine affidavits. In addition, the solicitor for KSN swore a number of affidavits dealing with

the confidential material to which her client did not have access. In his seventh affidavit, Mr Slevin explained that KSN did not submit proposals to combine services because, unlike the previous competition, this was not provided for in the tender documents.

103. Abtran proposed eleven different "improvement initiatives" as part of its tender. These include two which KSN claim were not permissible unless approved as Value Added Services, combining of appointments and uberisation of BER assessments.

Applicable legal principles – the methodology claim

General principles

104. The parties agree that the tender the subject of these proceedings is governed by Council Directive 2014/24/EU. This has been transposed into national law by the European Union (Award Of Public Authority Contracts) Regulations 2016 (SI 284 of 2016). For present purposes, I will refer to the relevant provisions of the implementing regulations ("**the Public Contracts Regulations**") rather than the Directive. There is no relevant difference between the terms of each.

105. Regulation 18 of the Public Contracts Regulations sets out the governing principle for public procurement:

> *18. (1) A contracting authority shall, in procuring, treat economic operators equally and without discrimination and shall act in a transparent and proportionate manner.*

106. The competitive dialogue procedure is set out in Regulation 30 of the Public Contracts Regulations. Of relevance are the following provisions:

> *30. (1) In a competitive dialogue:*
>
> *...*
>
> *(h) a contracting authority—*
>
> *(i) shall open, with the participants selected in accordance with the relevant provisions of Regulations 56 to 66, a dialogue the aim of which*

shall be to identify and define the means best suited to satisfying their needs, and

(ii) may discuss all aspects of the procurement with the chosen participants during the dialogue referred to in clause (i);

...

(k) in accordance with Regulation 21, a contracting authority shall not reveal to the other participants solutions proposed or other confidential information communicated by a candidate or tenderer participating in the dialogue without the agreement of that candidate or tenderer;

...

(3) In a competitive dialogue, the contracting authority shall continue the dialogue until it can identify the solution or solutions which are capable of meeting its needs.

(4) (a) Where a contracting authority has declared that a dialogue is concluded and has so informed the remaining participants, the contracting authority shall ask the remaining participants to submit their final tenders on the basis of the solution or solutions presented and specified during the dialogue.

(b) The tenders submitted in accordance with subparagraph (a) shall contain all the elements required and necessary for the performance of the project.

(c) The tenders submitted in accordance with subparagraph (a) may be clarified, specified and optimised at the request of the contracting authority, but such clarification, specification, optimisation or additional information may not involve changes to the essential aspects of the tender or of the public procurement, including the needs and requirements specified in the contract notice or in the descriptive document, where variations to those aspects, needs and requirements are likely to distort competition or have a discriminatory effect.

(5) In a competitive dialogue:

(a) a contracting authority shall assess the tenders received on the basis of the award criteria laid down in the contract notice or in the descriptive document;

...

Interpretation of tender documents

107. The correct approach to the interpretation of tender documents is well established. As made clear in Case C-19/00, *SIAC v Mayo County Council*, it is informed by the principle of transparency:

> "*41 Next, the principle of equal treatment implies an obligation of transparency in order to enable compliance with it to be verified (see, by analogy, Case C-275/98* Unitron Scandinavia *and* 3-S *[1999] ECR I-8291, paragraph 31).*
>
> *42 More specifically, this means that the award criteria must be formulated, in the contract documents or the contract notice, in such a way as to allow all reasonably well-informed and normally diligent tenderers to interpret them in the same way.*"

108. The reasonably well-informed and reasonably diligent tenderer (the "**RWIND tenderer**") represents the point of view which the court must take in interpreting tender documents. In *Gaswise v Dublin City Council* [2014] 3 IR 1, [2014] IEHC 56, the High Court (Finlay Geoghegan J) made clear that the interpretation of tender documents is a matter for the court, *i.e.* it is a question of law, but that the court must put itself in the shoes of the RWIND tenderer responding to the tender in question, not that of a lawyer. In so doing, the court quoted the following passage from *Clinton v Department of Employment* [2012] NIQB 2 with approval:

> "*The* SIAC *test… exhorts the court to attempt, so far as reasonably practicable, to occupy the shoes of the hypothetical tenderer. The test provides some insight into the characteristics and attributes of such a tenderer: well, but not necessarily fully, informed and usually careful and attentive, but not invariably a paragon of diligence. The incorporation of the adjectives 'reasonably" and 'normally' in the test, convey the notion of a tenderer who may be vulnerable to a certain (though not excessive) degree*

of error, inattention and other human weakness. In other words, the SIAC *hypothetical tenderer is a terrestrial, rather than celestial, being, hailing from earth and not heaven. In its determination of this issue, I consider that the court should approach the matter not as an exercise in statutory construction or as one involving the interpretation of a deed or contract or other legal instrument. To adopt such an approach would not, in my view, be consonant with the* SIAC *test. Rather, the court's attention must focus very much on the 'industry' concerned, in which the professionals and practitioners are not lawyers."*

109. The High Court (Baker J) also quoted *Clinton* with approval in *Somague v Engenharia SA v Transport Infrastructure Ireland* [2016] IEHC 435. The court continued:

"*138. The CJEU in* European Dynamics Luxembourg SA & Ors. v. O.H.I.M *Case T-299/11 also explained the objective test as a requirement of transparency*

> "In addition the principle of transparency, which is essentially intended to preclude any risk of favouritism or arbitrariness on the part of the contracting authority, implies that all the conditions and detailed rules of the award procedure must be drawn [up] in a clear, precise and unequivocal manner in the contract notice or tender specifications in order, first, to enable all reasonably well-informed and normally diligent tenderers to understand their precise scope …."

139. As Finlay Geoghegan J. explained, the well informed and normally diligent tenderer would not be approaching a tender document as a lawyer but rather as a tenderer from the relevant industry. In a case such as the present case, the tenderer would approach the question from the point of view of a professional practitioner with engineering experience and knowledge.

140. The test is objective, but the reader is a person who can be expected to have knowledge and understanding of the area of expertise in which the tender is made, and to have diligently considered the requirements of the works."

110. The courts have emphasised that the tender documents must be understood in the context of the relevant industry (see *Word Perfect Translation Services v Minister for Public Expenditure and Reform (No. 3)* [2021] 1 IR 698 at p. 718).

111. In order to understand how tender documents might be understood by persons within the relevant industry, it is permissible to adduce evidence of same. In *Sanofi v Health Service Executive* [2018] IEHC 566, one of the issues which the High Court (McDonald J) was required to address was whether the contracting authority had disclosed all criteria which it proposed to apply in awarding a contract for the supply of a 6-in-1 vaccine. Sanofi had been docked marks on the basis that its vaccine could not be given to the entire cohort of potential patients. The question for the court was whether the reference to "acceptability" as a criterion would be understood by RWIND tenderers as encompassing the capacity of the vaccine to be administered to the total cohort of patients. By reference to evidence adduced by the HSE and the successful tenderer, the court concluded that a RWIND tenderer would have understood that the acceptability of a vaccine included a consideration of whether it could be administered to the entire cohort, and therefore there had been no failure to disclose the award criteria.

112. In *SERE Holdings v Health Service Executive* [2024] IECA 197, the Court of Appeal was required to consider whether the transport of organs should be regarded as one of the services encompassed by a tender for emergency air ambulance services. It was agreed that this was a question of the interpretation of the tender documents, and how they would be understood by the RWIND tenderer. In his judgment, O'Moore J pointed out that no independent party had given evidence on this issue, and, at §43, identified the type of evidence which might be relevant to a consideration of this issue:

> "*…The evidence that could have been relevant to [the trial judge's] task in construing the tender documents through the eyes of the RWIND tenderer would have been evidence as to what a person in that industry would make of certain terms - "emergency air ambulance services" being the most obvious.*"

113. The UK Supreme Court has made clear that admissibility of such evidence, however, does not alter the fact that the RWIND tenderer test is an objective test, or require that tender

documents only be capable of one subjective interpretation. In *Healthcare at Home Ltd v Common Services Agency* [2014] UKSC 49, it held:

> "***3***. *It follows from the nature of the reasonable man, as a means of describing a standard applied by the court, that it would be misconceived for a party to seek to lead evidence from actual passengers on the Clapham omnibus as to how they would have acted in a given situation or what they would have foreseen, in order to establish how the reasonable man would have acted or what he would have foreseen. Even if the party offered to prove that his witnesses were reasonable men, the evidence would be beside the point. The behaviour of the reasonable man is not established by the evidence of witnesses, but by the application of a legal standard by the court. The court may require to be informed by evidence of circumstances which bear on its application of the standard of the reasonable man in any particular case; but it is then for the court to determine the outcome, in those circumstances, of applying that impersonal standard.*"

114. Lord Reed endorsed the following statement from the decision of the Inner House:

> *"**26.** The court's decision will involve it placing itself in the position of the reasonably informed tenderer, looking at the matter objectively, rather than, as occurred here to a degree, hearing evidence of what such a hypothetical person might think … Although different from an orthodox exercise in contractual interpretation, the question of what a reasonably well-informed and normally diligent tenderer might anticipate or understand requires an objective answer, albeit on a properly informed basis. Just like those other juridical creations, such as the man on the Clapham omnibus (delict) or the officious bystander (contract), the court decides what that person would think by making its own evaluation against the background circumstances. It does not hear evidence from a person offered up as a candidate for the role of reasonable tenderer. In a disputed case, the court will, no doubt, need to have explained to it certain technical terms and will have to be informed of some of the particular circumstances of the terms or industry in question, which should have been known to informed tenderers. However, evidence as to what the tenderers themselves thought the criteria required is, essentially, irrelevant."*

115. He continued:

"*27. As the Lord Justice Clerk made clear, evidence may be relevant to the question of how a document would be understood by the RWIND tenderer. The court has to be able to put itself into the position of the RWIND tenderer, and evidence may be necessary for that purpose: for example, so as to understand any technical terms, and the context in which the document has to be construed. But the question cannot be determined by evidence, as it depends on the application of a legal test, rather than being a purely empirical enquiry. Although, as counsel for the appellants emphasised, the question is not one of contractual interpretation – the issue is not what the invitation to tender meant, but whether its meaning would be clear to any RWIND tenderer – it is equally suitable for objective determination.*"

116. The above statements are consistent with the approach of the CJEU and Irish courts to the interpretation of tender documents.

117. One further case addressed by the parties was Case C-368/10, *Commission v Netherlands*. In that case, a contracting authority had issued a contract notice for the supply of automatic coffee machines. The contract notice contained specifications, including a specification that the contracting authority used two specified coffee brands and that, if possible, ingredients should comply with those labels. A query was raised at the clarification stage as to whether "*or equivalent*" to those labels could be read into the specifications, and the contracting authority replied that it could. The CJEU held that the contracting authority had impermissibly altered the rules of the competition:

"*55 While, as the Advocate General states in paragraph 71 of her Opinion, additional information relating to the specifications and any supporting documents, referred to in that provision, may clarify certain points or supply certain information, they cannot change, even by means of corrections, the meaning of the essential contractual conditions, to which category the technical specifications and the award criteria belong, as those conditions were formulated in the specifications, upon which the economic operators concerned legitimately relied in taking the decision to prepare to submit a tender or, on the other hand, not to participate in the procurement procedure concerned. That is apparent both from the very use, in Article 39(2), of the expression 'additional information' and from the brief period of time, that is to say six days,*

allowed between the communication of such information and the deadline for receipt of the tenders, in accordance with that provision.

56 In that regard, both the principle of equal treatment and the obligation of transparency which flows from it require the subject-matter of each contract and the criteria governing its award to be clearly defined from the beginning of the award procedure (see, to that effect, Case C-299/08 Commission v France *[2009] ECR I-11587, paragraphs 41 and 43).*"

Arguments – the methodology claim

KSN's arguments

118. In its written submissions, KSN suggests that SEAI's error in methodology was in concluding that it was permissible for tenderers to tender on the basis of methodologies other than those set out in the Statement of Requirements (SoR). It claims that Abtran's tender was not in accordance with the SoR and, therefore, SEAI erred in accepting it for consideration.

119. In fact, SEAI does not dispute that tenderers were required to tender on the basis of the methodologies in the SoR. However, it contends that Abtran's tender *was* in accordance with the SoR and, therefore, was a valid tender. The dispute, therefore, is whether Abtran tendered on a basis permitted by the SoR. The answer to this question turns on an interpretation of the tender documents.

120. Three of the core services required to be provided by the successful tenderer were pre-BER assessments, building surveys, and post-BER assessments. At the heart of KSN's case in its written submissions and at the hearing of the action is its assertion that the SoR did not permit a pre-BER assessment and a building survey to be carried out as part of the same visit. This suggestion is first contained in Mr Slevin's second affidavit, sworn in response to Ms O'Brien's verifying affidavit which had referenced the successful tenderer's reliance on "*alternative methodologies*". KSN's *pleaded* claim, first advanced in the first amended Statement of Grounds and elaborated on in the final Statement of Grounds, only expressly

refers to the combination of pre-BER assessments, surveys and inspections as part of a claim, not pursued at hearing, that SEAI had unlawfully evaluated the award criteria. Under a separate ground, its core claim that SEAI erred in accepting Abtran's tender even though it was non-compliant with the SoR, it refers to the impermissible combining of services, but does not identify which services it was impermissible to combine. Under the heading 'lack of transparency', it expressly refers to the combination of *post*-BER assessments and inspections. It notes that it currently combines these core services for a percentage of homes under the BEWH Scheme, but because "*the Statement of Requirements and the Pricing Schedule did not provide for combination of services (unlike the Pricing Schedule in the 2019 tender competition which did provide for combinations), [KSN] did not include any proposals with regard to combining services. The Applicant did not provide for such a methodology because it was not permitted by the tender documents.*" SEAI did not, however, advance any argument that the claim now pursued has not been pleaded.

121. KSN does not identify any statement in the tender documents which expressly prohibits pricing on the basis that a pre-BER assessment and building survey may be carried out in a single visit to a home. It acknowledges that there *are* express prohibitions on the same person providing other services, *e.g.* surveys and inspections or quantity checks. However, it contends that properly understood, it was clear from the tender documents that it is simply not possible to combine pre-BER assessments and surveys in a single visit if the services are to be provided in the manner prescribed by the SoR. It relies on a number of features of the tender documents which, it argues, confirm its interpretation.

122. It refers to the competition for the previous contract where, it notes, the tender documents included a pricing schedule which expressly provided for tenderers to propose prices on the basis of combining services. No such provision was made in the pricing schedule included within the tender documents in the Competition. KSN argues that this would have informed the RWIND tenderer that proposals to combine services were not permitted as part of the Competition. As noted above, Mr Slevin has averred that although it currently provides combined post-BER assessments and inspections in about 20% of cases under the current contract, it did not make any proposal to do so in this Competition because KSN understood from the pricing schedule that, unlike the earlier competition, this was not permissible.

