



Neutral Citation Number: [2026] EWHC 2209 (TCC)

Case No: HT-2025-000127

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

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

Date: 20th August 2026

Before :

Mrs Justice O'Farrell DBE

Between :

INVOLVE VISUAL COLLABORATION LTD

Claimant

- and -

**THE SECRETARY OF STATE FOR WORK AND
PENSIONS**

Defendant

Parishil Patel KC (instructed by Trowers & Hamlins LLP) for the Claimant
Ewan West KC & Alfred Artley (instructed by Government Legal Department) for the
Defendant

Reading date: 12th January 2026
Hearing dates: 13th, 14th, 15th, & 21st January 2026

Approved Judgment

This judgment was handed down remotely at 10.30am on 20th August 2026 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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MRS JUSTICE O'FARRELL DBE

Mrs Justice O'Farrell:

1. This claim arises out of a procurement conducted by the defendant for the award of a contract for a strategic video channels solution (“the Procurement”). The claimant challenges the defendant’s decision to exclude it from the competition and award the contract to another bidder, Accenture (UK) Limited (“the Decision”) on the basis that there were breaches of the applicable Public Contracts Regulations 2015 (“the PCR”).
2. The defendant is the government minister responsible for the Department of Work and Pensions (“the DWP”) which is responsible for welfare, pensions and child maintenance policy.
3. The claimant is a limited company specialising in the design, implementation, and support of audio-visual collaboration solutions. It is the incumbent provider of audio-visual services to DWP, including the Health Assessment and Universal Credit directorates, using a third-party platform known as “Attend Anywhere” under a contract dated 1 December 2021.
4. The claimant challenges the defendant’s decision to exclude it from the Procurement, notified in a contract award notice dated 7 April 2025, on the basis that it had failed to achieve the minimum threshold score for Question 6.4 in the “Technical Envelope”, with the consequence that the “Commercial Envelope” submitted was not marked. The claimant’s case is that had its bid not been excluded and its Commercial Envelope evaluated, it would have been identified as the most economically advantageous tender (“MEAT”) and the claimant would have been awarded the contract.
5. The defendant’s position is that the claimant was excluded from the Procurement competition on valid grounds. Its proposal in response to Question 6.4 involved “URL masking” (i.e. where a customer is re-directed to a non-GOV.UK domain, but that is then ‘masked’ from the customer by showing a GOV.UK URL in the address bar), which did not meet the requirement for the video solution to be integrated and consumed from within DWP web pages. Further, the claimant would have been excluded in any event, for failure to comply with its conflict of interest obligations as an incumbent provider, in that there was participation in the detailed bid assembly by senior managers, contrary to mitigation measures agreed with the defendant.

Background

6. The DWP is the UK’s biggest public service department. It administers the state pension and a range of working age, disability, and ill health benefits to approximately 20 million individuals.
7. The stated purpose of the Procurement is to procure a high quality, modern and single source video conferencing channel solution to enable DWP to interact with its customers, which is capable of being rolled out across DWP’s various lines of business. The video conference solution will replace the video conference solutions deployed in the Health Assessment Directorate and Universal Credit, which are the only services currently offering a video conferencing channel and whose contracts will soon end.

8. The stated intention is that the video conference solution will offer a range of key benefits that are not provided by the existing contract, including:
 - i) a solution which is controlled by DWP;
 - ii) call recording and capture capabilities;
 - iii) transcription functionality;
 - iv) a hierarchical model of customisation and configuration for each of the DWP directorates and the different business units;
 - v) integration with the Active Directory;
 - vi) a solution which follows GOV.UK styles and is consumed from within GOV.UK web pages; and
 - vii) improved security and security oversight.

The Invitation to Tender ("ITT")

9. On 25 June 2024 the invitation to tender for the DWP Strategic Video Channels Solution was published ("the ITT").
10. The contract was stated to be for an initial four-year period from 14 October 2024 to 13 October 2028, with two optional extension periods of up to 12 months.
11. Tenderers were required to submit three "envelopes" as part of the bid process:
 - i) the Qualification Envelope (evaluated on a pass/fail basis);
 - ii) the Technical Envelope (with a 60% weighting); and
 - iii) the Commercial Envelope (with a 40% weighting).
12. The defendant described its requirements for the solution as follows:

"5.1 The Authority requires a Video Solution which can be used by the various DWP directorates and the different business units within each directorate (DWP Lines of Business), in parallel to the continued use of Telephony, Chat or face-to-face customer engagement channels. The initiative intends to provide an alternative channel of communication with the individual. A major advantage of this initiative is that the individual won't have to travel to have a face-to-face meeting or assessment.

...

5.4. Additionally, the Authority needs a Video Solution that Customers and DWP employees will be able to use only via their web browsers and the solution must support two models of Video engagement:

a) First model is the more traditional and common approach where the Video Solution creates unique URLs per Video meeting so that Customers and DWP employees can use them to directly join the Video meeting.

b) Second model is where the solution provides waiting rooms functionality. Customers using the URL corresponding to each waiting room will be landing to a page where they'll be filling in some information (e.g. first name, surname) and will then be waiting in the waiting room until a DWP Host admits them to the actual Video meeting.

5.4.1 For the first model, the solution shall provide the ability for DWP to create and manage the Video meeting URLs programmatically via APIs.

5.4.2 For both models of engagement, the solution must follow GOV.UK styles and the DWP customers must consume the service from within GOV.Uk web pages without being aware that they are using a third-party Video product.”

13. Section 5.10 provided that the full set of the DWP's requirements was contained in the Specification at Attachment 1 to the ITT.
14. Section 5.11 provided that requirements were classified as “Must”, “Should” or “Could” (based upon the standard MoSCoW classification):
 - i) MUST - The solution MUST deliver this requirement and is critical to the delivery within the current timebox, failure to deliver a MUST makes the system unusable it is the Minimum Usable Subset.
 - ii) SHOULD - The solution SHOULD deliver this requirement and it is very important but may not be for the current timebox, this requirement can be as important as MUST but not as time critical.
 - iii) COULD - Ideally the solution COULD deliver this requirement which is desirable, or a nice to have, they may be included if time and resources permit.
15. Each of the questions within the Technical Envelope was marked out of 10 in accordance with the following scoring matrix at paragraph 21.14 of the ITT:

Marking Scheme:
The marking scheme is set out below that will be used to assess the response to each question.

10	Exceeded Requirements – Response fully addresses all requirements within the question to an excellent level of detail, and exceeds a significant proportion of the requirements; and The response is detailed, clear, consistent and well-evidenced, and the Potential Supplier displayed expertise and know how; and The response includes innovative approaches to meet the requirements within the question resulting in added value for the Authority, for example through efficiency or simplicity; and The response includes a solution to one or more requirements making an impactful difference to the Authority's solution.
7	Substantially/Fully Met – Response fully addresses all, or most, of the requirements, within the question to an excellent level of detail; and The response provides evidence that the requirements have been understood and addressed; and The response includes a solution to one or more requirements making an impactful difference to the Authority's solution.
4	Partially Met – Response partially addresses the requirements within the question; and The response provides limited evidence that the requirements have been understood and addressed, the response is minimal or largely generic.
1	Requirements not met or no evidence – Response does not, or minimally, addresses the requirements of the question; and/or The response does not provide evidence that the requirements have been understood and addressed, or the response is minimal or generic. The Authority will not proceed to evaluate the Commercial Tender responses of any Potential Suppliers that scores a 1 for questions where a minimum threshold applies.

16. Question 6.4 of the Technical Envelope was headed “GOV.UK STYLES” and was formulated as follows:

“Please provide a description of how the overall proposed solution will meet the GOV.UK related requirements, detailed in Attachment 1 – Specification.”

17. The relevant GOV.UK related requirements were in rows 10-12 of the Specification, headed: "User Interface and GOV.UK styles" classified as a "MUST" and stated:

"10. The proposed solution supports the standard GOV.UK styles so that the Customer interface of the Video Solution is integrated and provided from within DWP web pages that adhere to the design standard.

11. The proposed solution supports that no branding is visible to the Customer interface of the Video solution when they are using the service, i.e. DWP customers will consume the service from within GOV.UK web pages without being aware that they are using a third-party Video product.

12. The proposed solution must be presented via GOV.UK and alternative DWP websites e.g. the Universal Credit portal, Citizen View/Colleague View when they are available."

18. The requirements in the relevant specification were reflected in the Guidance for Question 6.4, which stated:

"The Authority requires a Video Solution that provides a Customer Interface which is consistent with the rest of the GOV.UK pages, it looks and feels like GOV.UK page and complies to GOV.UK structure and style requirements set out in the Specification. Your response should include, as a minimum:

1. A description of how the solution will ensure that the Customer Interface is integrated and provided from within DWP web pages that adhere to the standard GOV.UK styles as described in <https://www.gov.uk/service-toolkit> and <https://design-system.service.gov.uk/>".

2. Describe how the solution will be architected to ensure that DWP Customers will be consuming the Video service from within GOV.UK web pages, without being aware that they are using a third-party Video product."

19. Question 6.4 came within the "Technical Merit" section. The guidance to that section provided:

"5. A minimum score of 4 is required for each of the Technical Merit questions ("Technical Merit Minimum Threshold")

6. Where the Tender is evaluated and does not meet the Technical Merit Minimum Threshold set for a question within the Technical Envelope, the entirety of their Tender will be deemed as non-compliant and the Potential Supplier will be excluded."

20. Section 15 provided that potential suppliers could raise questions or seek clarification regarding any aspect of the ITT, although the DWP reserved the right not to respond to any repeated questions and would not enter exclusive discussions regarding the requirements of the ITT with any potential suppliers.
21. Section 16.1 provided:
- “Where information or documentation submitted by Potential Suppliers is or appears to be incomplete or erroneous, or where specific documents are missing, the Authority may request a Potential Supplier to submit, supplement, clarify or complete relevant information within a specified time limit provided that the Authority is satisfied that such requests are made in full compliance with the principles of equal treatment and transparency. In those instances, the Authority will send any questions using the Portal to the named representative of the Potential Supplier. They will also be notified by email from the Portal. This will be sent to the person who is registered on the Portal, who must arrange for a reply via the Portal by the stipulated clarification response deadline.”
22. Section 21 contained an explanation as to the basis on which tender responses would be evaluated:
- “21.1 The Authority shall evaluate all compliant Call-Off Tender responses to the Further Competition respectively. The purpose of evaluation as described in this section is to identify the “Most Economically Advantageous Tender” (‘MEAT’).
- 21.2. The Authority will only evaluate information provided by Potential Suppliers in their Call-Off Tender response.”
23. Section 21.4 stated that the defendant would evaluate the Qualification Envelope (Qualification Questions), the Technical Envelope (Quality Questions; ISQ; and Social Value) and the Commercial Envelope (Pricing) sequentially in line with the evaluation criteria.
24. Section 21.7 explained that a minimum threshold would be applied to certain questions, including Questions 6.1 to 6.7 of the Technical Merit section. The defendant would not proceed to evaluate the Commercial Tender responses of any potential suppliers that did not meet the minimum threshold of any of the minimum threshold questions.

Clarification Q & A

25. On 8 July 2024, a request for clarification was raised by a potential bidder on the requirements of Question 6.4 in the following terms:
- “Can you elaborate on the requirement to integrate into GOV.UK? are you expecting customers to access the solution ‘embedded’ into existing GOV.UK. pages or can the solution be deployed into GOV.UK (eg subdomain).”

26. On 9 July 2024, the defendant responded:

“A Customer is provided with a GOV.UK.URL. The Customer uses this URL in their web browser and they land to a GOV.UK web page which is styled with the standard GOV.UK styles. From within that GOV.UK page, the Customer consumes the Video service without being redirected to a page in a non GOV.UK domain, so that the Customer is not aware that they are using a third-party Video product.”

The claimant's tender

27. On 2 August 2024 the claimant submitted its tender, proposing a solution using its SQOD platform. Its response to Question 6.4 included the following:

“SQOD has been designed and built with the ability to provide full customisation to customers using the product. This allows for design elements to be changed including logos, colour schemes and text elements. As part of the development of SQOD for GOV.UK use, a full suite of customisation has already been developed and included using the GOV.UK design toolkit. All components used within the GOV.UK template have been developed using elements taken directly from <https://www.gov.uk/service-toolkit> and <https://design-system.service.gov.uk/>.

...

The SQOD platform supports integration into a customer website. The GOV.UK instance will be pre-designed using the GOV.UK template so any Waiting Rooms or Scheduled video calls will automatically have the design applied. Involve will work with DWP as part of the implementation to deliver a masked URL where applicable utilising DNS records to allow the SQOD platform to appear as part of the DWP web portfolio. The SQOD user interface will be presented within the flow of a DWP Business unit. The template used for the GOV.UK site will be maintained and updated based on the future development of the GOV.UK design toolkit.

...

All customers using the SQOD platform will be presented with a user interface using the GOV.UK design toolkit. This will provide the confidence that the solution they are using is provided and delivered by DWP. All elements of the user interface will use GOV.UK components, colours and fonts and provide a familiar user experience as provided on any other GOV.UK web site. SQOD has been designed to be third-party product and branding neutral, ensuring that there are no third-party video components or branding visible. This is possible by

embedding the video window and controls within the SQOD GOV.UK styled web pages.”

28. The reference to “a masked URL” described a solution whereby a customer would start in a GOV.UK domain but selecting the application would re-direct the customer to a non-GOV.UK domain; the fact that it was a non-GOV.UK domain would be hidden from the customer by displaying a GOV.UK URL in the address bar and by adopting the GOV.UK style for the web pages.

Technical evaluation and moderation

29. The initial technical evaluation of the bids from the claimant and four other bidders was carried out by three evaluators, Mathew Mann (Senior Technical Architect / Solutions Architect), Chelsea Townsend (Product Manager for Universal Credit) and Ioannis Faidros (Senior Solutions Architect for DWP Digital Channels).
30. The evaluators carried out their independent evaluations of the responses to Question 6.4 by the bidders. In respect of the claimant’s response to Question 6.4, Ms Townsend and Mr Mann gave an initial indicative score of 7. Mr Faidros gave an initial indicative score of 1 on the basis that he considered that the claimant’s use of URL masking did not meet the requirement that the solution be integrated into DWP/GOV.UK webpages.
31. At meetings held via Teams on 8 and 18 November 2024, the evaluators moderated the scores.
32. At the initial moderation on 8 November 2024, Mr. Faidros expressed his concern that the response did not meet the requirement of “being integrated and provided from within DWP/GOV.UK web pages” whereas the other two evaluators were of the view that it was compliant.
33. Following a discussion, the evaluators reached a consensus and agreed a score of 7 for the claimant’s response to Question 6.4.
34. That discussion and the rationale for the consensus score was recorded as follows:

“Customer Interface - Mat and Chelsea considered that the Potential Supplier had responded to guidance item one to an excellent level of detail, particularly how the web pages will adhere to the standard GOV.UK styles. The response provides evidence of previous development where these standards have been adhered to, as well as a number of relevant supporting screen shots. Furthermore, the response explicitly references relevant accessibility standards and flags the process if something isn't compliant with WCAG 2.2.

Ioannis agreed that the response does provide excellent detail on the compliance with GOV.UK styles element of the question, however, focussed on the 'integrated and provided from within DWP web pages' element. The Potential Supplier's response refers to use of a masked URL so platform appears to be a part of the DWP web portfolio. Ioannis considered that this does not

meet the requirement as a masked URL that looks like a DWP web page is not the same as the web page actually being integrated from within DWP web pages.

Following a lengthy discussion, Mat and Chelsea did not agree that URL masking did not meet the requirement, Ioannis agreed that if the URL masking was acceptable then it should be considered that the guidance item was addressed to an excellent level of detail.

GOV.UK Web Pages - The same rationale for Ioannis' score applied to guidance item 2 in that he did not consider URL masking to address how the solution will be consumed from within GOV.UK web pages. However, in line with the discussion on guidance item 1, it was agreed that if this did meet the requirement, the response explained how the solution would be architected to an excellent level of detail. Although, the response only confirmed that customers will not be aware that they are using a third-party product, it did not describe how this will be achieved.

Overall – Ioannis initially scored a 1 due to URL masking not meeting the requirement for the solution to be integrated and provided from within DWP/GOV.UK web pages, therefore the only part of the requirements that were considered to be addressed was the GOV.UK styles.

Following Mat and Chelsea's view that the URL masking did meet the requirements, it was agreed that how this process would be architected was done to an excellent level of detail and therefore Ioannis agreed to raise to a 7.

In summary the response was considered to have addressed most of the requirements to an excellent level of detail, further information on how the customer won't be aware that they are using a third-party video product could have been provided. The screenshots were relevant and demonstrated that the Potential Supplier had a thorough understanding of the Authority's requirement for a solution that adheres to standard GOV.UK styles."

35. Following that initial moderation, although Mr Faidros agreed to increase his score to 7, he remained concerned that URL masking did not meet the specification requirement. He raised his concerns with Jessica Cahill, the Commercial Lead for the Procurement. The issue was discussed within the commercial team and it was agreed that it would not be appropriate to proceed where one of the evaluators had voiced strong concerns that the claimant's score was awarded on an erroneous understanding. Consequently, the defendant decided to re-open the moderation of all the responses to Question 6.4, so that the issue of URL masking could be considered further.

36. On 28 November 2024, Ms Cahill sent an email to the evaluators, informing them of the decision to re-moderate the bids:

“In the process of writing up the moderation notes for Question 6.4, I do not believe we have sufficiently addressed the issue with Involve and around if a masked URL can be considered to meet the requirement that the Customer Interface is integrated and provided from within DWP web pages and a more thorough justification is needed for the final score. On that basis, Corinne will be sending out an invite for a follow up moderation meeting next week to discuss further.”

37. Ms Townsend, one of the original evaluators, went on maternity leave earlier than expected and therefore was unavailable to participate in any further moderation. However, she sent an email on 5 December 2024, stating:

“... I don't think I can actually add anything on the issue with the masked URL as from my perspective it is more of a tech question of whether this can be done seamlessly – as far as I'm aware it can be so any constraints are tech not GOV.UK design.

I certainly wouldn't feel comfortable failing any of the suppliers based on this.”

38. Ms Cahill decided that it would be necessary to bring in a new third evaluator who would re-assess all responses to Question 6.4 before the proposed re-moderation. This approach was approved by Jeremy Edwards, Head of Digital Channels at the defendant, as recorded in their email exchanges on 12 December 2024.

39. On 13 December 2024 Philip Harris, Lead Architect at DWP, was appointed to replace Ms Townsend as evaluator. Mr Harris stated in his evidence that Mr Faidros explained the background to the project and the Procurement to him but did not discuss the tenders or the assessments, so as not to influence his evaluation.

40. Mr Harris carried out a fresh independent evaluation of all the responses for Question 6.4 and awarded the claimant an initial indicative score of 1. His comments were:

“SQOD is a third party hosted platform requiring DNS entries that will need to be investigated further. The response states that there is customisation to customer requirements, with initial pre-design using GOV.UK templates.