123. KSN also relies on the fact that the earlier competition also provided an estimate of the number of pre-BER assessments and surveys which could be combined. It appears that SEAI sought tenders in the earlier competition on the basis that the same number of pre-BER assessments could be combined with a survey as would take place on separate visits to a property. KSN argues, in reliance on *Sanofi*, that the RWIND tenderer would have interpreted the tender documents in light of this change from the previous tender. It also argues that if the current tender documents were intended to allow for the combination of services, it would have been necessary for SEAI to set out the extent to which services could be combined, as it had done in the previous competition. The failure to do so indicates that combining of services was not anticipated.

124. KSN highlights that the impact that the combining of services could have on pricing was potentially drastic. In Mr Slevin's fifth affidavit (at §29 - §33), he provides a "*worked example*" of the potential effect of combining 60% of surveys with pre-BER assessments, based on hypothetical rates. He calculates the cost saving when compared to all surveys being carried out separately at €8,796,500.00, or 25% of the total cost of providing this service. He carried out a similar calculation for combining post-BER assessments which also resulted in significant savings, in excess of €4 million, or 10% of the total cost of that service.

125. KSN relies on the process adopted for the Competition, the competitive dialogue process. It notes the language of the ITPD and the ISFT which describes the purpose of the dialogue phase was to enable those invited to identify potential solutions so that SEAI could seek tenders on the basis of the "*optimal solution*" (see, for instance, §1.1 of the SoR). It contends that the ISFT and SoR identified the optimal solution and that tenderers were not free to identify any alternative solution. It suggests that the dialogue phase would have been rendered pointless if, at the tender stage, tenderers were free to offer alternative means of delivering the services required by SEAI than the method decided upon by SEAI as the optimal solution following the dialogue process.

126. KSN argues that any change to the manner in which the core services were delivered from that prescribed in the SoR could only be delivered as a Value Added Service, by following the procedure set out in the SoR for approval of such a service: it was not permissible to propose alternative means of providing the core services in response to the

tender. It highlights that the SoR states that Value Added Services may include "*development and deployment of initiatives to improve efficiency to Core Services*". It argues that a proposal to combine services is, therefore, a Value Added Service within the meaning of the SoR.

127. KSN places most reliance on its contention (at §63 of its written submissions) that the "*eligibility, prioritization, and workflow rules contained in the [SoR] ruled out the carrying out of pre-BER assessments and surveys in combination*." There are various provisions of the ISFT, the SoR (including the schedules and annexes thereto) and of the BEWH Guidance documents which they contend confirm its interpretation.

128. KSN states that in order for a home to be eligible for the BEWH scheme, it must have a BER rating. It notes that under the scheme, eligible homes are accorded priority based on their BER rating, with the oldest applications and lowest rated being prioritised for surveys. It argues that, therefore, a pre-BER assessment, where that is necessary, must be carried out before a decision on prioritisation can be made, and accordingly, a survey cannot be carried out until a pre-BER assessment has been completed, and a priority assigned.

129. It refers to Schedule 3 of the SoR which contains scheme specific information. As noted above, the purpose of providing the information was to ensure that tenderers were clear as to the tasks that would be undertaken and their supporting methodology. Schedule 3.2 describes the BEWH Scheme. It is here that the requirements of the managing agent for this scheme are listed in what KSN contends is sequential order, starting with pre-BER assessments and then surveys.

130. Sections 3.2.4 and 3.2.5, describing the survey process, starting with a pre-survey call, are set out above.

131. The process is elaborated on in Annex 3.2 c of the SoR, applicable to the BEWH Scheme. It describes the primary function of the Managing Agent's pre-survey call:

> *1. The primary function is an educational call to:*
>
> > *i. Manage the Homeowner's expectations in terms of a completion time for works*

ii. Advise the Homeowner to communicate fully with their Works Contractor, only confirming works can proceed once they are happy with what is going to be installed and how

iii. Advise the Homeowner of potential inspections, the requirement for a BER & Energy Advice.

132. Annex 3.2 c also contains the following statement on which KSN relies for its interpretation of the tender documents:

The Managing Agent will be responsible for administering and updating the Better Energy Warmer Homes survey list issued from SEAI. The following processes are required to support this service:

A survey list is issued to the Managing Agent through the changing of application status on the BEWH database by the SEAI. Allocation of the survey list to the Managing Agent is expected to take place approximately once a month.

…

SEAI required that the Managing Agent prioritise surveys in the context of pre-defined SEAI prioritisations, which seek to carry out surveys within prescribed periods of time. Both oldest applications and homes with a pre-BER value of E, F, or G are higher priority. SEAI will define the priority 1 and priority 2 homes and will inform the Managing Agent accordingly. The Managing Agent must survey homes in order of these priorities.

133. Section 3.2.1 of the SoR refers tenderers to its website for additional details of the BEWH Scheme and contains a link to Guidelines for how to make an application. The Guidelines refer to the fact that if an applicant's home does not have a BER rating, SEAI will carry one out at no cost. The Guidelines state that "*this will take place before your home is surveyed*."

134. In its affidavits and written submissions, KSN placed some reliance on the fact that the IT system is not currently set up to process a pre-BER assessment and a survey in the same day. This was disputed by SEAI.

135. KSN argue, in light of the above matters, that the "*supporting methodology*" described in the tender documents, interpreted in accordance with the principles described above, makes clear that the combining of services was not possible and therefore that a tender submitted on the basis of such combining of services, such as Abtran's, was a non-compliant tender and should have been rejected.

136. KSN also argues that Abtran's proposal to "*uberize*" the provision of core services was not compliant with the SoR. Abtran proposed to pilot this model and, if successful, roll it out across the Schemes. Neither in its written submissions, nor in its oral submissions did KSN explain how the uberisation proposal, in effect, an intention to sub-contract on an *ad hoc* basis the provision of BER assessment services, was inconsistent with any particular methodology prescribed by the tender documents. Rather, it argues that, as with the combining of services, it should have been proposed as a Value Added Service.

137. Insofar as KSN complains that the success of the pilot was uncertain, and introduced dependencies into Abtran's pricing, it seems to me appropriate that that be considered under second argument, as relevant to the question of pricing.

SEAI's arguments

138. SEAI made a number of preliminary observations at the outset of its submission. It highlighted its evidence regarding the unsatisfactory nature of the earlier competitions and its desire to increase competitiveness in light of those earlier competitions.

139. It also argues that KSN places too great a reliance on its particular understanding of the services being tendered for as incumbent tenderer. It highlights repeated statements by KSN in its affidavits and even in its pre-litigation correspondence, *e.g.* in response to the suggestion that its tender price was abnormally high, and its queries about Abtran's purportedly abnormally low price, that it has a unique understanding of the complexities involved in delivering the services required.

140. This, it submits, incorrectly informs KSN's analysis of the tender documents. SEAI argues that the RWIND tenderer would not have interpreted the tender documents in light of the previous tender and that KSN's reliance on *Sanofi* is misplaced.

141. In light of KSN's position as the incumbent tenderer, combining post-BER assessments and inspections in a single visit in 20% of cases, SEAI expresses surprise that KSN would now contend that that is impermissible.

142. More generally, SEAI characterises KSN's case as an assertion that there is a *prohibition* on combining services, in particular, pre-BER assessments and surveys. SEAI points out that, by contrast with the express prohibition on the same person carrying out a survey and inspection, the SoR expressly contemplates the same person carrying out a pre-BER assessment and a survey.

143. It argues that the proposal by Abtran to combine core services is consistent with the requirement in the tender documents for continuous improvement. If the SoR was as prescriptive as KSN contends, and did not permit a tenderer to propose efficiencies of the type proposed by Abtran, then the most significant qualitative scoring criteria for the Competition, which scored the tenderers on the basis of their approach and methodology to ensuring that the core services are delivered in "*an effective and efficient manner*", would make little sense.

144. It contends that the proposal could not be regarded as a Value Added Service, which are services made available to SEAI, at a cost to SEAI, on a no commitment basis.

145. Moreover, it argues, not only is there no statement in the tender documents to the effect that combining surveys and pre-BER assessments in a single visit is impermissible, both Clarification 76 at the ITPD stage and, more importantly, Clarification 90 at the ISFT stage expressly confirm that combining those services in a single visit is permissible and that tenderers were free to propose the combining of services. It suggests that KSN's interpretation of Clarification 90 as referring to the combination of services being permissible to propose as a Value Added Service is contrived.

146. In relation to KSN's identification of certain statements within the SoR and, in particular, what is said about prioritisation and scheduling, it argues that KSN has adopted a rigid approach to interpretation of tender documents more appropriate to statutory interpretation and that it has ignored, for instance, the clarifications at ITPD and ISFT stage, including Clarification 55 to the ITPD and §3.2.5 of Schedule 3 of the SoR, which refer to priorities and the approach to targeting homes for upgrades changing over time.

147. It notes that the reliance on the BEWH Guidelines is misplaced, as these are addressed to homeowners, and provided by way of background information only.

Discussion – methodology claim

148. Before considering each of KSN's arguments in detail, two preliminary observations are merited, both of which echo submissions made on behalf of SEAI.

149. The first is that KSN's argument that the combining of services was prohibited, or at least not permitted by the tender documents requires a close reading of the documentation which is at odds with the approach to interpretation advocated in the jurisprudence. The most striking thing about the documentation is that the only references to combining of services – at least the only references identified by the parties – unequivocally state that it *was* permissible for a tenderer to propose combining services, subject to segregation of duties requirements. Rather than point to express language which supports its case, KSN is required to explain away the contents of Clarification 76 (of the ITPD) and Clarification 90 (of the ISFT) in order to argue that notwithstanding those express references, combining of services was not permitted. In this regard, it is to be recalled that Clarification 90 was deemed to form part of the ISFT.

150. The second observation is that there is considerable force in SEAI's suggestion that KSN's interpretation of the documents appears to have been influenced by its position as incumbent tenderer and that, at least in some cases, the interpretation it advocates is informed by *its* particular perspective, and does not reflect that of the RWIND tenderer.

151. This is most evident in its reliance on the contents of the previous tender. I do not accept that the RWIND tenderer would have had regard to any of the contents of that tender in seeking to interpret the contents of the tender documents provided by SEAI in the Competition. KSN has not identified anything within the tender documents which would have encouraged a prospective tenderer to compare and contrast the two sets of tender competition documents, nor provided any evidence to suggest that those within the particular industry at issue here would have had a detailed understanding of the particular requirements of the previous tender competition, or would typically consider the rules of previous competitions for the purpose of understanding the rules of the current competition.

Such a proposition is inherently unlikely, especially when the requirements for transparency in any given competition are considered.

152. This is an entirely different scenario than that at issue in *Sanofi*. In that case, the court had regard to evidence that those in the industry would have known or expected that any vaccine required by the HSE needed to be acceptable to the entire cohort of patients, and would therefore have interpreted the 'acceptability' criterion in that tender accordingly. In this case, there was no evidence that those in the industry would have an understanding about the combination of services by reference to the earlier tender documents. None of the case law suggests that the RWIND tenderer should be taken to have informed itself of the contents of previous tenders for the same service. There is no evidential basis, therefore, on which I could conclude that the RWIND tenderer's interpretation of the tender documents would have been informed by the earlier tender in any way. In truth, this is unsurprising. The tender documents in this case are voluminous. The small extract from the previous tender exhibited in these proceedings suggests that the documentation for that tender was also extensive. As will be seen below, KSN argues that the RWIND tenderer would not have interpreted the tender documents by reference to Clarification 76 to the ITPD because it did not form part of the actual tender documents (the ISFT and accompanying documents). This is inconsistent with its reliance on an earlier tender, and only serves to highlight that KSN's suggestion that, in seeking to interpret the tender documents for the Competition, any putative tenderer should be expected to have regard to tender documents from the *previous competition* and note differences between the prior tender and the current tender is without merit.

153. It may well be that KSN, with its particular knowledge of the differences between the two competitions and the differences between the two pricing lists, may have attached significance to this difference as Mr Slevin's evidence suggests. But KSN's point of view is not that of the RWIND tenderer, and any reliance on those differences was misconceived. Insofar as KSN appeared to suggest that this put the incumbent at a *disadvantage*, and that the principle of equal treatment required that the tender documents be expressed in a way which avoided any confusion on the part of the incumbent, this is not an argument which is pleaded, nor is it supported by any of the authorities. In my view, it is without substance.

154. Notably, the comparison with the earlier tender appears to be the only basis upon which KSN inferred that combining *post*-BER assessments with inspections was not permitted. It did not, in its submissions, identify other reasons why this could not be done. As with pre-BER assessments and surveys, the pricing schedule in the tender did not expressly provide for combinations in relation to post-BER assessments and inspections. The evidence is that 20% of post-BER assessments and inspections are already being done in combination. Looking at this from the perspective of the RWIND tenderer, I consider it far more plausible that a tenderer with knowledge of the industry – which in this case means knowledge of the services provided by or on behalf of SEAI – insofar as their interpretation of the tender documents was informed by that knowledge, would have considered that combining of those services was possible. Certainly, I cannot identify any reason why they would have considered it *impermissible*.

155. If the combining of post-BER assessments and inspections was permissible, as I consider the most plausible interpretation of the tender documents, then this tends to suggest that the combining of other services, in particular pre-BER assessments and surveys, would also be permissible, absent other indications that they were not. I consider presently whether there are any such other indications.

156. I accept that the inclusion in the 2019 pricing schedule of a pricing mechanism for combining services meant that tendering on the basis of combining services may have been more straightforward in that competition. Tenderers would have been given some indication of the portion of cases where combining could be considered feasible, but that does not have the implication suggested by KSN, that it would have been considered impermissible by the RWIND tenderer for this Competition. The RWIND tenderer would not have compared the 2019 tender with the current tender and, therefore, would not have drawn any inference from the difference between the two competitions. When considering the tender on its own terms, the RWIND tenderer would not have interpreted the absence of guidance on how to price combining services as evidencing a prohibition on so doing. In any event, the form of the 2019 tender allowed considerable discretion on the part of tenderers in deciding what portion of services could be provided in combination, and accordingly, the difference between the two tenders is not as stark as KSN suggests.

157. I do not think KSN's reliance on the references to "*optimal solution*" in the singular is decisive. Although Regulation 30 of the Public Contracts Regulations refers to the identification of the "solution or solutions" capable of meeting the contracting authority's needs in the dialogue phase, a conclusion that the use of the singular in the ISFT is intended to be as prescriptive as KSN suggests requires an excessively legalistic interpretation of the documents, inconsistent not only with the case law, but also with, for instance, the manner in which the Competition was to be scored, where marks were awarded based on the efficiency of delivery of the core services.