Overall, this again is a disappointing example of a response. There is very little detail of how the solution will be seamless and transparent to the end user, or how it will fit within the DWP architecture.”

41. On 19 December 2024 the re-moderation took place by a Teams meeting. Mr Faidros explained why he did not consider that URL masking met the requirements. Following the discussion, Mr Mann and Mr Harris both agreed that URL masking did not meet the requirements that the customer interface be integrated and provided from within

DWP web pages, or that customers should be consuming the video service from within GOV.UK web pages.

42. Ms Cahill's notes of the discussion at the re-moderation meeting were as follows:

“Question says the customer interface is provided from within DWP webpages, the UI is not embedded within DWP webpages instead the URL is masked and you will be consuming the service from Involve's URL – does not meet the requirement. Mimic embedding of pages, whilst they are hosted somewhere else within Involve's space.

- Mat – do mention DNS redirect – standard approach to make it appear as if it is the same thing
- IF – user journey, start in gov.uk page then when click to go to new solution, will leave gov.uk space and land in supplier's site
- MM – do that in any of the supplier's web UIs
- No innovation or added value to score a 10.

Key argument on point 1 is 'from DWP web pages' and what this means.

Currently health customers go to a gov.uk url, select a supplier and are taken to that supplier's webpage, when start a video call, re-directed to a video platform which is a non-gov.uk page. Have no control to change content of page.

UC – create video and send gov.uk link. Customer lands in a DWP webpage with gov.uk URL.

Lacking how the solution will be integrated.

Evidence on adhering to styles (2nd part of point 1).

How the solution will be architected is lacking.

Discuss how they won't be aware.

Short response, screenshots take up a lot of the word count.”

43. Ms Harrison's notes of the discussion were as follows:

“Showed what was required- platform page has to show that it is a DWP page but Involve can't do this.

Matt- This may change my view. But the problem may be in the way on the exact wording of the questions. But based on what Ioannis has shown- in practice it is not viable. But is the score a 1- based on what constitutes a 1 if it doesn't meet requirements.

I am prepared to come down – I am onboard with what Ioannis-meets the look of the question but doesn't meet the integration. Part 1 does not meet the requirements. They have not met the description of how it would be integrated. They have explained how they will adhere to the standards.

Ioannis- Provided some evidence about adherence to the styles. They have provided evidence to show that the customer wouldn't know that it was being masked.

Matt- In reality the masking wouldn't work.

Philip- They said they are confident they can do it, but not confirmed that they can.

Matt- Happy to go to a 4- it is clear that now it is not a 7.

Phillip and Ioannis- Are happy to come up to a 4.

Jess went through question again for an understanding. Confident Architecture consumed from within - not met.

Philip- We are saying technically that it is not compliant.

Matt- Phil you mentioned the supplier said 'We are confident that we can do X, Y, Z' can we revisit this wording- to look at if they have said if they can do what we have asked or are they just confident? Phil shared the response.

Mathew- now rereading this I am leaning towards a 1.

Philip – from rereading this I am not confident that anything they put in there would work.

Mathew- 4 parts to the question and 25% of them are good.

Jess- If we go through each section one by one to understand.

Part 1 – Customer interface from within - Mathew- This is a fail- they have used a non-viable method. They have proposed to use masking- not viable- so show as they have not understood the requirement. Ioannis- URL masking could put masking in place- but to put this in place is not an integration- don't want to state this is not viable. It does not meet requirement. Masking not equivalent to not be integrated. Adherence to gov.uk styles – ok Consumed from Within- As above Not aware using a third-party-

Mathew- no explanation of how.

Ioannis- If I can add- URL masking- can you tell if you are technical enough it is masked? So there is technically a way for a user to know they are being direct.

Mathew- End point. Depending on where you are in the world and which part of the country your DSS records can lag and are not in real time. If the provided had an outage and switched to secondary data centre- would point to prior IP range and could get outages as a result. Could be a concern. Overall scoring relooked at again- if only hitting one out of four is not meeting it and also have misunderstood what we mean by integrated.

Score agreed - 1."

44. The discussion and rationale for the consensus score was recorded formally as follows:

"Each guidance item was reviewed and discussed, in turn alongside the moderation comments, with all three evaluators. It was felt that the original moderation comments were no longer applicable.

Customer Interface - In the initial moderation there was a substantial discussion around the meaning of 'integrated and provided from within DWP web pages'. Chelsea and Mat had originally considered that URL masking met this requirement and this again was discussed during the re-moderation. Ioannis presented the current Customer journeys, demonstrating the difference between pages that are integrated from within DWP web pages that have a GOV.UK URL, versus use of Supplier webpages. Following this demonstration, Mat revised his view and agreed that URL masking is not equivalent to the Customer Interface being integrated and provided from within DWP web pages. Phil also agreed that the proposed approach did not meet the requirement.

As a result, the extent to which the Potential Supplier had addressed guidance item one was considered, it was agreed that the response addressed the GOV.UK styles element to an excellent level of detail, however, did not address the integration point on the basis that the information provided did not meet the requirement. Therefore, the response only partially addressed guidance item one. Furthermore, the provision of a solution that does not meet the requirement suggests a lack of understanding of the Authority's requirements.

GOV.UK Web Pages - For the same reasons as above, Mat revised his view that the proposed architecture of the solution addressed the requirement within guidance item two that the solution will be consumed from within GOV.UK web pages. The response details the Customer consuming the video service from

something that appears to be a GOV.UK web page but is actually the Potential Supplier's SQOD platform.

As had already been highlighted in the initial moderation, and as Phil picked up on in his evaluation comments, the response provides very little detail on how the solution will be seamless and transparent to the end user. The response relies on a statement that 'we can confirm that DWP customers consuming the video service from within GOV.UK web pages will not be aware that they are accessing a third-party video product' rather than providing sufficient detail on how this will be achieved.

It was therefore agreed by all evaluators that the requirements of guidance item two were only minimally addressed with the confirmation statement described above. Similarly, there was minimal evidence that the Authority's requirements had been understood, given that the proposed architecture did not meet the requirements of the question.

Overall - Following the above discussions, it was then deliberated whether the response partially addressed the requirements or minimally addressed the requirements. It was agreed that the response only minimally addressed the requirements; GOV.UK styles were well addressed, Customer's not being aware that they were using a third-party product was minimally addressed, and the integration and provision of the Customer Interface and consuming the solution from within DWP / GOV.UK web pages was not addressed in a way that complied with the requirements of the question. Furthermore, the proposal to use URL masking rather than to integrate from within DWP / GOV.UK web pages provided evidence that the requirements had not been understood. All evaluators agreed to a score of 1 and Mat confirmed he was content to move from a score of 7 to a score of 1."

45. The outcome of these discussions was that the claimant's response was awarded a moderated score of 1 for Question 6.4.

The Contract Award Notice

46. On 7 April 2025, the defendant notified the claimant that its tender had not been successful, as it had failed to achieve the minimum threshold score for Question 6.4 in the Technical Envelope. As a result, the claimant had been excluded from the Procurement.

The Proceedings

47. The Claimant issued these proceedings on 24 April 2025.
48. Pursuant to Regulation 95(1) of the PCR, an automatic suspension was imposed, precluding the defendant from entering into the new contract. By application dated 17

July 2025, the defendant applied to lift the automatic suspension but that application was dismissed and, therefore, it remains in place.

49. This trial was fixed to determine the issues of liability, causation and remedies (save for quantum), including, to the extent relevant, whether any breaches were sufficiently serious to justify an award of damages.
50. The issues are largely agreed as follows:
- i) Was the defendant's decision to re-moderate the scores for Question 6.4 in breach of the principle of transparency and/or manifestly erroneous?
 - ii) Was the defendant's conduct of the re-moderation process in breach of the principles of transparency and/or equal treatment and/or the defendant's obligation to act proportionately?
 - iii) Was the score awarded to the claimant for Question 6.4 on re-moderation manifestly erroneous?
 - iv) Could and/or would the defendant have rejected the claimant's tender in any event for failure to comply with the conflict of interest rules in the ITT?
 - v) Relief.
 - vi) Damages.

Legal principles applicable

51. The relevant authorities and legal principles are not in dispute.
52. Regulation 18(1) of the PCR provides:
- “(1) Contracting authorities shall treat economic operators equally and without discrimination and shall act in a transparent and proportionate manner.”
53. The principle of equal treatment requires that comparable situations must not be treated differently and that different situations must not be treated in the same way unless such treatment is objectively justified: Cases C-21/03, C-34/03 *Fabricom v Belgium* [2005] ECR I-01559 at [27]; *Woods Building Services v Milton Keynes Council* [2015] EWHC 2011 (TCC) at [9]; *Abbvie Limited v NHS Commissioning Board* [2019] EWHC 61 (TCC) at [45] to [57].
54. The principle of equal treatment gives rise to an obligation of transparency, as summarised by the ECJ in Case C-19/19/00 *SIAC Construction Limited v County Council of the County of Mayo* [2001] ECR I-07725:
- “[41] ... the principle of equal treatment implies an obligation of transparency in order to enable compliance with it to be verified ...

[42] More specifically, this means that the award criteria must be formulated, in the contract documents or the contract notice, in such a way as to allow all reasonably well-informed and normally diligent tenderers to interpret them in the same way.

[43] This obligation of transparency also means that the adjudicating authority must interpret the award criteria in the same way throughout the entire procedure ...

[44] Finally, when tenders are being assessed, the award criteria must be applied objectively and uniformly to all tenderers ...”

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

“[8] ... [In the Mayo case] the Court explained what the legal principle of transparency meant in the context of invitations to tender for public contracts: the award criteria must be formulated in such a way as to allow all RWIND tenderers to interpret them in the same way. That requirement set a legal standard: the question was not whether it had been proved that all actual or potential tenderers had in fact interpreted the criteria in the same way, but whether the court considered that the criteria were sufficiently clear to permit of uniform interpretation by all RWIND tenderers.

...

[12] ... the yardstick of the RWIND tenderer is an objective standard applied by the court.

...

[14] The rationale of the standard of the RWIND tenderer is thus to determine whether the invitation to tender is sufficiently clear to enable tenderers to interpret it in the same way, so ensuring equality of treatment. The application of the standard involves the making of a factual assessment by the national court, taking account of all the circumstances of the particular case.

[27] ... The court has to be able to put itself into the position of the RWIND tenderer, and evidence may be necessary for that purpose: for example, so as to understand any technical terms, and the context in which the document has to be construed. But the question cannot be determined by evidence, as it depends on the application of a legal test, rather than being a purely empirical enquiry. Although, as counsel for the appellants emphasised, the question is not one of contractual interpretation – the issue is not what the invitation to tender meant, but whether

its meaning would be clear to any RWIND tenderer – it is equally suitable for objective determination.”

56. In *Optima v. Secretary of State for Work and Pensions* [2025] EWCA Civ 127, Coulson LJ approved of the observations of the Court of Appeal of Northern Ireland in *Clinton (t/a Oriel Training Services) v. Department for Employment and Learning* [2012] NICA 48 that:

“if a criterion was going to be fatal at the outset to the whole tender, then it ‘was one in respect of which the principles of clarity, fairness and equality of treatment demanded particular clarity and transparency’.”

57. The rules were summarised succinctly in *Energy Solutions EU Ltd v Nuclear Decommissioning Authority* [2016] EWHC 1988 (TCC) by Fraser J (as he then was) at [255]:

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

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

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

60. As noted by Fraser J in *Bechtel Limited v High Speed 2 (HS2) Limited* [2021] EWHC 458 (TCC) at [19] and [256]-[258], the manifest error bar is a high one; it is not sufficient to identify subjective disagreements with the scores awarded to a bidder:

“... the Court should always resist the temptation simply to substitute its view for that of a contracting authority and should only intervene where sufficiently material breaches of obligation are shown...”

There is, however, no judicial remedy for subjective dissatisfaction at losing a procurement competition.”

61. This court summarised the approach that the court must adopt in respect of a case where the assessment/marketing of bids is challenged in *Siemens Mobility Limited v High Speed Two (HS2) Limited* [2023] EWHC 2768 (TCC) at [146] as follows:
- i) The tender documents must be construed objectively on the basis of the standard of the RWIND tenderer.
 - ii) The court must consider whether the assessment criteria and tender process set out in the tender documents were applied objectively, uniformly, without discrimination or consideration of undisclosed criteria, and in a proportionate manner to all tenderers.
 - iii) The court must consider whether there was any manifest error in the tender evaluation exercise, such as a failure to consider all relevant matters, consideration of irrelevant matters, or a decision that is irrational in that it is outside the range of reasonable conclusions open to the utility.
 - iv) The court must not substitute its own assessment for that of the contracting utility. Its role is limited to a review of the process to determine whether the published rules of the procurement were followed in compliance with the regulations.
62. Where a contracting authority has a discretion to disqualify a tenderer under the terms of the ITT, that discretion must not be exercised on an unlimited, capricious or arbitrary basis: *Stagecoach East Midlands Trains Ltd and others v Secretary of State for Transport* [2020] EWHC 1568 (TCC) at [44].
63. Challenges to disqualification decisions on proportionality grounds face a high bar. Where the authority has a discretion to disqualify, the challenger must show that the decision to disqualify was manifestly disproportionate: *R (Lumsdon) v Legal Services Board* [2016] AC 697 at [73]; *Optima v SSWP* [2024] EWHC 766 (TCC) at [103].

Issue 1 – decision to re-moderate

64. It was common ground, as confirmed by Ms Cahill, Mr Faidros and Mr Mann in cross-examination, that the initial moderation exercise in November 2024 was completed and achieved its purpose in agreeing consensus scores against each of the Technical Questions in respect of the tenders. The issue is whether, in those circumstances, the defendant was entitled to re-moderate the scores for Technical Question 6.4.
65. The claimant’s pleaded case is as follows:
- i) The defendant’s decision to re-moderate the scores for Question 6.4 was in breach of the obligation to act with transparency. The process of re-moderation was not provided for in the ITT and, once the process of moderation had been completed and the evaluation proceeded to the Commercial Envelope, the defendant was not entitled to re-open the evaluation of the Technical Envelope.

- ii) The decision to re-moderate the scores was manifestly erroneous. The evaluators carried out their independent assessments, discussed their views and concerns in the initial moderation exercise, and a consensus was reached.

Entitlement to re-moderate

- 66. Mr Patel KC, leading counsel for the claimant, correctly notes that the tender documents did not contain any provision for re-moderation of the bids after the moderation exercise was complete and a consensus had been reached. That must be considered in context; the obligation of transparency did not require the defendant to explain in detail the internal procedure by which it would undertake assessment of the bids and any moderation. What was required was for the defendant to set out the marking scheme and criteria for assessment so as to allow all RWIND tenderers to interpret them in the same way; further, for the defendant to apply the marking scheme and award criteria objectively and uniformly to all tenderers during assessment.
- 67. Section 21 of the ITT provided details of the tender evaluation process. The defendant would evaluate the Qualification Envelope, the Technical Envelope and the Commercial Envelope sequentially in line with the evaluation criteria. The tenders would be evaluated in accordance with the marking schemes in the ITT. Some of the questions were 'pass' or 'fail' questions. In respect of certain questions, including Technical Merit Questions 6.1 to 6.7 of the Technical Envelope, there was a minimum threshold which, if not attained, would preclude the bid being considered at the commercial stage. The defendant would evaluate and mark all Commercial Envelope tender responses that met the minimum thresholds within the Technical Envelope.
- 68. Thus, the tenderers were informed of the award criteria, the marking scheme and the tender evaluation process. Subject to any discrepancies or errors in the ITT, that was sufficient to satisfy the principles of equality and transparency.
- 69. The tenderers were not informed of, and did not need to know, details of the internal evaluation and moderation exercises for the purposes of formulating and submitting their bids on an equal basis. Of course, in the event of a challenge to the fairness and lawfulness of the Procurement, the defendant had an obligation to disclose documents evidencing those internal exercises but that was for the purpose of enabling the claimant to verify whether there had been compliance with the principles of equality and transparency by objective and uniform application of the award criteria.
- 70. It was not necessary for the tender documents to explain the internal processes by which the tenders would be evaluated, through independent assessment and moderation. In those circumstances, the absence of any express provision permitting re-moderation simply did not arise. Certainly, it did not preclude re-moderation if otherwise appropriate.
- 71. The circumstances in which it might be appropriate to re-moderate are varied and fact sensitive. Evidence of impropriety on the part of one of the evaluators would be a sound reason for re-evaluating and re-moderating the bids. Likewise, a mistake discovered in the marking exercise would demand correction by the authority and might require re-moderation. On the other hand, re-moderation simply on the basis that the authority did not like the outcome would be inappropriate as an arbitrary or capricious distortion of the process.

72. In this case, the reason for the fresh evaluation and re-moderation of all bids was the concern raised by Mr Faidros that the award criteria had been incorrectly applied. As such, the reason for the decision to re-moderate was in furtherance of the requirement for equality and transparency, namely, to ensure that the award criteria identified in the tender documents were applied objectively and uniformly to all bidders. In those circumstances, there was no breach of the PCR.
73. Contrary to the claimant's submission, this was not a case of the defendant favouring the position of Mr Faidros over the position of Ms Townsend and Mr Mann, the other original evaluators. By re-moderating Question 6.4 for all tenderers and discarding the original evaluations and the original moderated scores, as explicitly stated in the notes of the re-moderation exercise, the question was considered afresh with no pre-conception or pre-determination.

Timing of re-moderation

74. It is said by the claimant that it was not open to the defendant to re-open the moderation of the Technical Envelope because the ITT stated that there would be sequential evaluation of each section of the tenders and the evaluation of the Commercial Envelope had already started. That allegation is disputed on the facts. The defendant's position is that, although the defendant undertook compliance checks on the Commercial Envelope in parallel to the Technical Evaluation in respect of each tender, the Commercial Evaluation was not undertaken until after the conclusion of the Technical Evaluation.
75. In her evidence, Ms Cahill explained that she, with her colleague, Corinne Harrison, carried out checks on the commercial responses in August 2024 during the ongoing Technical Evaluation. This included reviews of assumptions included in the response, the implementation costs for each phase, the ongoing costs, the skills and responsibility ("SFIA") rates and checks against the calculations. She also inserted the price submissions into a spreadsheet which automatically applied the relative weighted score to each bid. This disclosed the provisional score for each bidder and their relative ranking to the other bids. But at that stage she did not have the outcome of the Technical Envelope. Ms Cahill's evidence was that this was not intended nor considered to be the formal Commercial Evaluation. That could not be completed until the conclusion of the technical moderation process and confirmation of which potential suppliers had achieved the minimum scores.
76. I accept Mr Patel's submission that once the Commercial Evaluation had been completed, it could be difficult to re-visit the Technical Evaluation. The award criteria were stated to allow selection of the MEAT, not just the cheapest tender. Use of sequential evaluation of the Technical Envelope and the Commercial Envelope was intended to ensure independent assessment of these elements. Separation of the assessments would guard against giving the Commercial Evaluation undue influence to the detriment of the Technical Evaluation. Although there might be circumstances in which it would be acceptable, or even necessary, to unwind the tender process and correct any errors or address concerns, it could raise potential difficulties of cross-contamination of the process, through knowledge gleaned from the Commercial Evaluation that could unfairly influence assessment in the Technical Evaluation.