158. Nor am I persuaded that the submission of a more efficient means of providing the services in response to the ISFT rendered the dialogue phases redundant, or, looked at from another perspective, that the use of the dialogue phase suggested that the outcome must be a tender based on a single prescribed solution. There is nothing in the use of the competitive dialogue procedure which inevitably leads to a more prescribed tender process than, for instance, an open tender. As SEAI point out, competitive dialogue is likely to be used in more complex tenders, where very prescriptive competition rules are less, not more, likely to be appropriate. In any event, in terms of the adaptation of the tender in response to the dialogue, we see a change in the commercial model from that initially proposed, thus showing that the dialogue phase was effective in refining the rules of the Competition.

159. Importantly, the scoring matrix for the tenders clearly stipulates that the first criteria on which tenders will be assessed is the tenderers' approach to ensuring that the core services are delivered in an effective and efficient manner. It is apparent, therefore, that the Competition did not just allow for, but encouraged proposals to deliver the core services more efficiently.

160. The suggestion that there is significance to the order in which the core services are listed in Schedule 3.2 of the SoR, relating to the BEWH Scheme, has little substance. The order in Schedule 3.2, where BER assessments are listed first, before surveys, is different than the order in which the services are listed in the ISFT and within Schedule 1 of the SoR, where surveys are listed first. There is nothing in the language of Schedule 3.2 which suggests that they have been re-ordered to reflect the order in which they must be provided. Even if there were, there is nothing to suggest from this ordering that the services could not be combined.

161. As noted above, KSN places particular reliance on the order of priorities in which surveys must be conducted. It contends that the obligation to comply with it renders combinations of pre-BER assessments and surveys impermissible. It is not, however, the barrier to combining that KSN suggests. Insofar as there are technical barriers, *e.g.* the IT system, there is nothing in the tender documents which suggests that those barriers must apply to the new Contract. To be fair, KSN did not place significant weight on the configuration of the IT system. Its primary case was about eligibility, prioritisation and scheduling requirements in the SoR and Annex 3 thereto. However, as noted, there is no stipulation that combining services is not permitted. The only references to combinations of services in the tender process strongly suggest the contrary.

162. SEAI places emphasis on clarifications given in the dialogue phase. Clarification 76 was from the ITPD, but it is instructive. The portion of Clarification 76 highlighted above is as follows:

> *It is not unusual to have homes ready for BER assessment, inspection and survey in the same housing estate or town. Indeed, surveys and pre-BER assessments could be combined as could inspections and post-BER assessments, subject to segregation of duty requirements.*

163. KSN suggest that the reference to combining in the second sentence should be understood as combining services in different houses in the same estate or town. This is implausible – it is difficult to understand why that would need to be confirmed or clarified. Moreover, the reference to segregation of duty requirements would have no relevance if that was what was being discussed. The more obvious, indeed the only sensible meaning is that the services could be combined in a single visit to a particular house, subject to segregation of duties requirements. It is true, as KSN argues, that the clarifications provided on the ITPD related to the dialogue stage, and the ISFT takes precedence over anything stated in that phase, as confirmed by Clarification 7 of the ISFT stage, but KSN relies on the entire competitive dialogue process in support of its claim, so the suggestion that what was stated at ITPD stage should simply be ignored is somewhat inconsistent. Moreover, KSN didn't identify anything which changed between the ITPD and ISFT which clearly suggested that

an option proposed at dialogue stage – the combining of services – had been ruled out in the ISFT.

164. Clarification 90 of the ISFT is in even clearer terms. KSN argues that the appropriate approach to interpretation is to start with the SoR and then consider the clarifications. I accept that there is some force in this. However, KSN acknowledges that the SoR does not include an express statement precluding the combining of services. In fact, it doesn't reference combining services at all. Rather, it is mentioned (at ISFT stage) for the first time in the clarifications (which form part of the ISFT), so it *is* helpful to see what is expressly stated about combinations, before considering the documents as a whole. Moreover, as KSN argues, the clarification cannot alter the terms of the tender (see *Commission v Netherlands*), so the clarifications are required to be consistent with the content of the ISFT and SoR.

165. Query 90 was what percentage of pre-BER assessments and surveys were carried out in the same visit. As with query 55 quoted above, query 90 indicates an understanding on the part of whichever tenderer raised it that these services could be carried out in the same visit. Far from correcting any misapprehension (in either response), that pre-BER assessments and surveys can be carried out in the same visit, this is confirmed in unequivocal terms in Clarification 90.

166. SEAI's response was that it doesn't have that data, and that combining the services is not *mandated* but it does provide an opportunity for efficiencies and improved customer experience. It says, in terms, that "*[c]arrying both out at the same visit is at the Managing Agents' discretion.*" This can only reasonably be understood as a clear indication that combining these services is permitted and is how it would have been understood by the RWIND tenderer.

167. In light of the question posed, KSN's suggestion that this must be understood as relating to providing the services as part of a Value Added Service cannot be correct. If this was what the clarification intended to convey it would have to have indicated that the combining of services is not currently possible or permissible, but that it could be proposed as a Value Added Service. There is no suggestion of this in the response. Rather, it states in terms that such combining *is* (*i.e.* is already) at the Managing Agent's discretion. If this could only be done following the change control procedure required for a Value Added Service, it would

not be at the Managing Agent's discretion; they would have to wait for approval. In any event, it is difficult to understand how a proposal to carry out two core services at the same time, or as part of a single visit to a home, in the interests of efficiency could be regarded as a Value Added Service, in other words, a service other than a core service accessible to SEAI at additional cost on a no commitment basis. Finally, as part of Clarification 90, prospective tenderers are referred to the SoR and the restrictions regarding carrying out different services in the same visit.

168. There is no dispute that clarifications cannot change requirements in tender documents. But on their face, these clarifications clearly suggest that combining is permissible. KSN's alternative interpretation is not simply strained, it is, in my view, wholly at odds with the ordinary meaning of the words used.

169. KSN point out that the same set of clarifications, at Clarification 98 reiterate that the allocation and scheduling of BER assessments and surveys is as set out in Annex 3.2. It suggests that Clarification 98 and 90 must be read as consistent with each other and therefore Clarification 90 must be read consistent with its view that combining is impermissible. However, that begs the question, is compliance with Annex 3.2 inconsistent with the combining of services as KSN suggests? Properly understood, it is not.

170. As set out in clarification 98, the *allocation* of services is a matter for SEAI. The *scheduling* of those services is a matter for the Managing Agent. Annex 3.2 c deals with the scheduling of surveys, Annex 3.2 j, the scheduling of BER assessments. The only reference in Annex 3.2 c to BER assessments is as a query to be raised in the pre-survey call (nor is there any reference to surveys in Annex 3.2 j). In other words, there is no suggestion that the SEAI will not allocate a home for a survey until after a BER assessment is completed. Indeed, the contrary is suggested by the inclusion of this as a query to be raised by the Managing Agent.

171. In Mr Slevin's affidavits (see his fifth affidavit at §62) and in submissions, KSN characterised a BER assessment as an eligibility requirement under the SoR to qualify for the BEWH Scheme. This is not correct. The eligibility requirements are set out in Annex 3.2 to Schedule 3 of the SoR. There is no reference to a pre-BER assessment as a qualifying

criterion in the SoR. Rather, the SoR makes clear that it is something which must be done before any works.

172. It is true that the Guidelines, addressed to homeowners, note in relation to eligibility that "*in order to qualify for works… [y]our home must have a published BER*", but the Guidelines do not form part of the ISFT or SoR. Insofar as they contain "*standards*", tenderers are expected to comply with them and are, therefore, expected to have detailed knowledge of them, but they could not be interpreted as imposing restrictions on tenderers regarding scheduling of pre-BER assessments with which they must comply which are not contained within the SoR. In any event, the statement in the Guidelines reflects the reality, that a pre-BER assessment must be done prior to any works.

173. The allocation of pre-BER assessments and surveys are presented in the annexes to the SoR, therefore, in separate annexes as two separate processes, not contingent on each other. The supporting methodology for each is provided, but there is no supporting methodology concerning the interaction between the two services. KSN's contention that Abtran proposed a *different* methodology than prescribed in the annexes is, accordingly, incorrect. There is no suggestion in the documentation that Abtran proposed to carry out either BER assessments or surveys in a different way than prescribed therein.

174. Thus, consistent with Annex 3.2, the Managing Agent will be allocated a list of homes where pre-BER assessments are required to be scheduled, and a list of homes where surveys require to be scheduled. It may be that in practice homes are not allocated by SEAI for survey until a BER assessment has been completed, as suggested by the Guidelines, but that is not what Annex 3.2 mandates.

175. Once allocated, it is for the Managing Agent to schedule the services. Scheduling the pre-BER assessment and survey in a single visit is an obvious option, and is precisely what Clarification 90 envisaged. Scheduling requirements, therefore, do not create any conflict between the contents of the SoR and Clarification 90 and no necessity, therefore, to resolve any conflict by reference to the order of precedence at §27.2 of the ISFT (or the different order of precedence in the SoR).

176. The remaining restriction which KSN identifies to the combining of services is the requirement that the Managing Agent survey homes in accordance with prioritisation

requirements set by SEAI. The prioritisation requirements are subject to change, and Clarification 55 of the ITPD, referred to above, indicates that they changed in 2022, *i.e.* over the course of the last contract. Schedule 3 of the SoR, when describing pre-BER assessments states that they "*may* be used to inform decision-making". Annex 3.2 states that *both* oldest applications and those with a BER value of E, F and G are "*higher priority*". It further states that SEAI "*will define the priority 1 and priority 2 homes and will inform the Managing Agent accordingly. The Managing Agent must survey homes in order of these priorities*."

177. No further detail of what priority 1 and priority 2 homes are or might be is provided in Annex 3.2. In her affidavits, Ms O'Brien indicates that it is something to be determined by SEAI and, as suggested in the SoR, is subject to change.

178. Even assuming, for present purposes, that the priority requirements under the new Contract will relate to the age of the application or the BER value of a home, the RWIND tenderer would have understood that it would be permissible for a Managing Agent to schedule surveys and BER assessments in a home at the same time, as long as it respected SEAI's prioritisation requirements. This is not, as KSN sought to convey, impossible. Most straightforwardly, the Managing Agent could combine services in the case of the oldest applications. It can also readily be envisaged that it could combine services where it was apparent from the type of home being surveyed that its BER value would meet the current priority requirements, for instance, if it was a home in a development where other similar properties had low BER values, or if it was a home of a certain construction-type or age. Different prioritisation requirements from SEAI may render combining serves less (or more) difficult.

179. In the circumstances, I consider that KSN's interpretation of the tender documents as making the combination of services impermissible or impossible is incorrect. The RWIND tenderer would not have understood from the documents that there was any prohibition on the combination of services. Only a very close reading of the Schedules to the SoR would have indicated that there was any practical difficulty in scheduling pre-BER assessments with surveys, the necessity to respect SEAI's order of priorities. The RWIND tenderer would not have considered that this complication ruled out the potential for combining services. Moreover, it would have understood from SEAI's clarifications, in particular Clarification 90, that combining services was permissible, even to be encouraged.

180. There was much debate at the hearing of the action regarding whether a proposal to combine services was something which required to be provided as a Value Added Service, as contended by KSN, or whether it was simply a proposal consistent with the Managing Agent's obligation to strive for continuous improvement, as suggested by SEAI. In my view, neither contention adds much to the consideration of the question of whether SEAI accepted a tender with an impermissible methodology. I have concluded that the combining of services was not impermissible, nor rendered practically impossible by the requirement to comply with any order of priorities fixed by SEAI. Combining, where possible, pre-BER assessments and surveys in a single visit to a home is, therefore, an acceptable means of providing these two core services and does not need to be approved as an additional Value Added Service to SEAI, nor justified on the basis that it represents continuous improvement of its offering by the successful tenderer, although it is clearly consistent with that ongoing obligation on the appointed managing agent.

Unequal treatment / Lack of transparency

181. For completeness, I will address an alternative argument pursued by KSN at hearing (though not referenced in its written submissions) which arises if I am wrong about my interpretation of the SoR, such that, before regard is had to the clarifications, it should be interpreted as excluding the possibility of combining services. This gives rise to two possibilities, according to KSN.

182. It argues first that this should inform the interpretation of Clarification 90, so that it should be interpreted in the way suggested by it, as referring to Value Added Services, to avoid any inconsistency. It does not appear to me that that is an interpretation reasonably open to me.

183. I note that Mr Slevin has offered that interpretation in his affidavits (fifth affidavit at §22, and seventh affidavit at §85). During the hearing, it appeared to be argued that Mr Slevin had averred that that is how he read the clarification *at the time* that KSN received the clarification document, *i.e.* before KSN submitted its tender. In his affidavits, however, he merely avers that that is how he interprets it *now*, although he also avers that it never

occurred to KSN to tender on the basis of combining services because this was (in its view) precluded by the SoR.

184. Mr Slevin was not cross-examined on his affidavit, and I must, accordingly, accept that that is how he interprets the document (and may have interpreted it at the time). However, the perspective of the RWIND tenderer is to be assessed objectively. I do not accept that Clarification 90 objectively interpreted could be understood as referring to Value Added Services. As noted above, the question being answered assumed that combining of pre-BER assessments and surveys was already occurring. The response made clear that while this was not mandated, it had advantages and could be done at the Managing Agent's discretion. No reasonable tenderer could have understood from that that, in fact, combining services was not permitted, but that it was open to a tenderer to propose doing so as a Value Added Service, and therefore, subject to SEAI's approval.

185. If KSN's interpretation of Clarification 90 is rejected by the court, which it is, KSN contends that this means that there was a lack of clarity in the documents, in breach of the obligations of transparency and that, as in *Gaswise*, the tender documents must be regarded as defective, entitling KSN to relief.

186. In response, SEAI make three points. First, they claim that there is no inconsistency in the tender documents and that Clarification 90 is consistent with the SoR. I have accepted this proposition above.

187. However, even had I concluded otherwise, SEAI argues that KSN has not pleaded any case regarding lack of transparency by reference to Clarification 90. In the alternative, SEAI argues that any claim that the tender documents lack sufficient clarity is statute barred.

188. The case pleaded – for the first time in the first amended Statement of Grounds delivered on 11 October 2024 - is that the requirements of the tender were not formulated in such a way that they enabled all RWIND tenderers to interpret them in the same way.

189. Notwithstanding this definitive plea of a lack of clarity, KSN then pleads that had it known that it was permissible to tender on the basis of combining services, it could and would have done so. It pleads that it did not do so, because it was not permitted by the tender documents. It can be seen that there is something of a tension between these two pleas.

190. There is no reference to Clarification 90 in the first amended Statement of Grounds or in the affidavit verifying it. The plea seems to have been informed by KSN's awareness that Abtran's tender on the basis of combining some services had been accepted, rather than by identifying anything within the tender documents which gave rise to a lack of clarity. Put otherwise, KSN doesn't identify any ambiguity in the documents, rather it seems to assert that if it has misunderstood the documents and that combining services was permitted, then the documents have not been drafted with sufficient clarity to enable all RWIND tenderers to be aware of that.

191. I have some doubt about whether it is permissible for a party wishing to challenge the grant of a public contract following a procurement process in accordance with the Public Contracts Regulations to plead a lack of transparency without identifying how that lack of transparency arises. In *Gaswise*, the applicant had been excluded from the tender process on the basis that it had not satisfied a pass/fail criterion in the tender regarding the submission of a replacement parts statement. It argued, and the court agreed, that there was no clear statement that such was required.

192. In *Gaswise*, the area of ambiguity was crystallised by the contracting authority's decision to exclude the applicant on the basis of its purported failure to comply with a pass/fail criterion. In this case, KSN makes a different argument, that Abtran should have been excluded for failing to comply with what it contends were the requirements of the tender. SEAI's objection that a case about lack of clarity had not been pleaded is not without merit (indeed counsel for KSN initially confirmed that it was not part of KSN's claim when opening the case (Transcript Day 1, p. 31, lines 20 – 25), before adopting a more nuanced position shortly after). However, in my view, it was not unreasonable for KSN to plead, as it has (albeit in a slightly roundabout way) that if the tender documents are capable of being understood as permitting the combining of services, the tender documents were not formulated in a way which enabled all RWIND tenderers to interpret them in the same way. KSN has identified the issue about which (if its primary case is not accepted) there was confusion – whether it was permissible to combine different services in a single visit to a home – even if it hasn't identified the portions of the documents which give rise to that confusion.

193. As an aside, it is worth observing that given the forensic analysis to which the tender documents were subjected by KSN in an attempt to show that combining services was not permitted, despite this being nowhere stated in the documents, had Abtran been excluded from the competition on the basis that it had proposed combining services, it would undoubtedly have had a strong claim that the tender documents lacked transparency. In those circumstances, it would have been in a very similar position to the unsuccessful tenderer in *Gaswise*.

194. In any event, insofar as KSN has an entitlement to complain about a lack of clarity or a breach of the principle of transparency, it was required to seek a remedy within the time mandated for so doing. The time limit is set out in Council Directive 89/665/EEC on the Coordination of the Laws, Regulations and Administrative Provisions Relating to the Application of Review Procedures to the Award of Public Supply and Public Works Contracts as amended by Directive 2007/66/EC, ("**the Remedies Directive**"). The Remedies Directive was transposed into Irish law by the European Communities (Public Authorities Contracts) Review Procedures Regulations 2010 SI No. 130 of 2010 and subsequently amended by SI 192 of 2015 ("**the Remedies Regulations**").

195. Regulation 7(2) provides as follows:

> *An application referred to in subparagraph (a) or (b) of Regulation 8(1) shall be made within 30 calendar days after the applicant was notified of the decision, or knew or ought to have known of the infringement alleged in the application."*
>
> * emphasis added

196. Regulation 8(1)(a) and (b), referred to in Regulation 7 are as follows:

> *8.—(1) An eligible person may apply to the Court—*
>
> *(a) for interlocutory orders with the aim of correcting an alleged infringement or preventing further damage to the eligible person's interests, including measures to suspend or to ensure the suspension of the procedure for the award of the public contract concerned or the implementation of any decision taken by the contracting authority, or*

(b) for review of the contracting authority's decision to award the contract to a particular tenderer or candidate.

197. Accordingly, the time within which a challenge must be brought may commence before a final decision to award a contract. Parties are not entitled to sit back and await a final decision before challenging a tender process on the basis of an error which has arisen during the competition. This was made clear in *Baxter Healthcare Ltd v HSE* [2013] IEHC 413. In that case, the High Court (Peart J) determined that an argument that the successful tenderer was impermissibly admitted to the competition on the basis that it satisfied the minimum entry requirements was dismissed as being out of time. The applicant had been advised that the successful tenderer had been admitted to the competition before final tenders were sought. Referring to the decision of the CJEU in Case C-406/08, *Uniplex (UK)*, the court explained the position as follows (at §77):

"Uniplex *does not of course provide any assistance as to what level of knowledge is required by an applicant before the clock starts to run against it for the purpose of the applicable time limit. That will be a matter for the national court to decide on the facts of any particular case. But it provides guidance in the sense that it emphasises the objective of an effective remedy, and therefore this Court must decide at what point did the present applicant possess sufficient knowledge of facts to enable it to consider that it had reasonable grounds to challenge the decision that Beacon Dialysis Services Limited had qualified in the competition. As soon as it had sufficient facts at its disposal to commence its challenge, an effective remedy was available to it, and therefore the clock started to run against it. From that point on, it could not sit on its hands and hold the point over until it saw the final decision on the award of the contract. It was obliged at act immediately.*"

198. The test for date of knowledge is an objective test. In *Newbridge Tyre and Battery Co. Ltd v Commissioner of An Garda Siochána* [2018] IEHC 365, the High Court (Baker J) rejected a characterisation of the test as involving a subjective element (at §32):

"*While I do not accept the proposed characterisation of the rule as importing a subjectivity to the test, I consider that the assessment of the date from which time runs*

is not always straightforward, and may be linked to the state of knowledge objectively understood of an intended applicant in the light of the circumstances of the case."

199. KSN refers to the decision in *White Mountain*, in which the High Court (Quinn J) held that the claim that there had been a failure to carry out a Regulation 69 inquiry (into whether the successful tender was abnormally low) was not time-barred. In that case, the court concluded that although the applicant had sufficient information to complain that the tender was abnormally low at an earlier stage, it only became aware of "*the critical fact*" of which it complained, that there was no investigation, some time later, and the proceedings were issued within 30 days of obtaining that information.

200. What then are the objectively knowable facts upon which KSN relies for its argument in the alternative, that the tender documents breach the principle of transparency because, in effect, it was not clear that combining of services was permitted. It seems to me that this purported lack of clarity could arise in one of two ways. First, the tender documents were never clear, and Clarification 90 did not resolve any ambiguity. Or second, the tender documents appeared to clearly show that combining was *not* permitted, but that Clarification 90 cast doubt on this interpretation. In this regard, as noted above, KSN initially argued the case on the basis that SEAI had impermissibly sought to change the SoR, whether by the clarifications or otherwise. KSN pointed out, by reference to Case C-368/10, *Commission v Netherlands*, that this was impermissible. This was not disputed. As a consequence, the clarification must be capable of being read consistently with the SoR. If the SoR could only be read as rendering combining *impermissible*, and the clarification could only be read as combining being *permissible*, this would have created an ambiguity potentially breaching the requirement for transparency.

201. In the first of those scenarios, time must have run from the date that the tender documents issued. If the latter, it ran from the date that Clarification 90 issued to the prospective tenderers, including KSN, *i.e.* 25 March 2024. Proceedings issued on 9 July 2024.

202. In either event, proceedings issued well outside the time limit in Regulation 7(2). Indeed, the first amended Statement of Grounds, in which KSN raised the lack of transparency plea for the first time was not delivered until October 2024. Given KSN's

interpretation of the tender documents, it may not have *actually* known that there was an alternative interpretation until it realised that Abtran had been awarded the contract having proposed to combine services, but in light of my conclusions on Clarification 90, it *ought* to have known, at least, that it had a claim regarding lack of transparency.

203. KSN complain that given the timing of Clarification 90, even had they interpreted it as introducing ambiguity into the tender requirements, it was too late for them to do anything about it. This is not correct. First, it could have, as required by the ISFT at §27.1, brought it to the Contracting Authority's attention. It may have been too late to seek a clarification, but there was nothing to prevent it alerting SEAI to what it considered to be an ambiguity in the documentation, affording SEAI an opportunity to take steps to address it. Second, it could have brought an application to the court within the meaning of Regulation 8(1)(a) for an interlocutory order to correct an error in the process. It did neither.

204. The importance of adherence to time limits in public procurement proceedings is well-established (see *Dekra Eireann Teo v Minister for the Environment* [2003] 2 IR 270, [2003] IESC 25). Accordingly, it is not open to KSN to pursue a complaint regarding lack of transparency for the first time in October 2024 when the facts relevant to that claim were or ought to have been known to it in March 2024.

205. To be clear, I have concluded that there was no lack of transparency in the tender documents, and I have addressed the foregoing only against the risk that I am wrong about my interpretation of the SoR. Even if I had concluded differently in relation to my interpretation of the SoR (without clarifications), and a RWIND tenderer would have interpreted the SoR as rendering the combining of services impermissible, KSN's case that there was a lack of transparency in the tender requirements, insofar as it is pleaded, would have been statute-barred.

Conclusions on the methodology claim

206. In order to succeed in its methodology claim, it was necessary for KSN to persuade me that the tender documents, properly understood by a reasonably well informed and normally diligent tenderer, made it impermissible or impossible for a tenderer to propose to deliver the core services by combining some of them in single visits to the same property, or for SEAI to accept a tender which proposed so to do. I am not so persuaded. It was neither

impermissible nor impossible to combine services while at the same time complying with the SoR.

207. This interpretation of the SoR is put beyond doubt by Clarification 90, which is in clear terms, and only open to one reasonable interpretation regarding the combining of services – that it was permissible and even to be encouraged.

208. Even had the tender documents been open to the interpretation that combining services was impermissible such that the statement to the contrary in Clarification 90 meant that there was a lack of clarity in the tender documents in breach of the principle of transparency, KSN delayed in making that case, such that it would have been statute barred.

209. As noted above, however, the manner in which Abtran tendered, reliant on the combining of services in an unspecified proportion of cases, and the uberisation of its services does have some relevance to KSN's pricing claim to which I now turn.

The pricing claim

210. Following the receipt of tenders, the pricing information was analysed by a pricing evaluation team ("**PET**"), made up of a number of individuals, each of whom appear to be appropriately qualified. The tenders were separately evaluated by a qualitative evaluation team ("**QET**"), also made up of qualified personnel. There was no overlap between the two teams, a fact with which KSN initially took issue, but did not pursue in the proceedings. There was an independent chair of the two evaluation teams.

211. In addition to writing to KSN, as detailed above, SEAI engaged with Abtran regarding the price information submitted in its tender ("**the Regulation 69 inquiry**"). By letter dated 30 April 2024, it noted that "*the line items in [Abtran's] tender appear low in comparison to other tenderers"*. Accordingly, the letter sought the following, on a line-item by line-item basis:

(i) An explanation for your pricing and a justification for your price.

(ii) A detailed breakdown of each of the cost components that make up each unit rate.

212. It also sought the following confirmations:

> *(i) that you comply unconditionally and in all respects with all social, environmental and labour laws.*
>
> *(ii) That all costs associated with all activity and all proposed services are included in your pricing schedule*
>
> *(iii) There are no other costs associated with your tender that the contracting authority is exposed to or expected to bear.*

213. Abtran issued a reply dated 2 May 2024 in which it provided the three confirmations sought. In response to the query seeking an explanation for its price, the reply stated as follows:

> *Our unit rate pricing for all items is based on a bottom-up cost calculation, as detailed in response to question 2 below, and the application of a gross margin %, which takes account of risk and corporate overheads. Costs have been calculated based on the requirements provided in the tender documentation.*
>
> *Moreover, each rate provided [REDACTED]. Our cost calculations take account of the efficiencies that will be delivered from our transformation initiatives and blends these into a single rate. Therefore, SEAI benefits from a lower rate from day 1 of the contract.*
>
> *This has been subject to detailed review internally, as part of our governance process, to ensure that the charges deliver the required level of profitability. Furthermore, Abtran has engaged industry experts and the market to understand current market rates, and opportunities for efficiency savings.*

214. It indicated that the cost categories encompassed in its quoted prices included: people, travel, IT and indirect costs. The cost of personnel was the focus of these proceedings, and the 2 May 2024 reply indicated that the cost components incorporated under that heading were: salary, PRSI, benefits, pension contributions and bonuses.

215. SEAI sent further queries on 2 May 2024 in relation to the statement that the rates quoted cover the entire contract term. SEAI sought confirmation that the rates tendered have no dependencies associated with them. This was confirmed by Abtran in a response the following day.

216. A query was raised on 8 May 2024 regarding non-domestic *ad hoc* rates, applicable to some schemes, but not the BEWH Scheme. In a reply dated 9 May 2024, Abtran provided a schedule of rates for the various personnel providing non-domestic services, *e.g.* non-domestic inspectors, technical evaluators, QMS auditors, *etc*. The schedule showed that contractor rates were higher than for permanent employees. However, the price charged to SEAI was shown as being the same for both.

217. As explained in the affidavit of Marion O'Brien, verifying SEAI's original Statement of Opposition, SEAI then engaged Mark Wearen of Kroll Advisory Ireland Ltd ("**Kroll**") to review the information provided and provide advice on what, if any, additional information SEAI should seek from Abtran. This prompted a letter from SEAI to Abtran dated 24 May 2024 in which additional queries were raised. The letter stated the following:

> *While the information provided to date provides an explanation of your pricing and identifies what appear to be the typical cost components you have used to make up your unit rates, it does not include a detailed breakdown of each of the cost components in relation to each unit rate.*
>
> *Can you please provide a 'detailed breakdown of each of the cost components that make up each unit rate' to a) clearly set out what cost components are included for in each unit rate on a rate by rate basis and b) to clearly identify the allowance in financial terms within each unit rate for each cost component together with the justification for that allowance. The level of information we require is that which is reasonably necessary to allow us to assess whether each unit rate makes sufficient provision in financial terms to carry out the work under each rate over the duration of the Contract for the defined scope of works on an individual cost component by cost component basis. The information should therefore break down the unit rate in financial terms and could be accompanied, where applicable, by explanatory narrative to assist us in our assessment.*

218. Abtran responded to this request on 29 May 2024. It provided a spreadsheet with unit rates for individual items, *e.g.* BEWH Scheme surveys, broken down into direct and indirect labour costs and direct and indirect non-labour costs, each of which was stated to include "*margin*". The response explained Abtran's "*strategic rationale for pricing*":

> *In order to help the contracting authority better understand the rationale behind our overall pricing and provide assurance that our pricing is sustainable, we have provided further details below of key elements that have influenced our approach.*
>
> 1. ***Shared Costs**: Abtran has conducted detailed market research and completed full bottom-up pricing of each activity. Noting that all charges are variable, Abtran has taken the decision to spread shared labour / non-labour costs across multiple unit rates. This may make some rates appear lower than the existing service or other bidders but ensures that Abtran have a sustainable model which will provides flexibility, and at the same time, ensures that the service is still sustainable should volumes increase further than anticipated.*
>
> 2. ***Transformation:** Abtran's market research and experience clearly demonstrates that there is significant opportunity to digitally transform the service, making it more efficient and therefore more cost effective. Our cost calculations take account of the efficiencies that will be delivered from our transformation initiatives and blends these into a single rate across the contract term. Therefore, SEAI benefits from a lower rate from day 1 of the contract. Based on our research of the current service, we believe that there is significant potential for service improvements driven by process optimisation and technology, including generative AI and automation. As a leader in digital transformation, Abtran is well placed to deliver this and fully accepts the associated risk.*
>
> 3. ***Margin & Overhead:** Abtran are committed to working with SEAI in order to help achieve Ireland's decarbonisation targets for 2030 and 2050. As a long-standing employer in Ireland, we believe we have a duty to support SEAI and to deliver value for money. We have therefore included a highly competitive but sustainable profit margin within our pricing. We also recognise the opportunities for growth over the*

term, beyond the volumes provided in the contract, that are required in order to achieve the decarbonisation targets. We accept that there is no guarantee of growth and indeed, there are no committed volumes in the contract. Moreover, as a supplier of a wide range of outsourced services, we are able to spread our central overheads across a large number of contracts, therefore providing more competitive pricing than some of our competitors in the market.