77. Such potential difficulties did not prove to be a problem in this case. The Technical evaluation and moderation did not take place until November/December 2024. Notwithstanding the provisional checking and weighting of the bids, the Commercial Evaluation did not take place until after completion of the Technical Evaluation. There is no evidence that the provisional exercise was given to the technical evaluators, or that such exercise contaminated the integrity of the Technical Evaluation or Commercial Evaluation. In re-examination, Mr Faidros confirmed that he did not have visibility of the pricing, information security or moderated scores for other questions. The technical evaluators were not told what the commercial scores were prior to the evaluation and moderation exercises.

Whether decision to re-moderate manifestly erroneous

78. The decision to carry out re-moderation in relation to Technical Question 6.4 could not be said to be manifestly erroneous. In the notes of the initial moderation, Mr Faidros recorded his opinion that the claimant's proposal to rely on URL masking did not comply with the specification. Ms Cahill's evidence is that shortly after the moderation, Mr Faidros raised his concerns with her via a Teams meeting. He told Ms Cahill that he was not comfortable with the outcome of the moderation process for Question 6.4 because he considered that URL masking did not meet the tender requirements. If Mr Faidros was correct, at least two of the scores for Technical Question 6.4, in respect of the claimant and another bidder, were wrong.
79. Having heard those concerns, it was appropriate for Ms Cahill to raise the matter with more senior figures in the Commercial team, namely, James Gee, the Associate Commercial Specialist, and Neil McCann, the Commercial Specialist with oversight of the Procurement. Following discussions, it was agreed that the moderation should be re-opened to enable Mr Faidros to explain his position to the other evaluators, who could discuss the issue and re-moderate the scores. The re-moderation was extended to all tenders, not just the two tenders whose scores were the subject of concern, to ensure that all tenders were assessed and marked on the same basis and to the same standard.
80. Legitimate criticism is made by the claimant as to the defendant's record-keeping of the concerns raised by Mr Faidros, the discussion within the commercial team, the decision to re-moderate and the reasons for the same. When contemplating a departure from the agreed procedure, albeit the internal procedure not forming part of the ITT, it would have been prudent for the defendant to keep a complete audit trail in case of any challenge. But it does not follow that the decision to re-moderate was in error, let alone manifestly so.
81. In conclusion on this issue, the defendant's decision to re-moderate the scores for Question 6.4 was not in breach of the principle of transparency or manifestly erroneous.

Issue 2 – conduct of the re-moderation process

82. The claimant's pleaded case is that the defendant's conduct of the process of re-moderation was in breach of the principles of transparency/equal treatment and contrary to the defendant's obligation to act proportionately:
- i) Extraneous material was referred to during the process outside the evaluation criteria. That approach was contrary to the ITT which required the evaluation to

take place on the basis of the response to the particular question in accordance with the evaluation criteria.

- ii) The defendant wrongly approached the re-moderation on the basis that URL masking was not capable of meeting the requirements of Question 6.4. That interpretation would not be clear to any RWIND tenderer and the defendant should therefore, in accordance with its obligation to act proportionately, have issued a clarification to all bidders and invited them to re-state or amend their response to ensure that all bidders were responding on the same basis, particularly where the failure to understand the defendant's requirements was capable of excluding a bidder from the Procurement.

83. Mr West KC, leading counsel for the defendant, submits that Mr Faidros did not introduce into the re-moderation any extraneous material about the claimant's solution; rather he simply demonstrated in generic terms the difference between DWP webpages and third-party webpages. Evaluators are entitled to rely on their existing technical expertise in assessing tender responses. Mr Faidros' use of visual aids was in substance no different to an oral explanation of the differences between the two types of webpages to support the score he had awarded and did not result in the evaluation being based on anything other than the application of the award criteria to the claimant's submitted response. In any event, even if there was any breach of transparency, it does not follow that, absent use of the additional material, a different score would necessarily have been awarded. Further, the defendant disputes that there was any ambiguity in the requirement of Question 6.4 in the ITT.

Use of extraneous material

84. The starting point must be to identify the extraneous material and consider the use to which it was put.
85. Mr Faidros was responsible for drafting the technical requirements, with input at technical and business levels from colleagues whose respective teams would eventually be users of the video solution, such as from the Health Assessments and Universal Credit teams. He acted as one of the evaluators for all seven Technical Evaluation questions.
86. In his initial evaluation of the claimant's response to Question 6.4, Mr Faidros' view was that the proposed presentation of the solution was acceptable because it could present to the customers a web page with standard GOV.UK styles, which was part of the Specification requirements. What was not acceptable to Mr Faidros was the claimant's use of URL masking without integrating the solution into the DWP web pages. He considered that the development of pages which looked like DWP web pages did not meet the requirement for integration of the solution into the DWP web pages. On that basis, his initial marking of Question 6.4 was a score of 1 for the claimant.
87. During the original moderation of Question 6.4, Ms Townsend and Mr Mann took the view that the combination of URL masking and the ability to present the page as a GOV.UK styled page would satisfy the Specification requirements. Mr Faidros disagreed. Notwithstanding that disagreement, and a number of points that he had formulated by reference to documentary sources used for drafting the Specification requirements and discussions with stakeholders, which he considered supported his

interpretation of the requirements, he did not ventilate them in the moderation meetings because he considered that the evaluation should be limited to the responses from the bidders to the questions.

88. Having raised his concerns after the initial moderation was complete, Mr Faidros prepared various materials, including screenshots of websites, which he used at the re-moderation meeting to explain his appraisal of the claimant's proposed solution. He said that the claimant's proposal was to create new web pages, that would look like DWP web pages, to which it would add its video solution. It would host and maintain the new pages but the video solution would not be integrated into the DWP web pages. The visual presentation of the web pages would give the customer the illusion that they were consuming DWP pages but the claimant did not own the GOV.UK domain; as a result, customers would see a non-GOV.UK URL in the address bar of their browser. URL masking would present a GOV.UK URL in the address bar, so as to give the impression to the customer that it was a layer of DWP web pages but the claimant would need assistance from the defendant to facilitate this. Assuming that the defendant facilitated URL masking, the content of those pages would still be loaded by the claimant's hosting location and the real address would not be GOV.UK. URL masking would create the illusion that the service was provided from DWP web pages but the solution would not be integrated or provided from within the DWP web pages.

89. Mr Faidros illustrated his points by showing Mr Harris and Mr Mann an example of the Universal Credit video solution, which was integrated into the Universal Credit web pages. Further, he demonstrated what would be produced by the video solution proposed by the claimant. He expressed the view that the claimant's proposal would be:

“like taking the existing “Attend Anywhere” solution, adding a GOV.UK style ‘skin’ to that and then asking DWP to use it, which would not in my view have been acceptable to Domain Architecture.”

90. Mr Mann explained in his witness statement that, during the re-moderation, he changed his evaluation of the claimant's response to Question 6.4:

“In my initial evaluation and at the initial moderation meeting, I thought that Involve's answer to question 6.4 ... should be scored with a 7 and that it met the requirements. In the wider world of IT solution architecture, URL masking can be used to appear as part of a wider solution relatively transparently.

With hindsight, I believe that I misread part of the requirements and that some of what Involve was saying did not meet the intent of question 6.4. The portion of Involve's response specifically referencing URL masking did not meet the requirement of hosting the solution within what I would describe as the boundary of GOV.UK (“provided from within DWP web pages”).”

91. Following a full discussion, evidenced by the notes taken by Ms Cahill and Ms Harrison referred to above, the evaluators reached a consensus score of 1 in respect of the

claimant's response to Question 6.4. In their evidence, the three evaluators, Mr Faidros, Mr Harris and Mr Mann, confirmed that the claimant's response to Question 6.4 was awarded a score of 1 following re-moderation, on the basis that they regarded URL masking as not satisfying the technical requirements of Question 6.4.

92. From the above, it is apparent that Mr Faidros used extraneous material, namely, the screenshots and presentation, for two purposes: (i) first, to give a technical explanation regarding the distinction between a solution provided from within DWP web pages/GOV.UK web pages and a solution using a masked URL; and (ii) second, to illustrate the inferiority of the claimant's proposal by likening it to the existing "Attend Anywhere" solution, which was intended to be replaced by the new, upgraded system.
93. There is no breach of the principle of transparency in the first purpose; it was open to the evaluators to provide technical background explanation in support of their approach to assessment of the tenderers' responses to the technical questions. Such explanation provided clarity within the moderation exercise and was applied equally to all the tenderers.
94. Greater difficulty arises in respect of the second purpose; that Mr Faidros made use of extraneous material by way of comparison and this was limited to the claimant's proposal; it was not applied to the other responses. Mr Faidros was aware of the limitations in introducing extraneous materials; in cross-examination, that was the reason he gave for not raising the points he had in mind during the initial moderation meetings. Comparison with the "Attend Anywhere" solution was not part of the stated criteria in the ITT. In comparing the claimant's proposal with another solution, Mr Faidros strayed beyond technical explanation into impermissible evaluation against extraneous material. That approach was contrary to section 21.2 of the ITT which provided that the defendant would only evaluate information provided by the tenderers on the basis of their responses to the particular question in accordance with the evaluation criteria.
95. Thus, I find that there was a breach of the principle of transparency, in that the award criteria were not applied objectively and uniformly to all tenderers, by the use of extraneous material to evaluate the claimant's proposal during the re-moderation.

Objective interpretation of Question 6.4

96. I start by construing the natural and ordinary meaning of the language used in the ITT in Question 6.4 and the context of the overall tender documentation.
97. Section 5.4.2 of the ITT stated that:

"the solution must follow GOV.UK styles and the DWP customers must consume the service from within GOV.Uk web pages without being aware that they are using a third-party Video product."
98. This was reflected in the material parts of the Specification, headed: "User Interface and GOV.UK styles":

“10. The proposed solution supports the standard GOV.UK styles so that the Customer interface of the Video Solution is integrated and provided from within DWP web pages that adhere to the design standard.

11. The proposed solution supports that no branding is visible to the Customer interface of the Video solution when they are using the service, i.e. DWP customers will consume the service from within GOV.UK web pages without being aware that they are using a third-party Video product.

12. The proposed solution must be presented via GOV.UK and alternative DWP websites e.g. the Universal Credit portal, Citizen View/Colleague View when they are available.”

99. Thus, there were two specific requirements identified in the ITT in respect of the customer interface. The first was presentation – the solution was required to adopt the standard GOV.UK styles, so that customers would not be aware that they were using a third party product. The second was architecture – the solution was required to be integrated and provided from within the DWP/GOV.UK web pages.

100. Technical Question 6.4 required the tenderers to provide a description of how the proposed solution would meet the GOV.UK related requirements set out in the Specification. The Guidance for Question 6.4 stated:

“The Authority requires a Video Solution that provides a Customer Interface which is consistent with the rest of the GOV.UK pages, it looks and feels like GOV.UK page and complies to GOV.UK structure and style requirements set out in the Specification. Your response should include, as a minimum:

1. A description of how the solution will ensure that the Customer Interface is integrated and provided from within DWP web pages that adhere to the standard GOV.UK styles as described in <https://www.gov.uk/service-toolkit> and <https://design-system.service.gov.uk/>.

2. Describe how the solution will be architected to ensure that DWP Customers will be consuming the Video service from within GOV.UK web pages, without being aware that they are using a third-party Video product.”

101. Question 6.4 required the tenderers to explain how they could satisfy the requirements of both (i) presentation – use of the standard GOV.UK styles so that the customers would not be aware that they were using a third-party product; and (ii) architecture – integration of the customer interface and provision from within the DWP/GOV.UK web pages.

102. These two requirements were reiterated in the clarification provided by the defendant on 9 July 2024:

“A Customer is provided with a GOV.UK.URL. The Customer uses this URL in their web browser and they land to a GOV.UK web page which is styled with the standard GOV.UK styles. From within that GOV.UK page, the Customer consumes the Video service without being redirected to a page in a non GOV.UK domain, so that the Customer is not aware that they are using a third-party Video product.”

103. On a natural and ordinary meaning of the words used in the ITT, Technical Question 6.4 required the tenderers to describe how their solution would be integrated into, and provided from, the DWP/GOV.UK web pages. The natural and ordinary meaning of the reference to DWP/GOV.UK web pages was to web pages that were owned and hosted by DWP/GOV.UK; it did not include web pages that merely appeared to be DWP/GOV.UK web pages, such as by URL masking.
104. Mr Patel submits that, on an objective construction of Question 6.4, it would not be clear to the RWIND tenderer that the reference to DWP/GOV.UK web pages in rows 10-11 of the Specification was to be limited to actual DWP/GOV.UK web pages, in the sense of actual DWP GOV.UK web pages hosted and owned by DWP/within the boundary of the DWP.
105. It is said that if that were the proper interpretation, one would have expected it to be stated explicitly and clearly on the face of the requirements. I consider that it is clear on the face of the requirements. The DWP/GOV.UK web pages are owned and hosted by DWP/GOV.UK and it is not suggested otherwise. The natural and ordinary meaning of DWP GOV.UK web pages must be to those hosted and owned by DWP. On a fair and objective reading of the requirements, they are not limited to presentation and styles; they extend to architecture, including the requirement to provide the service from within those web pages.
106. Mr Patel submits that such an interpretation would be contrary to the requirements of the Specification as a whole. Reliance is placed on requirement (139) in the Specification which is said to be incompatible with the customer interface being integrated and provided from within webpages hosted and owned by DWP. Requirement (139) is within the “business continuity and disaster recovery” section of the Specification and stipulates that the proposed solution should be “hosted geographically in UK Data Centres radially distanced, typically at least 40km from each other ensuring there is no shared infrastructure”. As explained by Mr Faidros in cross-examination, there were a number of potential permutations in the solutions that might be offered. These might include the use of libraries held in remote data centres or the cloud that would be incorporated by code written into the DWP/GOV.UK web pages through the use of APIs. The requirement at (139) related to the overall infrastructure and not just the front end of the solution. Such requirement is not incompatible with requirements (10), (11) and (12), which were concerned with the user interface.
107. I accept the claimant’s point that Specification rows (10) and (11) refer to DWP pages that adhere to GOV.UK design standards and styles and that row (11) is concerned with how the video service is presented to the customer. But rows (10) and (11) also refer to a separate requirement that the solution must be integrated and provided from within those DWP/GOV.UK web pages. Similarly, the guidance to Question 6.4 refers to the “Customer interface” being “consistent with the rest of GOV.UK pages, that looks and

feel like GOV.UK and complies with the GOV.UK structure and styles requirements”. But the guidance continues by stating in terms that the tender response should describe, as a minimum, how the solution will ensure that the “Customer interface is integrated and provided from within DWP web pages” and how the solution “will be architected to ensure that DWP customers will be consuming the Video service from within GOV.UK web pages.” These express requirements go beyond mere presentation and extend to architecture. The claimant’s interpretation seeks to give no effect to the words “integrated” and “provided from within”, which is a strained reading of the specification.

108. Reliance was placed on the fact that the defendant’s interpretation is at odds with the context in which the video service is to operate. Mr Faidros agreed that for health assessments, a DWP customer would be taken out of DWP GOV.UK web pages to the web pages of the third-party provider, acting on behalf of the defendant in carrying out the assessments, and the customer would be aware that they were going to a third-party web site. However, as Mr Faidros explained, this was a special use case, based on existing supplier contracts for health assessments. It does not follow that the defendant was precluded from stipulating that its new solution should be integrated into and consumed from within the DWP/GOV.UK web site.
109. In conclusion, on an objective interpretation of Question 6.4, it required the tenderers to explain how they could satisfy the requirements of both (i) presentation – use of the standard GOV.UK styles so that the customers would not be aware that they were using a third-party product; and (ii) architecture – integration of the customer interface and provision from within the DWP/GOV.UK web pages. There was no ambiguity in respect of Question 6.4. The formulation of these requirements in the ITT documentation was sufficiently clear and precise to allow all RWIND tenderers to interpret them in the same way.
110. In those circumstances, it was, or should have been, clear to the RWIND tenderer that a solution using URL masking would not meet the requirements of Technical Question 6.4. It follows that I reject the claimant’s case that the defendant should have issued further clarification on this issue and invited revised or restated responses.

Issue 3 – manifest error

111. The claimant’s pleaded case, as clarified during the hearing, is that the score of 1 awarded on Technical Question 6.4 was manifestly wrong.
112. First, it is said that the defendant wrongly concluded that URL masking set out in the claimant’s response did not meet its requirements in Question 6.4, whereas neither the Specification nor the clarification provided by the defendant on 9 July 2024 prohibited the use of URL masking.
113. Second, there were a number of ways in which the defendant’s requirements could be achieved and the claimant’s response indicated that this issue could be dealt with during implementation; in those circumstances, it was erroneous to conclude that the claimant’s response did not understand or address the requirements.
114. Third, the defendant was wrong to state that the claimant’s response only minimally addressed the requirement that the customer should not be aware that they were using

a third-party video product. Had the defendant assessed the claimant's response lawfully, it would have awarded a score of 7.

URL masking

115. The claimant's case is that its response to Question 6.4 complied with the requirements set out in the ITT and merited a score significantly above the minimum threshold. Daniel Loomes, Director of Technical Services for the claimant, explained in his evidence that its proposed video platform, SQOD, was developed in 2023-2024. In its response to Question 6.4, the claimant provided the following information:

- i) The SQOD platform was developed for GOV.UK use with a full suite of customisation already developed including a GOV.UK design toolkit which would allow any directorate or business to be easily added.
- ii) The SQOD platform supported integration into a customer website. A GOV.UK instance would be pre-designed using the GOV.UK template so that any waiting rooms or scheduled video calls would automatically have the GOV.UK style applied.
- iii) During implementation of SQOD, the claimant would work with the defendant to allow the customer interface (i.e. the web page which is presented to customers from a GOV.UK URL) to appear as part of the DWP/GOV.UK web pages, which would be achieved by URL masking where applicable utilising DNS records.
- iv) The customer interface was fully compliant with WCAG2.2 AA guidelines (a set of technical standards which improve the accessibility of web content, and webpages for people with disabilities). The claimant's response included screenshots of the customer interface and the web page that would be accessed by the DWP staff when using the proposed video service.
- v) SQOD was designed to be third-party product and branding neutral, ensuring that there were no third-party video components or branding visible, by embedding the video window and controls within the SQOD GOV.UK styled web pages.
- vi) DWP customers consuming the video service from within the GOV.UK webpages would not be aware that they were accessing a third-party video product.

116. As set out above, in the re-moderation, the evaluators agreed that the claimant's response only minimally addressed the requirements of Question 6.4. It was accepted that GOV.UK styles were well addressed but the requirement that the customers should not be aware that they were using a third-party product was minimally addressed, and the requirement for integration of the customer interface and provision of the solution from within DWP/GOV.UK web pages was not met. Further, the proposal to use URL masking indicated that the requirements had not been understood by the claimant.