Abtran is also cognisant of the strategic benefit in developing a world-class Managing Agent service for SEAI, given the wider opportunities for Abtran across the UK and Europe for similar services, offering further scope for growth and business development, based on using Ireland as a showcase.

219. On 5 June 2024, SEAI wrote to Abtran asking it to confirm the number of resources (by FTE) it proposed to use to deliver the services required. (As discussed below, there was some discussion during the hearing regarding whether FTE referred to full-time *employee* or full-time *equivalent*. The glossary in the SoR includes FTE as an abbreviation for full-time equivalent.) Abtran was asked to align this information with the organisational structure contained in Abtran's tender. In that document, Abtran had identified six separate positions which it characterised as 'field services'. These were: BEWH Surveyor, BEWH BER Assessor, Pre-BER Assessment Technical Advice, Domestic Inspectors, On-site Technical Support (Clerk of Works), and Non-domestic Inspectors.

220. Abtran's reply grouped these six together and gave a single figure for all, explaining as follows:

Under Programme Management and Field Services we have grouped the field support roles together, [REDACTED]. As part of our operating model, where possible, the same individuals will be capable of undertaking surveys, BER assessments and inspections.

221. It stated that the figures exclude contract resources which will be employed to manage peaks in demand or to cover short term requirements.

222. On 6 June 2024, SEAI invited Abtran to an online clarification meeting the following day. Abtran were asked to explain how they proposed delivering the field services with the resources proposed in its previous response.

223. Following the meeting, SEAI sought additional information on 7 June 2024. In particular, it asked Abtran to provide a resourcing profile which demonstrates the FTE and contractor profile over the continuance of the contract, *i.e.* the number of FTEs and contractors it proposed to use over the course of the contract. In response, Abtran replied on 10 June 2024. It referred, *inter alia*, to its proposal to "uberise" BER assessments, starting with an initial pilot, before rolling it out by region. It explained:

> *As such, we are unable to provide a profile of the contractor resources until this plan has been agreed. However, we can confirm that all costs for performing the required activities, whether performed by permanent staff or contractors, are included in our tendered unit prices.*

224. The response also highlighted the "*transformation initiatives*" Abtran relied on:

> *These initiatives include but are not limited to:*
>
> - *Centralised scheduling and appointment booking - removing the administrative burden from field workers and freeing them up to focus on higher value activities.*
> - *Using technology and data to optimise the scheduling of appointments, rather than leave it to individual field workers.*
> - *Multi-skilling field workers to be able to undertake surveys, BER assessments and inspections and maximising the number of combined appointments, e.g. a survey and pre-BER assessment, to reduce the number of visits, whilst ensuring there is no conflict of interest.*
> - *Incentivising staff through bonuses and gamification to increase the average number of appointments undertaken.*
> - *Simplification and standardisation of processes and tooling, to reduce the complexity of the operation and associated burden that this places on field workers, and*
> - *Automation of previously manual activities such as reporting.*

The benefits associated with these transformational efficiencies are committed within our unit rates.

225. In response to a query about how the resourcing model could manage the workload associated with surveys, based on SEAI's guidance that a survey of a 3-bedroom house took two hours, Abtran replied:

We have presented a blended unit rate that reflects the average survey time across a range of property types. Our unit rate is also averaged across the contract term, which means that we will make less margin in earlier years, until the benefits of our transformation programme and ongoing continuous improvements are realised. Our estimates have been validated by surveyors who have previously worked on the SEAI Managing Agent contract, and our unit rates have been further benchmarked against the market.

226. On 12 June 2024, the PET produced a document entitled '*Pricing Assessment Report (Core Services) Potential Abnormally Low Tender – Abtran Unlimited Company*'. The document detailed the Regulation 69 inquiry which had been undertaken in relation to Abtran's tender. The report noted that even prior to the engagement of Kroll, *i.e.* on foot of the responses dated 2, 3 and 9 May 2024, SEAI's pricing team had concluded that Abtran had provided a satisfactory account for the low pricing level, but they had engaged Kroll to provide "*additional assurances*".

227. The report concluded as follows:

Based on the information received, the contracting authority has concluded

(i) *that the tendered price for Core Services received from Abtran does not meet the characteristics associated with an abnormally low tender.*

(ii) *that the explanations received from Abtran provide a satisfactory level of assurance that they can and will deliver the Core Services at the tendered price.*

(iii) *that the tender received from Abtran should not be eliminated from the evaluation process.*

Applicable law – the pricing claim

228. Regulation 69 of the Public Contracts Regulations addresses what a contracting authority must do if it receives what appears to be an abnormally low tender. In relevant part, it provides as follows:

> *69. (1) A contracting authority shall require economic operators to explain the price or costs proposed in a tender which appears to be abnormally low in relation to the works, supplies or services.*
>
> *(2) The explanations given in accordance with paragraph (1) may relate to, amongst other things, the following:*
>
> > *(a) the economics of the manufacturing process, of the services provided or of the construction method;*
> >
> > *(b) the technical solutions chosen or any exceptionally favourable conditions available to the tenderer for the supply of the products or services or for the execution of the work;*
> >
> > *(c) the originality of the work, supplies or services proposed by the tenderer;*
> >
> > *(d) compliance with applicable obligations referred to in Regulation 18(4);*
> >
> > *(e) compliance with obligations referred to in Regulation 71;*
> >
> > *(f) the possibility of the tenderer obtaining State aid.*
>
> *(3) The contracting authority shall assess the information provided under this Regulation by consulting the tenderer.*
>
> *(4) A contracting authority may only reject a tender where the evidence supplied under this Regulation does not satisfactorily account for the low level of price or costs proposed, taking into account the elements referred to in paragraph (2).*

(5) A contracting authority shall reject a tender where it has established that the tender is abnormally low because it does not comply with applicable obligations referred to in Regulation 18(4).

229. The effect of these provisions was summarised by the court in *White Mountain* (at §45):

"*45. Subparagraph 69(4) means that an authority may only reject a tender as abnormally low after performing a Regulation 69 Inquiry and determining that evidence provided is unsatisfactory, apart from cases to which 69(5) applies, namely tenders which do not comply with applicable legal obligations, where the authority is obliged to reject.*"

230. In Case C-101/22, *Sopra Steria*, a case concerning provisions analogous to those in the Public Procurement Directive, the court identified that the assessment of abnormally low tenders was a two-stage process. In the first stage, the contracting authority need only determine whether there is *prima facie* evidence that a tender is abnormally low. If there is no such evidence, the contracting authority may proceed to assess the qualifying tenders. If there is such evidence, however, an assessment must be carried out:

"*73 In the second stage, if there is evidence that a tender might be abnormally low, the contracting authority must check the composition of that tender in order to ensure that it is not abnormally low. To that end, it must allow the tenderer concerned to state the reasons why it considers that its tender is not abnormally low.*

74 The contracting authority must then assess the explanations provided and determine whether the tender concerned is abnormally low, in which case it must be rejected. In order to provide an adequate statement of reasons for the fact that, after an in-depth analysis, the successful tender is not abnormally low, the contracting authority must set out the reasoning on the basis of which, first, it concluded that, on account primarily of its financial characteristics, that tender complies, inter alia, with the legislation of the country in which the services are to be carried out in respect of the remuneration of staff, contribution to the social security scheme and compliance with occupational safety and health standards, and, second, that it has verified that the proposed price included all the costs arising from the technical aspects of that tender."

231. As identified in *White Mountain*, the authorities also make clear that an unsuccessful tenderer is entitled to seek reasons why a tender was not determined to be abnormally low, and that "*such reasons cannot be explained for the first time before the court*" (at §65).

232. In *White Mountain*, having reviewed the authorities, Quinn J identified the following obligations on contracting authorities (at §93 – 103):

> "*93. Firstly, the purpose of the Directive is to encourage competition and competitiveness in identifying the most economically advantageous tender. In this respect price is a key aspect subject to*
>
> > *i. The lowest tender being sufficiently robust in financial/economic terms to provide the services tendered for. Most contracting authorities will "foreseeably be delighted to place the contract with such a tender" and there is nothing objectionable in this (per Fraser J. in* SRCL*) and*
> > *ii. The tender not breaching national laws regarding environmental, social or labour laws. (Regulation 69(5)).*
>
> *94. Secondly, the use of the word "appears" in Regulation 69(1) requires the contracting authority not, in every case, to carry out, on its own initiative, a detailed analysis of the composition of each tender in order to establish that it does not constitute an abnormally low tender but in every case to carry out a prima facia assessment of whether the tender is or arouses suspicion of being abnormally low (*Sopra Steria Benelux*, Case 101/22 and Regulation 69(1)).*
>
> *95. Thirdly, the contracting authority is under an obligation to identify suspect tenders (*Veridos *GMBH, Case No. 669/20).*
>
> *96. Fourthly, where a tender has the appearance of being abnormally low, including a suspicious tender, the contracting authority must perform the inter partes inquiry mandated by Regulation 69 namely the following:*

(a) Require the tenderer to explain the price or cost, including as appropriate by provision of the information identified in Reg. 69(2).

(b) Assess the information provided,

(c) Consult with the tenderer and

(d) Make a decision to admit or reject the tender (see Veridos *and Regulation 69).*

*97. Fifthly, this examination must enable the authority to determine whether, despite the existence of distance between the tenders, the tender is sufficiently genuine (*Veridos*, op cit).*

*98. Sixthly, there is no obligation to perform this inquiry, in respect of every tender. The obligation only applies where a suspicion arises and the tender is prima facie doubtful (*Veridos*).*

*99. Seventhly, there is no general obligation on the contracting authority to adopt or express a reasoned decision finding that there are no abnormally low tenders (*Veridos*) but where an unsuccessful tenderer requests reasons for a determination that a tender is not abnormally low the authority is required to provide a detailed response. This must be more than a pre-emptory statement which does not put forward any justification (*Sopra Steria*).*

100. Eighthly, where a Regulation 69 Inquiry is performed the contracting authority must then formally adopt a reasoned decision admitting or rejecting the tender in question. (This does not arise in this case).

101. Ninthly, apart from cases where the tender breaches national legislation regarding such matters as payment of wages, there is no general duty to reject tenders even where they are abnormally low. The duty conferred by the Regulation is that the contracting authority may only reject such a tender on the grounds that it is abnormally low after performing the Article 69 inquiry, including consultation with the tenderer. This obligation affords a measure of protection to the tenderer who may be excluded after an inquiry. That is not its only purpose. It also enshrines the integrity of the process as

a whole. In its terms it is not confined to the protection of the rights of the tenderer rejected following the inquiry.

102. Tenthly, the obligation to conduct the Regulation 69 Inquiry arises where a tender has the appearance of being abnormally low or where a suspicion is aroused to that effect. I reject the proposition that the obligation to conduct such an inquiry arises only where the tender has the appearance of being abnormally low and where the authority considers that the tender should be rejected for that reason. Insofar as the judgment in SRCL Ltd *at para. 193 (paragraph 72 above) is relied on for such a proposition it is inconsistent with the plain language of Article 69 and the judgments of the ECJ discussed earlier.*

103. Eleventhly, the court's function in these cases is not to substitute its own view for that of the contracting authority on whether a tender has the appearance of being abnormally low, or for that matter on other evaluative decisions of the authority. The correct approach is to intervene only in cases where manifest error has occurred (per Fraser J. in SRCL Ltd*). This general principle of judicial review applies as much to procurement cases as to other forms of judicial review. See also* Word Perfect Translation Services Ltd v. Minister for Public Expenditure and Reform *[2019] IESC 38 and [2021] IR page 698).*"

*Emphasis in original

233. Regarding the manifest error threshold in the assessment of abnormally low tenders, as appears from his eleventh point above, Quinn J relied on the decision of Fraser J in *SRCL Ltd v The National Health Commissioning Board* [2018] EWHC 1985 (TCC), [2019] PTSR 383. At §207 of his judgment, Fraser J explained the threshold for intervention by a court:

"*207. I consider that courts should be very slow to interpret the PCR 2016 implementing the Directive as imposing some wide-ranging obligation on the contracting authority to determine whether there is or might be an abnormally low tender. A second level of investigation, either before or after an evaluation, is not required as a matter of course or routine. The obligation, such as it is and in the circumstances that I have explained, only arises in the circumstances identified above*

and even then only after a conclusion has been reached by the contracting authority that a bid has the appearance of being abnormally low. Secondly, the concept of considering whether there is independently some "manifest error" on the part of a contracting authority in failing to appreciate that there was or might have been an abnormally low tender shows that, in the majority of cases, the conclusion of the contracting authority will be given substantial weight by the court. Going further, as SRCL seeks to do in this case, risks placing an impossible burden on contracting authorities, and stifling true commercial competition. As Akenhead J stated in the NATS (Services) Ltd *case, particularly for an economic operator attempting to break into a market or increase its market share, attractively low pricing may be the only way that this can be done. If the courts interfere unduly with this operation of market forces, the advantages and aims of open and fair competition will be lost.*"

234. Quinn J also relied on the decision of the Supreme Court in *Word Perfect Translation Services (No. 3)*. In that case, the Court explained the manifest error threshold in the following way (at pp. 716/717):

"***[36]*** *There is little dispute but that the applicable law in this case was established in the leading case in this jurisdiction,* SIAC Construction Ltd. v. Mayo County Council *[2002] 3 I.R. 148. In that case, the Supreme Court held that the standard of review required was that applied in European law: that is, a standard of manifest error. Furthermore, the word "manifest" should not be equated with any exaggerated description of obviousness. The study of the case law undertaken by Fennelly J. showed that the community courts were prepared to annul a decision when an error had clearly been made. It is important, however, to understand that judgment against the background of the national law of judicial review, and indeed the decision appealed from. The High Court in that case had applied the irrationality test deriving from* The State (Keegan) v. Stardust Compensation Tribunal *[1986] I.R. 642: that is, a consideration of whether the decision could be said to plainly and unambiguously fly in the face of fundamental reason and common sense. Fennelly J. observed at p. 176 that it was apparent that the applicable test should be "rather less extreme". Accordingly, the manifest error test may be understood as a departure from the irrationality standard applied in domestic law. However, the distance there is in practice between the two tests as applied is perhaps more difficult. In that regard, useful*

guidance is also to be obtained from the judgment of the Supreme Court in SIAC Construction Ltd. v. Mayo County Council. *There, Fennelly J. said, at p. 176, that the courts:*

> "… while recognising that awarding authorities have a wide margin of discretion, must recognise that this cannot be unlimited. The courts must exercise their function of judicial review so as to make the principles of the public procurement directives effective. In the case of clearly established error, they must exercise their powers. *The application of these principles may not, in practice, lead to any real difference in result between the judicial review of purely national decisions and of those which require the application of community law principles*." (Emphasis added.)