117. For the reasons set out above in respect of Issue 2, on an objective interpretation of Question 6.4, it required the tenderers to explain how they could satisfy the

requirements of both (i) presentation – use of the standard GOV.UK styles so that the customers would not be aware that they were using a third party product; and (ii) architecture – integration of the customer interface and provision from within the DWP/GOV.UK web pages. The formulation of these requirements in the ITT documentation was sufficiently clear and precise to allow all RWIND tenderers to interpret them in the same way.

118. URL masking did not meet the requirements of Question 6.4 because the solution would not be integrated into and consumed from within the DWP/GOV.UK web pages. The claimant's proposal was not to add the video solution to existing DWP/GOV.UK web pages but instead create new pages that would look like DWP/GOV.UK web pages. The claimant would need DWP's assistance to put in place URL masking so the customer would see what appeared to be a DWP web page but the content of those pages would be hosted by the claimant and the real address would not be GOV.UK, meaning that the solution was not integrated and provided from within DWP web pages as required.
119. In those circumstances, it was not erroneous for the defendant to find that a solution using URL masking would not meet the requirements of Technical Question 6.4.

Alternative methods

120. Mr Loomes' evidence was that the defendant's requirements could be achieved in a number of ways, including by: (a) delivering a masked URL; (b) deploying SQOD into the DWP's AWS environment so that the DWP would host the page itself whilst the claimant would manage that environment for the DWP; and (c) providing the DWP with the necessary components to put SQOD into a web page. He stated that the claimant's preferred solution was to deliver a masked URL but it could deliver the requirements by the other solutions. For that reason, he included the words "where applicable" added after the reference to "masked URL" in the response.
121. It is said by the claimant this indicates that it was well aware of how to ensure that the customer interface could be integrated into DWP web pages but it was ignored during the evaluation, moderation and re-moderation stages.
122. This argument does not assist the claimant. The requirement of Question 6.4 was for the claimant to provide a description of how its overall proposed solution would meet the material requirements set out in the Specification. The alternatives now identified did not form any part of the claimant's tender response. The claimant's description was a solution based on URL masking. That did not meet the Specification requirements.

Customer awareness

123. The claimant's proposal stated that customers would not be aware that they were using a third-party product. However, although URL masking could present a GOV.UK URL in the address bar, so as to give the impression to the customer that it was a layer of DWP web pages, as Mr Faidros noted, the claimant would need assistance from the defendant to facilitate this using the Domain Name System (DNS) team. The claimant did not explain how this would be achieved. On that basis, the defendant was entitled to find that this element of the question was minimally addressed.

124. In conclusion on this issue, there was no error, let alone a manifest error in awarding the claimant a score of 1 in respect of Technical Question 6.4.

Issue 4 - Conflict of interest

125. The defendant's pleaded case is that, even if it was not entitled to exclude the claimant from the competition for failure to achieve the minimum score for Question 6.4, the claimant should have been excluded for failure to comply with the tender requirements concerning conflict of interest.

126. Section 20 of the ITT contained the following provisions regarding conflicts of interest:

“20.1 Each Potential Supplier must notify the Authority of any actual or potential conflict of interest that may be relevant to this Further Competition and/or the submission or evaluation of its Call-Off Tender as soon as reasonably practicable after it becomes aware of such a conflict.

20.2. Failure to declare such conflicts and/or failure to address such conflicts to the reasonable satisfaction of the Authority may result in the Potential Supplier and/or members of the Potential Supplier's Team being excluded from further participation in the Further Competition.

20.3. Potential Suppliers should remain alert to the possibility of conflicts of interest arising at all stages of the Further Competition and should update the Authority if any new circumstances or information arises, or there are any changes to information already provided to the Authority.

20.4. Failure to comply with this Section, and/or to manage any conflicts of interest properly, may result in a Call-Off Tender being rejected.”

127. The claimant was the incumbent supplier for the existing video system. This gave rise to a potential conflict of interest, on the basis that because of its relationship with the defendant under the existing contract, it had access to information which could provide it with an unfair advantage in the competition.

Agreed mitigation steps

128. As part of the Qualification Evaluation, tenderers were asked to confirm whether they had any potential, actual or perceived conflicts of interest that might be relevant. If so, the tenderer was required to identify in writing any potential, actual or perceived conflicts of interest in respect of the ITT and to outline what safeguards would be put in place to mitigate the risk of actual or perceived conflicts arising during the delivery of the services.
129. The claimant submitted its tender response prior to the deadline on 5 August 2024. Its response to the above Qualification Evaluation question was:

“We have no potential, actual or perceived conflicts of interest relevant to this requirement.”

130. On 2 September 2024 the defendant raised a clarification question with the claimant, as the incumbent provider, requesting confirmation that the above response was correct, noting that it referred to both actual and perceived conflicts of interest.

131. In response, the claimant stated:

“We confirm that there is no actual, potential or perceived conflict of interest as the incumbent, as defined by the regulations.

As the incumbent, we acknowledge that there will always be a perception of conflict of interest in the wider sense of having an unfair advantage.

Furthermore, we are an SME without the resources to ensure total separation at executive level of oversight of the bid.

Prior to the issue of the tender, the Authority raised the question of actual and perceived conflicts of interest with us as the incumbent. After extensive discussion, we agreed with the Authority a mitigation approach which is set out in the attached note in order to address an unfair advantage perception (which could, in the widest sense, be interpreted by some as a conflict of interest). This has been implemented as described.

The bid team, in its response to question 3.1 of attachment 2, had no knowledge of our previous discussions and responded within their knowledge without recourse to senior executives.

Furthermore, as the response was completed in the portal, Involve's executive team did not have governance oversight of this and so were not in a position to and did not inform the bid team of this agreed position.

Therefore, whilst we acknowledge the existence of a perception of conflict of interest (in its widest sense) as the incumbent, we are confident that the steps implemented with the Authority's approval ahead of this exercise mitigate any potential conflict.

Furthermore, in response to a clarification request from another tenderer, you have confirmed the extent to which steps have been taken to ensure equal access to information, fairness and transparency in the process and we fully support your response. As we state above, the steps agreed have been implemented and we are confident that these will help to demonstrate the transparency of the Authority's tender process.”

132. There had, indeed, been discussions in respect of the potential conflict of interest arising out of the claimant's status as incumbent provider. Mr Pasqualino, managing director of the claimant, explained that the claimant was unwilling to enter into an ethical wall agreement in respect of the Procurement, as requested by the defendant, because it would have excluded it from the competition. As a result, the parties entered into discussions regarding alternative forms of mitigation.
133. The agreed mitigation steps were set out in an email dated 15 April 2024 from Mr Roach of the claimant to Ms Harrison of the defendant:

“As the incumbent provider to DWP, Involve believes that there could arise a perception of a potential conflict of interest if Other Bidders believe that Involve (or its Representatives taking part in the ITT Process), because of its relationship with DWP under the existing contract, has or has had access to information which could provide Involve and/or its Representatives with an advantage and render unfair an otherwise genuine and open competitive ITT Process.

...

The conclusions reached by Involve in undertaking such considerations are that it would be possible, with the resources available to Involve, to separate ongoing management of the existing contract from the new ITT Process and ensure that there is no information flow between the delivery team working on the current contract and the bid team for the new ITT Process.

Therefore, in order to eliminate a conflict arising, Involve has proposed taking the following steps and seeks DWP's approval to these steps for the purpose of the EWA, so that Involve can participate in the new tender process with those measures in place.

The steps being implemented by Involve are as follows:

The current senior executives overseeing delivery and performance of the current contract (commercial lead (Mick Roach) and Technical Lead (Dan Loomes) will withdraw from their roles with immediate effect and have no further engagement with the current contract (and no line management roles in relation to that contract). They will be replaced by Mark Rea (commercial) and James Tongue (technical) [who will report to other managers within the Involve hierarchy].

Following issue by DWP of the specification for the new ITT Process, a bid team will be assembled by Involve which will not include any of the current delivery team. Mick Roach and Dan Loomes will have oversight/review roles (relating to commercial and technical aspects of the bid) for the bid as senior managers but will not participate in the detailed bid assembly. As an SME

it is not possible to completely remove Mick/Dan from the process without it having a disproportionate negative impact on the quality of any potential bid from Involve.

These steps will eliminate potential conflicts of interest arising as the timeframes involved in the ITT Process should mean that any short-term information to which either Mick or Dan may have access will quickly become out of date and irrelevant for the new bid, which will be appraised internally on its merits..."

134. By email dated 29 April 2024 Ms Harrison accepted the claimant's proposals as appropriate mitigation.
135. Therefore, in order to manage the potential conflict, the parties agreed that the claimant's bid team would not include any of the team delivering the existing contract. The senior executives overseeing the delivery and performance of the existing contract, Mick Roach, the commercial lead, and Dan Loomes, the technical lead, would step down from their current roles. Further, it was agreed that Mr Roach and Mr Loomes would only have oversight/review roles relating to commercial and technical aspects of the bid and would not participate in the detailed bid assembly.
136. Although Mr Pasqualino stated that the spirit of the agreement enabled Mr Loomes to be involved in the bid as technical lead, as demonstrated by Mr Artley in cross-examination, this did not find its way into the agreed mitigation set out in the email exchanges.
137. Mr Loomes was informed in a telephone call that he had been removed from day-to-day running of the existing contract and there were mitigation measures in place. Unfortunately, he was not involved in the above discussions and was unaware of the details of the agreement set out in the April 2024 email exchange. Contrary to the agreed mitigation steps, Mr Loomes' understanding was that he could be the technical lead for the bid, involved in drafting responses to the questions and not confined to oversight and review, because he had the most technical knowledge of the SQOD platform.