[37] *In other words, the test as applied must still afford a "wide margin of discretion" to the awarding authority.*"

235. In *Killaree Lighting Services Ltd v Mayo County Council* [2025] IECA 7, the Court of Appeal (Hyland J) concluded that the contracting authority was entitled to reject a tender as abnormally low. In particular, it was not obliged to accept the tenderer's explanation for items priced at effectively zero in the tender – that the tenderer had successfully completed other contracts tendered on the same basis. The court described the object of assessing whether a tender was abnormally low was to (at §4) "*to ensure that the tender is genuine, reliable and will not impair the proper performance of the contract*".

236. In its decision in Case T-161/24, *NTT Data Belgique*, the General Court reviewed the relevant principles:

> "*43 It is apparent from Article 69(1) and (3) of Directive 2014/24, to which point 5.1.3 of the EIB Guide to procurement refers, that the contracting authority is to require a tenderer to explain the price or costs proposed in the tender where the latter appears to be abnormally low and that it may only reject the tender where the evidence supplied does not satisfactorily account for the low level of price or costs.*
>
> *44 In that regard, while there is no definition of an abnormally low tender (see judgment of 10 October 2017,* Solelec and Others v Parliament*, T-281/16, not*

published, EU:T:2017:711, paragraph 113 and the case-law cited), it is apparent from the case-law that the abnormally low nature of a tender must be assessed in relation to the service concerned. Thus, in the course of examining the abnormally low nature of a tender, the contracting authority may, for the purpose of ensuring healthy competition, take into consideration all the factors that are relevant in the light of that service (see judgment of 15 September 2022, Veridos*, C-669/20, EU:C:2022:684, paragraph 35 and the case-law cited).*

45 According to the case-law, in the absence of a definition of the notion of an 'abnormally low tender', it falls to the contracting authority to determine the method used to identify abnormally low tenders, provided that that method is objective and non-discriminatory (see, to that effect, judgment of 19 October 2017, Agriconsulting Europe v Commission, C-198/16 P, EU:C:2017:784, paragraph 55 and the case-law).

46 It should also be borne in mind that, according to settled case-law, the contracting authority has broad discretion with regard to the factors to be taken into account in order to decide whether a tender is abnormally low, and the Court's review must be limited to verifying that the rules governing the procedure and statement of reasons have been complied with, that the facts are materially accurate, and that there has been no serious and manifest error of assessment or misuse of powers (see, to that effect, judgment of 20 March 2024, Westpole Belgium v Parliament*, T-640/22, not published, EU:T:2024:188, paragraph 110 and the case-law cited).*

47 In addition, in order to establish that, in the assessment of the facts, the contracting authority committed an error so obvious as to justify annulment of the decision rejecting a contract tender as abnormally low, the evidence adduced by the applicant must be sufficient to render the assessments made in the decision at issue implausible. In other words, a plea alleging a manifest error must be rejected if, in spite of the evidence put forward by the applicant, the assessment challenged may be accepted as genuine or valid (see judgment of 20 March 2024, Westpole Belgium v Parliament*, T-640/22, not published, EU:T:2024:188, paragraph 111 and the case-law cited).*"

Arguments – the pricing claim

237. As noted above, both KSN and SEAI provided expert reports on the pricing issue and both experts were cross-examined. Although some observations were offered on the interpretation of the tender documents by, in particular, KSN's expert witness, counsel confirmed that it was not making the case that the interpretation of those documents was a matter for expert evidence (see Transcript Day 2, p. 77, lines 17 and 18).

238. KSN delivered a total of four expert reports from Ms Joan O'Connor, SEAI delivered three from Mr John Delaney. Helpfully, the experts prepared a joint report setting out, in tabular form, the issues between them and their views on those issues.

239. In circumstances where the reports and issues between the experts developed over the course of the exchange of reports and the oral evidence, rather than rehearse them in detail at this stage, it is helpful to consider the arguments advanced on the pricing issue before considering the evidence.

KSN's arguments

240. KSN's case is that SEAI has committed a manifest error in reaching its conclusion that the Abtran tender was not abnormally low and could be accepted as a genuine bid. In effect, KSN contends that despite the extensive engagement between SEAI and Abtran, key questions remained unanswered such that SEAI could not have safely reached the conclusion which it did.

241. In particular, it contends that Abtran failed to provide (or SEAI failed to obtain) a detailed explanation of the resourcing numbers in the Abtran tender. Despite being asked, Abtran did not provide a profile of its contractor resource, and provided inconsistent numbers of its proposed FTE resources.

242. Relatedly, KSN claims that Abtran's bid was based on productivity rates which were simply unachievable. In other words, the resources proposed by Abtran could not complete the tasks required within the time allowed.

243. Separately, KSN contends that Abtran failed to price the cost components of its bid. As we will see, in evidence, particular reliance was placed on the fact that Abtran's tender did not disclose its gross margin, or its margin for risk.

244. The final complaint is that Abtran's tender relied on what it termed transformation initiatives, including the proposed uberisation initiative referred to above, and was therefore impermissibly dependent on the success of these initiatives.

SEAI's arguments

245. SEAI contends that its assessment of the Abtran tender in relation to pricing was "*thorough and robust*" and that Abtran responded to all queries raised. It distinguishes *White Mountain* (where the contracting authority failed to assess whether the tender was abnormally low) and *Killaree* (where the tenderer's response to queries raised consisted of "*generic*" reassurances).

246. SEAI contends, by reference to the above-referenced case law that it had a broad discretion regarding what it could take into account in deciding whether the Abtran bid was abnormally low and that the court should only intervene KSN establishes that its conclusion that the bid was genuine was "*implausible*". It argues that its decision was well within the margin of discretion which should be afforded to the decision maker.

247. SEAI contends that it is not appropriate to look at any query arising in the Regulation 69 inquiry in isolation, that the court must consider the information sought and obtained from Abtran in the round. It notes the expertise of the PET and the extensive engagement with Abtran.

Expert evidence

248. Ms O'Connor is a chartered architect, chartered arbitrator and a gold medal graduate from the School of Architecture, University College Dublin (UCD). She is a diploma holder from the Faculty of Law at UCD and a Fellow of the Chartered Institute of Arbitrators. She

is a Fellow of the Royal Institute of Architects of Ireland (RIAI) and of the Royal Institute of British Architects (RIBA). She was elected as the President of the RIAI in 1994 and served for 2 years in that honorary position.

249. Mr Delaney is a chartered quantity surveyor, with an honours degree in quantity surveying. He is a fellow of the Royal Institute of Chartered Surveyors, and of the Society of Chartered Surveyors Ireland. He is also a Fellow of the Chartered Institute of Arbitrators. He has 24 years' experience in construction as a quantity surveyor, including in sub-contractor experience, main contractor experience and client representative experience. He is currently employed as Managing Director of Rimkus, a provider of engineering and technical consulting services, based in its London office.

250. I propose to summarise each of the expert's reports. The subsequent reports reflect an engagement between them which is ultimately summarised, in relation to the key issues, in the joint report. I will, therefore, briefly refer to those subsequent reports, then that joint report, before addressing the oral evidence of each witness, focussing on those matters which KSN contends amount to manifest errors on the part of SEAI.

Joan O'Connor's first report

251. Ms O'Connor's first report explains the process she went through in its preparation. This involved reviewing documents, meeting with KSN where she was "*briefed on the operation of the 2019 Contract, the delivery of the Core Services and the use of the shared SEAI database.*" She reviewed the Surveyor's Manual and attended three site visits to houses on 15 and 20 May 2025, during which KSN staff were carrying out inspections. She says that she "*received and noted the outputs from the surveys conducted on 15 May 2025*".

252. There is a detailed section in her report in which Ms O'Connor provides her interpretation of the SoR. Since the parties were agreed that the interpretation of the SoR was a question of law, I do not propose to set out Ms O'Connor's views here save to record that they reflect the interpretation of KSN. She also offers some criticisms of SEAI's processes which do not relate to issues pursued by KSN in these proceedings.

253. In relation to pricing, she compares key sections of KSN's and Abtran's tenders. This includes two documents, one purporting to compare prices for Year 1 services proposed by each, the other a detailed breakdown of KSN's costs which Ms O'Connor contrasts with what she considers inadequate detail provided by Abtran as part of the Regulation 69 inquiry. In her second report, Ms O'Connor expressly suggests that the KSN breakdown provides the level of detail required.

254. Ms O'Connor contends that she "*cannot find a complete and consistent FTE allocation [in Abtran's responses to SEAI queries] such as to allow a valid comparison with the KSN proposals*."

255. She then considers the productivity expected of field staff which she notes is expressed as an expected number of "units per FTE per week". In her report, Ms O'Connor describes FTE as referring to "full-time employees". She notes that Abtran's proposals are based on a 52-week year with an "*undefined allowance for holidays, illness, training and the like*". In her calculations, she uses the "*industry norm*" of 1650 productive hours (44 weeks at 37.5 hours per week).

256. Based on those figures, and her knowledge of the time taken to complete the core services, and taking into account advised travel distances, she forms the view that the services cannot be provided with the resources allowed for by Abtran in its tender, *i.e.* the productivity required is unachievable. In this regard, she calculates the time allowed per survey by KSN as 2.78 hours, whereas it is 1.72 hours for Abtran. Based on her experience and the site visits she attended, and allowing for a travel time of 1 hour (based on average travel distances of 70 km), she concludes that 1.72 hours is not sufficient time to complete a survey in accordance with the SoR.

257. She concludes her opinion on pricing as follows:

> *87. It seems to me that Abtran achieved a substantial reduction in cost by intensifying the rate of output of its field staff beyond acceptable norms, by applying unachievable time targets to the carrying out of the tasks and by under-pricing overheads and TUPE obligations.*

86. Having reviewed the documents made available to me and having carried out the appraisal of costs, I consider that the Abtran tender was non-compliant and abnormally low in that the projected productivity for fieldwork staff is not achievable with the FTE staff proposed, the allowance for indirect costs and overheads is not clear and is, in all probability, inadequate to provide the Core Services to the standard required.

258. In an additional appendix, she calculates Abtran's proposed salaries, based on her assumptions of how many staff Abtran will engage. By way of example, she notes that Abtran proposed to complete [REDACTED] surveys per week. The indicative number of surveys per annum (in the tender) was 8700. Ms O'Connor then divides that number by 52 (the number of weeks per annum on which Abtran said it based its figures), and again by [REDACTED], the number of surveys per week. She concludes that Abtran therefore propose to engage [REDACTED] surveyors per week. In total, she concludes that it will require [REDACTED] field workers (in her second report she suggests the equivalent figure for KSN is 46).

259. In relation to salaries, her first report concludes that "*Abtran salaries equate to or exceed the KSN salaries: both KSN and Abtran's salaries exceed the advertised rates of pay for equivalently qualified and experienced field staff by up to 50% in some instances*."

John Delaney's first report

260. Mr Delaney's first report is focussed entirely on the SEAI's Regulation 69 investigation of Abtran's bid.

261. He adopts a step-wise approach, examining each request for information from SEAI in order to determine whether the queries raised by SEAI were appropriate for the purpose of a successful investigation into an apparently abnormally low tender, before considering whether the request elicited sufficient information to enable SEAI to reach a reasonable conclusion that the tender was not abnormally low and could be accepted as a genuine bid. He identifies eight rounds of engagement between SEAI and Abtran.

262. He concludes overall that:

[T]he entire investigation process taken as a whole, did in my opinion, yield the requisite information to allow the SEAI, acting in its role as a contracting authority, to reasonably reach a conclusion that the Successful Tenderer's tender did not constitute an abnormally low tender.

263. He then makes a number of observations on Ms O'Connor's first report. He concludes his assessment of Ms O'Connor's evidence in the following way:

16.10.6 I also consider that Ms O'Connor's opinion as to the adequacy of the time allowed by Abtran to perform the required tasks to be fundamentally flawed and of little if any utility in consideration of whether the tender is abnormally low as it fails to include for contractor resources.

16.10.7 Furthermore, Ms O'Connor has failed to take into account Abtran's repeated commitment to meet all the requirements and services required under the contract and that SEAI are not exposed to any risk or further costs in providing the core services.

Further reports

264. In the subsequent reports, much of the dispute between the experts concerned the interpretation of the tender requirements. I will therefore focus on those elements of the reports which relate to KSN's pricing claim.

265. Ms O'Connor's second report revisits some issues raised in her first report and addresses Mr Delaney's first report. In relation to the breakdown of costs, she states:

27. The gross margin percentage is not stated, nor are the items covered by the gross margin described: the profit margin is well-hidden.

28. In my opinion, the detailed cost breakdown has not been provided in sufficient detail to provide an assurance that all costs have been covered adequately to support delivery of service in strict accordance with the SoR, nor to make a meaningful comparison between Abtran and KSN's costs.

266. She concludes that Abtran's tendered costs were conditional on the success of its transformation initiatives.

267. Ms O'Connor's third report contained a table which, *inter alia*, purported to calculate the time allowed by Abtran for each service required. In the table, Ms O'Connor made the same calculation above regarding the total FTEs allowed for by Abtran, [REDACTED]. Based on her calculation that of those [REDACTED] FTEs, [REDACTED] were surveyors, she concluded that 1.718 hours was allowed for each survey. She notes that Mr Delaney had attended a survey for the purpose of preparing his second report. Although Mr Delaney reports that the survey took 1 hour and 45 minutes (1.75 hours), she considers that the time excluded "*post survey writing up*". She calculates that the survey duration was therefore 2.15 hours "*excluding scheduling and travel time*". Ms O'Connor notes that the survey was on an extended 3-storey, 5-bedroom house.

268. In his third (and final) report, Mr Delaney reviews the table prepared by Ms O'Connor in her third report and corrects some calculation errors. He also addresses Ms O'Connor's calculation of the time allowed for each service. He notes that Ms O'Connor's calculation is based on a 44-week year. He adjusts that parameter to allow for a 52-week year (as tendered by Abtran) and calculates the time allowed for each survey, changing only that parameter, to be 2.031 hours.

269. Of Ms O'Connor's opinion that insufficient time was allowed for individual tasks, Mr Delaney points out that the sample of those tasks witnessed by Ms O'Connor was very small.

270. In her final report, Ms O'Connor reiterates her opinion regarding the failure to confirm contractor numbers, and therefore FTEs:

> *Put at its simplest, if we do not know the number of FTEs, we cannot know whether the tendered costs are sufficient to cover the outlay required to fund the core services. The assumption of risk by Abtran is not adequate "comfort" and I therefore come to the conclusion that the bid is not "genuine".*

The Joint Report

271. The Joint Report identified eighteen issues on which the experts each opined. It was clarified during the hearing that the list of issues was agreed as between the experts.

272. Ms O'Connor concludes that Abtran's tender (and information provided on foot of the Regulation 69 inquiry) did not provide clarity on its contractor resource or FTE numbers. It was therefore not possible to ascertain whether the tendered costs were sufficient.

273. She considers that Abtran did not provide a sufficiently detailed breakdown of their costs and that the time allowed for provision of surveys was insufficient, based on unfeasible productivity rates which assumed that employees would work a 52-week year.

274. Ms O'Connor also considers that the Abtran rates are dependent on the successful rollout of initiatives like uberisation, which she considers was impermissible. She also contends that SEAI placed too great a reliance on Abtran's assurances that SEAI would not be exposed to increased risk or costs in the provision of core services.

275. Mr Delaney made clear that he considered the issue from a different perspective, solely that of whether sufficient information had been provided to enable a reasonable conclusion that the bid was genuine and not abnormally low. He concluded sufficient information had been provided. As suggested by Ms O'Connor, Mr Delaney placed reliance on Abtran's assurances regarding risk to SEAI and that there were no dependencies in the tender.

Oral evidence

276. Ms O'Connor gave oral evidence and was cross-examined on Day 2 of the hearing. Ms O'Connor adopted her four reports as her evidence, subject to acknowledging the calculation errors in the table provided in her third report. She produced a corrected table at the hearing.

277. In her direct evidence, she explained that FTEs were, in fact, full-time equivalents, not full-time employees. As noted above, this reflects the glossary to the SoR. Her evidence was that an FTE is regarded as providing 1650 hours per annum but that this was a point of dispute between the experts.

278. During cross-examination, she accepted that Abtran's "*strategic rationale*" for pricing represented an appropriate approach to pricing, provided that what was proposed complied with the SoR.

279. It emerged that the KSN document containing a breakdown of its costs, referred to above at §252, which Ms O'Connor relied on as evidence of what an appropriate breakdown of cost should include, had not been submitted by KSN as part of its tender bid, but had been prepared for the proceedings. Ms O'Connor stated that she was not aware of this fact, which is why it was not disclosed in her reports.

280. Ms O'Connor was asked about the extent to which Abtran had broken down its costs into its component parts in the information provided on 29 May 2024. Ms O'Connor said the important issue is not how detailed the breakdown is, but what information is included. She said the "*most important thing is that the margin be disclosed but not broken down, if you want to net it down to the chase*" (Transcript Day 2, pp.42/43). She said that she needed to know what the margin is if evaluating comparative tenders. She accepted that a profit margin wouldn't typically be disclosed by a tenderer, but asserted that the margin for risk, another element of gross margin should be.

281. Ms O'Connor accepted that it was reasonable for a tenderer to propose that it would meet uncertain demand through contractor resources. She also accepted it was appropriate in principle for a tenderer to tender on the basis of reduced margin in the early years of a contract in the hope that greater margins could be achieved later on in the contract.

282. Ms O'Connor indicated that she had treated the figures provided by Abtran, including the indication that each FTE would complete [REDACTED] surveys per week (or [REDACTED] per annum), as an average for year one, rather than as an average for the whole contract term.

283. When it was pointed out that she hadn't indicated an indicative time that it would take to deliver each of the services, *e.g.* a survey, she responded that she was "*reluctant to equip myself with a stick with which you will beat me!*" (Transcript Day 2, p. 61, lines 16 – 17). She accepted that she had attended a very small sample of the services currently being provided by KSN but pointed out that she had very considerable experience of this type of work.

284. Mr Delaney also gave oral evidence and was cross-examined on Day 2 of the hearing. He adopted his reports as his evidence. He noted the discussion regarding gross margin during Ms O'Connor's evidence and pointed out that it wasn't requested by SEAI and that that "*came as no surprise to [him] because the question of gross margin is a very commercially sensitive and usually closely guarded secret by most contracting entities*" (Transcript Day 2, pp 83 – 84).

285. As regards any uncertainty in FTEs and contractor resources, his evidence was that this reflected the fact that the level of activity was not fixed under the Contract. He said that he understood from Abtran's tender that they assumed that FTEs were going to be utilised and productive 52 weeks of the year, which he said was normal for large international organisations that he had worked for, similar to Abtran.

286. He considered that the way in which Abtran had grouped costs was appropriate, noting that a tenderer would not typically provide line by line every item of cost as this would undermine its position in negotiations.

287. He said that he wasn't in a position to give evidence regarding appropriate times to carry out the individual services, *e.g.* surveys, BER assessments, inspections, as the data hadn't been provided. He couldn't, therefore, offer a view on Abtran's estimate of [REDACTED] surveys per week per FTE surveyor.

288. He described "*risk*" as the most important part of an estimator's role, "*the undefined element of a price*" (Transcript, Day 2, p. 93, lines 2 – 3). He said that having determined the base costs, it was then for the contractor to determine its appetite for risk, by reference, for instance, to its desire to break into a new market. He referred to contractors "*sharpening their pencil*", *i.e.* tendering competitively. His experience was that the larger the company, the lower their profit margin on individual contracts. He regarded Abtran as a company which has been successful in managing risk.

289. In cross-examination, Mr Delaney expressed the view that Abtran had sharpened its pencil and priced with a "*very competitive edge*". He acknowledged that he hadn't seen any analysis by SEAI of Abtran's financial capacity. He also acknowledged that Abtran never provided a contractor resource profile, despite that being requested.

290. Mr Delaney was questioned about the productivity rates proposed by Abtran. It was put to him that whether Abtran had bid on the basis of a 52-week year or not, no full-time employee could work 52 weeks, and accordingly, they would have to be more productive to achieve 52 weeks' worth of work in, say, 44 weeks. Mr Delaney suggested that this was not the basis on which Abtran bid.

291. Following his evidence, I sought to clarify this issue with him and suggested that an interpretation of the documents was that Abtran was proposing that it would have the *equivalent* of [REDACTED] field workers working 52 weeks of the year, not that it had assumed that [REDACTED] employees would do 52 weeks work within a 44-week working year. He agreed that this was possible, that this was a normal way to bid and that that was the basis upon which he believed Abtran was bidding (Transcript Day 2, p. 136, lines 20 – 28).

Discussion – the pricing claim

292. From its submissions, the extensive reports exchanged by the experts, and the further oral evidence which they gave, it appears that there are, in substance, four bases on which KSN argues, by reference to that evidence, that SEAI's acceptance of the Abtran bid as genuine, *i.e.* not abnormally low, was a manifest error. SEAI suggest that the court should consider the information provided by Abtran in the round, and not focus on individual elements, the approach taken by KSN. When considering whether there has been a manifest error, it is permissible, as KSN suggests, to seek to identify individual errors which undermine confidence in the correctness of the decision. However, in considering whether there has been a manifest error, it would be a mistake to disregard the context in which the error was said to arise.

293. Before discussing those alleged errors, a couple of preliminary observations are merited. As Quinn J noted in *White Mountain*, a contracting authority is not obliged to reject a tender even where it concludes that it is abnormally low. However, the ISFT here stated in terms that any abnormally low tenders would be rejected.

294. SEAI does not, therefore, rely on any discretion it may have had *in law* to accept an abnormally low tender. Rather it relies on its margin of discretion in determining whether

Abtran's tender here was *in fact* abnormally low, *i.e.* was not genuine. It contends that it was entitled to conclude that it wasn't abnormally low and that its conclusion wasn't vitiated by any manifest error.

295. In assessing whether there was a manifest error, the court is not entitled to substitute its view for that of the contracting authority. I am not required, therefore, to assess whether the tender was abnormally low. Rather, I am to assess whether SEAI committed any obvious error in concluding that it was not. As noted by O'Donnell J (as he then was) in *Word Perfect Translation Services (No. 3)*, manifest doesn't import any "*exaggerated description of obviousness*", rather, SEAI's decision should be annulled where an error has clearly been made. As the General Court put the matter in *NTT Data Belgique*, the evidence must be sufficient to render the assessments made in the decision "*implausible*". As appears from that case (at §47), the onus rests on KSN to establish an error.

296. Assistance on calibrating the test is available from the two Irish decisions regarding abnormally low tenders. In *White Mountain*, the contracting authority's decision was annulled because it failed to assess the contractor's share mechanism, relevant to pricing, and the ability of the tenderer to perform the contract at the tendered price.

297. In *Killaree*, the Court of Appeal concluded that the contracting authority was entitled to reject a tender as abnormally low, and, in particular, it was not obliged to accept the tenderer's explanation for items priced at effectively zero in the tender, which was that the tenderer had successfully completed other contracts tendered on the same basis. As the court concluded (at §45) this was "*a generic statement that did not in any way discharge the tenderer's obligation to provide the necessary evidence to allay the contracting authority's concerns"*.

298. The question, therefore, is whether KSN has established that SEAI made a clear error in its assessment of Abtran's tender in overlooking a key element in its assessment of whether Abtran's bid was genuine, or in accepting explanations which were clearly inadequate?

Inadequate cost breakdown

299. As appears from above, the most detailed breakdown of Abtran's costs was provided in its reply dated 29 May 2024. This broke down each task or service into four cost components, direct and indirect labour costs, and direct and indirect non-labour costs, with each element said to include margin. Its earlier response, dated 2 May 2024, had identified four cost categories (people, travel, IT, indirect) and indicated what was included within each cost category.

300. In her reports, Ms O'Connor had compared the information provided by Abtran unfavourably with that provided by KSN. However, as emerged in evidence, Ms O'Connor had operated on the mistaken belief that the KSN breakdown of costs on which she relied had been submitted as part of its tender. It had not. This somewhat undermines Ms O'Connor's complaint that the level of detail contained in Abtran's responses was inadequate by reference to what KSN had provided. Ms O'Connor, however, maintained her opinion that inadequate information had been given. In particular, she relied on the fact that the cost breakdown did not include Abtran's proposed gross margin.

301. There was disputed evidence between Ms O'Connor and Mr Delaney regarding whether this information would *ever* be provided in a tender. Mr Delaney indicated that this would never be provided to an employer, as it would provide that employer with too much information when seeking to negotiate on price (*e.g.* in this instance, for a Value Added Service). In his view, a tenderer would endeavour to *avoid* providing this information. Ms O'Connor accepted that a *profit* margin would not be included, but argued that a margin for risk should have been disclosed so that SEAI could assess the level of risk which Abtran had allowed for in their pricing.

302. I am unable to agree that the failure to be provided with such a figure fatally undermines SEAI's assessment of the Abtran tender. There was no agreement between the experts as to whether such a figure would typically be provided. There was certainly no agreement that it was an essential element of a tender such that its failure to include it rendered any assessment of whether a tender was genuine implausible. Although I accept that there is a distinction to be drawn between profit margin and margin for risk, I am not convinced, and the evidence did not establish, that a tenderer would be entitled to withhold the former, but that a tender could not properly be assessed without the latter. It is difficult to understand

why that should be so. SEAI never specifically asked for this figure. Ms O'Connor expressly accepted that the information sought by SEAI was appropriate.

303. It was not, therefore, a clear error on the part of SEAI to assess the tender without obtaining detailing of Abtran's gross margin (or margin for risk). I am not persuaded that it renders SEAI's conclusion that the bid was genuine implausible or sufficiently undermines confidence in SEAI's decision to award the Contract to Abtran to justify annulling that decision.

Inadequate information on contractor resource

304. KSN's complaints on this issue are based on the failure of Abtran to specify what contractor resources it will use to operate the Contract despite express requests from SEAI for this information. Therefore, the complaint has two components. First, that it was a manifest error for SEAI to conclude its assessment without having obtained information that it had requested. And second, and in any event, it was a manifest error for SEAI to conclude that the tender was not abnormally low without this information.

305. The first of these can readily be dismissed. Abtran *did* provide a response to the request for this information and explained why it was not possible at that time to specify the number of contractors which it would be required to use, because it depended on its uberisation proposal. Abtran also referred to resources "*flexing*" to meet demand. The response can readily be distinguished from the generic reassurances given in *Killaree*, which did not address the substance of the query. Here, the tenderer engaged with the request and explained why, by reference to its proposal, it couldn't give a definitive answer to the question posed. If KSN is not correct about the second aspect of its argument, SEAI was entitled to accept that explanation. Although KSN sought to argue in oral submissions that SEAI's error was thinking that it *had* been provided with this information, this is not correct. In this regard, KSN referred to Philip Lee's letter of 21 June 2024, quoted above. There is nothing in that letter, or anything else, to suggest that SEAI erred in assessing the Abtran bid on the basis of information which it thought it had but didn't.

306. In the circumstances, SEAI asked an appropriate question, seeking relevant detail. It was given a reasoned response, which confirmed that the costs of contractors had been accounted for, although the precise number of contractors could not be specified at that time,

and didn't need to be because, as stated in its reply of 10 June 2024, all costs for services were included in its tendered rates "*whether performed by permanent staff or contractors*". Unless the tender could not have been adequately assessed without the number being specified, KSN's second argument, then the acceptance of this explanation falls within the discretion afforded to a contracting authority when carrying out its assessment.

307. Could the question of whether the tender was abnormally low be assessed without the number of contractors being specified? The argument, expressed with admirable clarity by Ms O'Connor in her final report, is superficially attractive: "*if we do not know the number of FTEs, we cannot know whether the tendered costs are sufficient to cover the outlay required to fund the core services*". However, I am not satisfied that there was any manifest error by SEAI.

308. The information provided by Abtran indicated the number of field workers which would be allocated to the core services. Abtran did not specify how many would provide each individual service. In this regard, it will be recalled that Abtran proposed that some services would be combined, and therefore, some individual field workers will of necessity provide more than one service: based on that proposal – which I have already concluded was compliant with the SoR – providing a global figure for the number of field workers was reasonable.

309. Abtran also specified that it hoped to uberise its service, engaging skilled workers on an *ad hoc* basis to provide services. And that in the event of increased demand, it would flex, engaging additional contractor resources.

310. Critically, it explained that all costs for services whether provided by contractors or permanent employees were incorporated in the unit prices provided: put otherwise, from SEAI's perspective, it will make no difference whether a service is provided by a contractor or a permanent employee, it will face the same price. This is consistent with the information provided by Abtran in relation to non-domestic inspectors.

311. Abtran provided a figure for the total field resource it had allowed for in its tender in its reply of 5 June 2024, giving a figure of [REDACTED] FTE. It referenced that these numbers would flex to meet demand, and that it would seek to employ field workers who could perform multiple roles. It then states:

Please note that these totals exclude contract resources which will employed to manage peaks in demand or to cover short term requirements.