Mr Loomes' involvement in the bid

138. Mr Loomes was primarily responsible for preparing and drafting the response for Question 6.4 of the Technical Envelope, with assistance from others. He explained that the claimant did not have the resources to allocate anyone else to draft the response and no one else within the claimant had the requisite knowledge or experience of SQOD to answer the question.
139. Further, it transpired that Mr Loomes was also involved in preparing the responses to other technical questions, including Questions 6.1, 6.2, 6.3, 6.5, 6.6 and 6.7. Hedgehog Labs Limited, the developer of the SQOD platform, produced a technical document that supported a technical explanation in respect of the platform. Further assistance was provided by Whereby, the third-party video engine provider used for SQOD, regarding the WebRTC components. Mr Loomes contributed to the bid submission, not just by way of oversight but by drafting parts or all of the responses to technical questions.

140. It is said by the claimant that Mr Loomes' involvement did not amount to "detailed bid assembly" and on that basis there was no breach of the agreed mitigation steps. That does not stand up to scrutiny, given the frank explanation properly provided by Mr Loomes in his evidence as to his involvement in preparing the responses to the technical questions. It is clear that his technical knowledge, some of which must have been gleaned from the existing contract, was considered necessary for the claimant in drafting the tender response. On any view, this went beyond the oversight and review role agreed with the defendant.
141. Mr Pasqualino's position was that the agreed mitigation was not necessary. He formed the view that Mr Loomes' involvement in the response to Question 6.4 did not provide the claimant with any advantage as incumbent, stating in his fourth witness statement:
- "The content of the technical questions in the ITT effectively rendered the agreed mitigation unnecessary since there could be no incumbency advantage (by reason of having relevant information not available to other bidders) because of the entirely different requirements of the new contract compared with the existing contract."
142. That view may explain the claimant's approach to Mr Loomes' involvement in the preparation of its bid but it overlooks two important matters. Mr Pasqualino's conclusion that there was no actual advantage does not address the risk of perceived or potential conflict of interest, arising as a result of the claimant's incumbent status. It also fails to address the consequence of Mr Loomes' involvement in drafting the responses, namely, breach of the terms of the claimant's undertaking by way of the agreed mitigation.

Discretion to exclude the tender

143. Paragraphs 20.2 and 20.4 of the ITT entitled the defendant to exclude or reject the claimant's tender for failure to address the identified conflict, or failure to manage properly any conflicts of interest.
144. The defendant's evidence is that it would have exercised its discretion to exclude from the competition or reject the claimant's tender if it had known about the breach of the mitigation agreement during the procurement exercise.
145. Ms Cahill's evidence in her second witness statement was that she would have recommended disqualification to senior stakeholders for the following reasons:
- i) Given Mr Loomes' involvement in drafting the response to Question 6.4, the defendant would not be confident that the claimant had not benefited from an unfair advantage as the incumbent.
 - ii) Given that the claimant had breached the agreed mitigations in relation to Mr Loomes' involvement, the defendant could not be sure that the other agreed mitigations had been adhered to.

- iii) There would be a significant risk of challenge from the other bidders had they discovered that the claimant had breached its conflict of interest obligations but still been permitted to continue in the competition.
146. In cross-examination, it was suggested to Ms Cahill that it would have been disproportionate to exclude the claimant from the competition without seeking further information from it and ascertaining whether Mr Loomes' involvement in the technical bid gave rise to any incumbent advantage. I accept as valid Ms Cahill's response that the breach was clear, in that the claimant agreed that Mr Loomes would not be involved in detailed bid assembly but he was primarily responsible for drafting the response to Question 6.4. The defendant could not properly assess what, if any, advantage the claimant gained by Mr Loomes' involvement. Further, that had to be considered against the background of agreed measures, already in place as proportionate mitigation, which had been disregarded.
147. Neil McCann, a commercial specialist and Deputy Director within DWP, had delegated authority to exclude or disqualify bidders from the competition. His view was that, if he had become aware of the claimant's breach of the terms of the mitigation agreement, it would have put a level of risk on the defendant as a contracting authority that it could not reasonably accept. Had this matter been referred to him during the competition, he would have exercised his delegated authority to exclude/disqualify the claimant from the competition and/or to reject the bid.
148. He stated in cross-examination that the defendant took conflict of interest issues very seriously. The ethical walls that would normally apply on a procurement could be quite stringent; in this case there was a relaxation based on the agreed mitigation steps. When it was suggested to him that the claimant could not put in a proper response to the technical questions without involving Mr Loomes in drafting the same, Mr McCann reasonably replied that the claimant could have, but did not, ask for the mitigation steps to be revised.
149. As submitted by Mr West, it is not enough for the claimant to show that exclusion of the claimant's tender for breach of the agreed mitigations would have been disproportionate and unfair. The test is whether the exercise of discretion could be shown to be manifestly disproportionate. In the circumstances of this case, a decision to exclude or reject could not be said to be disproportionate, let alone manifestly so.

Issue 5 - Relief

150. I turn to consider the consequences, if any, of the transparency breach in respect of the extraneous material relied on by the defendant in the re-moderation exercise. This brings into play the question whether, absent the introduction of the extraneous material, the outcome of the re-moderation would have been different.
151. There is no evidence that Mr Harris or Mr Mann were influenced by the use of extraneous material by Mr Faidros. Mr Harris awarded a score of 1 to the claimant in his independent evaluation before any discussion of the response with the other evaluators. Mr Mann changed his view as to the requirement of Question 6.4 but that was based on his appreciation of his earlier misunderstanding of the question. There is no suggestion that he was influenced by Mr Faidros' impermissible comparison

between the “Attend Anywhere” solution and the claimant’s solution, as opposed to Mr Faidros’ permissible technical explanation during the re-moderation.

152. For reasons that were unrelated to the material presented by Mr Faidros in the re-moderation, based on an objective interpretation of Question 6.4 by the RWIND tenderer, the claimant’s response failed to meet the requirements of Technical Question 6.4 and the defendant was entitled to award a score of 1.
153. In those circumstances, I find that, absent the extraneous material that Mr Faidros was not entitled to rely on, the outcome of the re-moderation would have been the same. In any event, in the light of my finding that the defendant would have been entitled to exclude or reject the claimant’s tender, it would not have changed the outcome of the Procurement.
154. It follows that the claimant is not entitled to an order setting aside the Contract Award Decision or a declaration that the claimant submitted the MEAT in the Procurement.

Issue 6 - Damages

155. There is no dispute as to the applicable principles in respect of the test for damages awarded in the context of a procurement challenge.
156. In *Francovich v Italian Republic* (Joined Cases C-6/90 and C-9/90) and *Brasserie du Pecheur SA v Federal Republic of Germany; R v Secretary of State for Transport, Ex.p. Factortame (No.4)* (Joint Cases C-46/93 and C-48/93), the European Court of Justice decided that EU Member States are obliged to make good loss and damage caused to individuals by breaches of EU law for which they can be held responsible. However, the ECJ laid down three conditions that must be met by an individual who seeks damages as a result of a breach of EU law, namely, cases where (i) the rule of EU law breached is intended to confer rights upon that individual, (ii) the breach is sufficiently serious and (iii) there is a direct causal link between the breach and the damage sustained by the individual (“the Francovich conditions”).
157. In *Nuclear Decommissioning Agency v Energy Solutions EU Ltd* [2017] UKSC 34 the Supreme Court held that the Francovich conditions applied to claims made for breaches of UK regulations implementing EU directives.
158. More recently, a full analysis of the relevant authorities and the approach to this question was carried out in *Braceurself Limited v NHS England* [2024] EWCA Civ 39 per Coulson LJ at [27]-[46].
159. In this case, the finding of breach is limited to the use of extraneous material during the re-moderation. As set out above, I have found that the breach had no causative effect, either on the outcome of the re-moderation or the outcome of the competition. The defendant would still have awarded a score of 1 for Technical Question 6.4 on the basis that the claimant’s tender did not satisfy the requirements of the question and there was no manifest error in the defendant’s award of such score. Further, the defendant would have been entitled to exclude or reject the claimant’s tender pursuant to section 20.2 or 20.4 of the ITT. In those circumstances, the claimant is unable to prove that the breach caused any loss and is not entitled to damages.

Conclusions

160. For the reasons set out above, I conclude as follows:

- i) The defendant's decision to re-moderate the scores for Question 6.4 was not in breach of the principle of transparency and/or manifestly erroneous.
- ii) The defendant was in breach of the principle of transparency, based on the use of extraneous material to evaluate the claimant's proposal during the re-moderation but that breach had no effect on the outcome of the re-moderation or the Procurement and caused no loss to the claimant.
- iii) The defendant's approach in the re-moderation, namely, that URL masking was not capable of meeting the requirements of Question 6.4, was not manifestly erroneous.
- iv) The score awarded to the claimant for Question 6.4 on re-moderation was not manifestly erroneous.
- v) The defendant was entitled to, and would have, rejected the claimant's tender in any event for failure to comply with the conflict of interest rules in the ITT and the agreed mitigation measures.
- vi) The claimant is not entitled to any relief, save for a declaration that the defendant was in breach of the principles of transparency by referring to extraneous material in the re-moderation.
- vii) The claimant is not entitled to damages.

161. The parties are invited to draw up and agree an appropriate order. Any disagreement as to its terms and all other consequential matters arising out of this judgment, including any applications for permission to appeal and costs, will be determined by the court on a date to be fixed following hand down.