312. KSN appears to have interpreted the information provided as suggesting that Abtran has included the cost of its permanent staff in the tender, but has excluded a significant *additional and unquantified* cost, that of the contractors it also requires to deliver the services. I do not believe that that is a correct reading of the information, or consistent with what Abtran expressly stated throughout the Regulation 69 inquiry process.

313. Nowhere does Abtran indicate that there will be an additional cost for contractors which has not been provided for in its tender. It repeatedly stated that contractor *costs* were included. What can be understood from the responses given in the Regulation 69 inquiry is that Abtran was unclear what portion of the services will be provided by permanent employees and what portion will be provided by contractors, for the various reasons explained, but that the tender prices include whatever costs may be associated with engaging contractors. In this regard, although it was agreed that the price per task of an individual contractor will typically be higher than the price of an individual permanent employee doing the same task, it is Abtran's intention to use contractors to improve efficiency and lower costs. Thus, the possible use of additional contractor resources does not necessarily translate into increased cost, or increased risk for SEAI, as KSN seems to assume, still less does it suggest that the Abtran bid was not genuine.

314. Nor does the reference above to employing contract resources to manage peaks and cover short term requirements suggest an additional unquantified cost, not accounted for in the tender. In context, it means no more than that the figure of [REDACTED] FTE, itself an estimate, may not reflect the required resources at any given time.

315. In its letter of 21 June 2024, Philip Lee, on behalf of SEAI, stated as follows:

Our client was satisfied that the salary costs included in the Successful Tenderer's tendered price were consistent with current market salaries for the various roles included in its tender.

The Successful Tenderer provided a resourcing profile for the term of the contract with confirmation that all contractor costs were included in the tendered rates. This included a detailed explanation of the basis on which these resourcing numbers were established and how the Successful Tenderer will deliver the services at the tendered price.

316. I am not satisfied that KSN has identified any clear error by SEAI in reaching such a conclusion by reference to the absence of a contractor resource profile.

317. KSN's counsel asked, rhetorically, what was the point of asking for the information if the tender could be assessed without it, but it cannot be the case that by asking a question in a Regulation 69 inquiry, a contracting authority trammels its discretion to decide whether a bid is genuine in the absence of a direct answer to that question. Here, in any event, there was an answer, an explanation why a precise figure couldn't be given. It was within SEAI's discretion to determine whether that explanation meant that the bid was not genuine, and there was no manifest error by SEAI in concluding that it was.

318. The contractor resource required to complete the contract is, of course, related to the productivity assumptions which form the basis of the tender, as acknowledged by Mr Delaney in his reports. Put otherwise, if, as KSN suggests, it would simply be impossible for Abtran to complete the services required in the manner required with the resources indicated in the tender, then that might suggest that there *were* additional resources required but not allowed for and assessed, either due to the failure to provide a contractor resource profile, or because the number of FTEs required had been underestimated. It is KSN's productivity claim I consider next.

Inadequate assessment of productivity

319. KSN's claim under this head is straightforward. The tender document provides for an indicative number of each service to be provided. Each service, be it survey, pre-BER assessment, inspection or other takes a certain amount of time, including travel time. On Abtran's figures, KSN contends, there simply isn't the time to complete the tasks required in the manner prescribed in the SoR. If this were established, it would in my view, have constituted a manifest error on the part of SEAI to have concluded that the bid was genuine despite the fact that it could not be performed with the resources proposed.

320. It has not, however, been established and KSN's argument is based on at least three misinterpretations by it of the figures provided by Abtran.

321. As above, I will concentrate on the example of surveys. On Ms O'Connor's analysis, based on Abtran's estimate of how many surveys its surveyors could complete in 1 week, each survey would have to be completed in 1.72 hours. She says that this is clearly inadequate.

322. Ms O'Connor's calculation, explained above, is as follows. The tender estimates 8700 surveys per annum. Abtran estimates that each FTE will complete [REDACTED] surveys per annum. Therefore, Ms O'Connor calculates, Abtran will have [REDACTED] FTE to conduct surveys.

323. Ms O'Connor then takes that calculation of FTEs and multiplies it by the number of hours an individual employee might be expected to work in a year, which she calculates at 1650 hours for the total number of hours worked by [REDACTED] FTEs. She then divides that by the total number of surveys to be conducted in a year, to calculate 1.718 hours per survey.

324. As Mr Delaney indicates in his third report, changing any of these variables may have a significant impact. In particular, he suggests that Ms O'Connor's assumption of 1650 hours per FTE is incorrect. I agree.

325. As noted above, there was some discussion and confusion regarding whether FTE referred to full-time *employee* or full-time *equivalent*. In the SoR, the abbreviation FTE is defined as meaning full-time *equivalent*. This can be a significant distinction. A full-time equivalent is not a real person, entitled to holidays, sick days, *etc*. Rather it is a notional employee, a means of calculating the total resources available for a task. In this context, it was agreed, Abtran *expressly* stated that its full-time equivalent calculations were done on the basis of a 52-week working year. Of course, no individual employee could be required to work a 52-week year. But in calculating total resources, it is entirely permissible to calculate what is required based on a notional full-time person working 52 weeks. This is what Mr Delaney contended that Abtran had done, and how I interpret the evidence.

326. As Mr Delaney illustrated in his evidence, assuming a 52-week working year, [REDACTED] FTEs would have had 2.031 hours per survey.

327. The second error made by Ms O'Connor is in her calculation of [REDACTED] FTEs for surveys, and a total of [REDACTED] FTE for all field work. This is based on the total number of surveys which it is proposed each FTE will do, based on an estimate of [REDACTED] per week. However, this ignores the fact that Abtran made clear that the figure of [REDACTED] per week was not intended to reflect the rate at the start of the Contract, but rather over the lifetime of the Contract at a time when its efficiency will, if its transformation initiatives (including the combining of services and uberisation) deliver the efficiencies Abtran anticipates, have improved. Ms O'Connor accepted that she did not take this into account.

328. In fact, at no time has Abtran suggested that it will commence the Contract with [REDACTED] field workers, or [REDACTED] surveyors. As Ms O'Connor points out, Abtran has provided different figures for its total number of field workers in different documents, depending on what is incorporated within the aggregate figures, but at no point did it suggest that the total number of field workers will be as low as [REDACTED]. The only place Ms O'Connor identifies a separate figure for FTE surveyors, as reflected in her table, the figure provided is [REDACTED]. On a quick calculation, [REDACTED] FTEs at 52 weeks per annum allows 2.24 hours per survey.

329. Notably, Abtran's figure of [REDACTED] for field workers (albeit it includes a clerk of work and non-domestic inspectors) is not greatly different than Ms O'Connor's figure for the total number of field workers allowed for in KSN's tender, 46 FTEs, as reported at §71 of her first report.

330. The third error is alluded to above, but is difficult to quantify. Ms O'Connor assumed that the figures provided by Abtran of [REDACTED] surveys per annum (or [REDACTED] per week) per FTE was a year one figure. However, as Abtran made clear, that was a figure given over the whole life of the Contract, on the assumption that it would become more efficient at delivering services over the course of the Contract as its transformation initiatives took hold. Thus, Abtran did not anticipate that it would, on the figures above, be carrying out surveys in 2.24 hours from day one of the Contract. Rather, this is what it hoped to achieve on average over the life of the Contract.

331. This is not to suggest that there is any evidence that SEAI carried out these calculations as part of its assessment. Indeed, KSN did not argue that it was required to show that it had. Rather, it contends that SEAI erred in accepting a tender which was based on unachievable productivity rates. Has KSN identified a manifest error in this regard? I think not.

332. Ms O'Connor's evidence regarding how long surveys took was based on a very limited survey, as she accepted, but also her experience and an ability to make an assessment of what was required. I accept that her experience entitled her to comment on the length of time a survey of the type described in the SoR might typically take. She was, however, appropriately reluctant to identify a precise figure, although in her first report, she calculated that 2.78 hours per survey was allowed for on KSN's figures. Her oral evidence, therefore, was limited to saying that, on the basis of the current model of operations, 1.72 hours was insufficient but, at least implicitly, 2.78 hours was enough.

333. Mr Delaney's evidence was even more limited. He attended just one survey in what appears from Ms O'Connor's replying report to have been a much larger than average house. He did not contend that he had any experience of conducting surveys or was in any position to offer an opinion on an appropriate length of time. The survey itself took 1.75 hours excluding travel (and possibly writing up time). One can surmise that a survey of an average house might take somewhat less time.

334. Abtran's figures did not imply an average time of 1.72 hours to complete surveys, for the reasons stated above. Properly understood, considerably more time was allowed, even assuming that there were no room for efficiencies in how surveys were carried out. Of course, a variety of efficiencies were proposed by Abtran, including the combining of services and its uberisation initiative.

335. It will be recalled that in its letter of 7 June 2024, SEAI expressly queried how Abtran could manage the survey workload in light of SEAI guidance of 2 hours per survey for an average 3-bedroom house. Abtran explained its position regarding averaging over the life of the contract and confirmed that it had validated its figures with surveyors who had worked with SEAI and with the market. Approaching the evidence in the manner suggested in *NTT Data Belgique*, I am satisfied that SEAI was entitled to accept that explanation based on the

totality of the information provided by Abtran, and that KSN has not adduced sufficient evidence to render SEAI's assessment that the tender was genuine implausible on this basis.

336. As an aside, I should note that if Ms O'Connor has *under*estimated the resources which Abtran's tender indicated would be made available under the Contract, she has likely *over*estimated the salaries proposed by it. However, at no point did KSN argue that there was any infirmity in the tender by reference to the salaries proposed. On Ms O'Connor's analysis, Abtran proposed rates 50% above advertised market rates. There was, therefore, considerable scope for overestimation without calling in to question the genuineness of Abtran's bid.

Reliance on dependencies

337. The final complaint made is that SEAI erred in accepting a tender reliant on dependencies. In this regard, we return to some of the issues arising under the methodology claim, Abtran's proposal to combine services and for uberisation. KSN contends, and Ms O'Connor's evidence is, to the effect that, Abtran's bid was reliant on the success of these uncertain proposals and, in particular, its uberisation proposal relied on a successful pilot.

338. It is true that SEAI accepted a tender in which the precise means by which the successful tenderer would provide the service would depend on various factors such as how successfully it could combine services, and how well its proposed uberisation model worked, as well as the success of its other transformation initiatives. But that itself does not render the award of the tender unlawful. Indeed, KSN confirmed that it made no complaint about many of what Abtran characterised as "transformation initiatives" (Transcript, Day 3, pp. 5 – 6), and Ms O'Connor confirmed that there was nothing wrong with tendering on the basis that efficiencies would be achieved and passing on the benefits of those efficiencies to the employer (Transcript Day 2, pp. 21 – 22). KSN's complaint is that Abtran's *price* was dependent on the success of these initiatives. Abtran made abundantly clear that it was not.

339. As set out above, I have concluded that it was permissible for Abtran to tender on the basis that it would combine services or seek to uberise its service provision. It was entitled, therefore, to take the view, that pursuing permissible options would enable it to achieve cost efficiencies. Ms O'Connor accepted as much in her evidence. Abtran did not, however, suggest that the cost of its services to SEAI will depend on how successful those initiatives

are. In Mr Delaney's evidence, he referred to Abtran having "*sharpened its pencil*" when preparing its tender, suggesting that it appeared to him that it sought to be as competitive as possible. This seems to me fair comment. There is no evidence, however, on which I could conclude that Abtran proposed, or SEAI accepted, the tender on the basis that the price would depend on how well Abtran's transformation initiatives played out. There was therefore no error, still less a manifest error, by SEAI in accepting that the tender was a genuine bid and was not abnormally low, just because Abtran priced its bid on the basis of achieving efficiencies which were not certain to arise.

340. In the circumstances, KSN has failed to establish any manifest error by SEAI in its determination that Abtran's bid was genuine and was not abnormally low.

Conclusion on the pricing claim

341. KSN has failed to establish that SEAI's decision conclusion that Abtran's tender was not abnormally low was implausible or that it made a clear error in so concluding. SEAI was entitled to conclude that Abtran had adequately explained its costs and proposed resources. The evidence does not establish that there was a clear error by SEAI in accepting that Abtran could perform the contract with the resources proposed. There is no evidence that Abtran proposed or SEAI accepted a bid where the price was dependent on the success or otherwise of transformation initiatives proposed by Abtran.

342. In the circumstances, I reject SEAI's claim that there was a manifest error in SEAI's assessment of whether Abtran's tender was abnormally low within the meaning of Regulation 69.

Other issues

343. The final Statement of Grounds included 8 separate grounds, only one of which, Ground 2, unlawful evaluation of the selection criteria, did the applicant indicate it was not pursuing. However, it is clear that a number of grounds, Ground 3, unlawful evaluation of the award criteria, Ground 5, unlawful evaluation of a non-compliant tender, Ground 6, unequal treatment, and Ground 8, error of law in interpretation of tender documents, are simply manifestations of the interpretation argument addressed above. I have also separately

addressed Ground 2, error in accepting an abnormally low tender, and Ground 7, lack of transparency.

344. The only other ground remaining, Ground 4, failure to provide reasons, was not directly pursued but was referred to in the context of an argument that it was not open to SEAI (or its witness, Mr Delaney) to elaborate on SEAI's reasons for concluding that Abtran's tender was genuine, once it had provided those reasons prior to the commencement of proceedings. It was not entirely clear whether KSN were pursuing this point as a standalone ground.

345. It is true that in *White Mountain*, the court made clear that it was impermissible for a contracting authority to provide its reasons for determining that a tender was not abnormally low for the first time in proceedings. But the difficulty for KSN in seeking any remedy by reference to this argument is not only that SEAI made clear that it was not relying on anything Mr Delaney said in evidence to supplement SEAI's reasons for its decision, but also, and more importantly, KSN advanced no pleaded case regarding the absence of reasons for its conclusions in relation to any of the issues relied on by KSN at hearing.

346. Paragraphs 12.22 and 12.23 of the final Statement of Grounds plead that SEAI failed to provide reasons for its conclusion that the tender was not abnormally low, and failed to provide sufficient information regarding the steps that it took to satisfy itself that Abtran's bid was not abnormally low.

347. SEAI's letter of 21 June 2024 provided comprehensive detail of the steps SEAI took, including identifying the members of the PET, the questions asked of Abtran, and the engagement of Kroll. It also answered each of the questions asked by KSN.

348. The letter also provided detailed reasons for its conclusion that the tender was not abnormally low. Having regard to the obligations of confidentiality on SEAI, these reasons were entirely adequate and certainly sufficient to meet a claim that there had been a failure to provide reasons at all.

349. In the circumstances, none of the other grounds pleaded by KSN provides any basis for a remedy.

Conclusion

350. For the reasons explained above, I will refuse KSN's application for relief by way of judicial review of SEAI's decision to award the Contract to Abtran.

351. I will list the proceedings on Friday, 27 February 2026 at 10.30 am for the purpose of making final orders.