Neutral Citation Number: [2015] EWHC 2011 (TCC)

Case No: HT-2015-000058

**IN THE HIGH COURT OF JUSTICE**
**QUEEN'S BENCH DIVISION**
**TECHNOLOGY AND CONSTRUCTION COURT**

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 14 July 2015

**Before**:

**MR JUSTICE COULSON**

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**Between:**

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|---|---|
| **WOODS BUILDING SERVICES** | **Claimant** |
| **- and -** | |
| **MILTON KEYNES COUNCIL** | **Defendant** |

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**Mr Joseph Barrett** (instructed by **Salvus Law Ltd**) for the **Claimant**
**Ms Ligia Osepciu** (instructed by **Freeths LLP**) for the **Defendant**

Hearing Dates: 16, 17, 18 June 2015

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# Judgment

**Mr Justice Coulson:**

## 1. INTRODUCTION

1. This is a procurement dispute arising out of a tender process undertaken by the defendant ("the Council") for the award of a framework agreement for asbestos removal. A contractor was sought to provide asbestos removal and re-instatement services pursuant to an £8 million, 4 year, single-supplier contract. The claimant ("Woods") currently provides asbestos-removal services to the Council. Of the five submitted tenders, Woods' was the cheapest. However, they lost out to European Asbestos Services ("EAS") as a result of the Council's evaluation of the quality criteria in the tenders. Given that the scoring was weighted 60/40 in favour of price over quality, this meant that, on the Council's evaluation, EAS significantly out-scored Woods on the quality aspects of their respective tenders.

2. Woods say that the tender evaluation process was unfair. They point to the unusual way in which it was carried out, and the almost complete absence of any contemporaneous records arising out of the Council's evaluation process. They also complain that, because the EAS tender was prepared by a former employee of Woods, the EAS tender included passages which had been lifted directly from the Woods library of tender responses.

3. At root, however, this is really a claim about the specific scores awarded to EAS and Woods during that tender evaluation process. Woods submit that the evidence demonstrates a lack of transparency and a failure to treat the tenderers equally. In

addition, they say that manifest errors are apparent in the scores awarded. They say that, in consequence of these defaults, the tender evaluation was fundamentally flawed and that, had it been properly carried out, it would have been their tender that would have been accepted.

4. I deal with the relevant law in **Section 2**. Thereafter I set out the background facts in **Section 3**. I identify the issues in **Section 4**. Then in **Section 5** I set out my general observations before, in **Section 6** dealing, one by one, with the tender evaluation of the answers provided by EAS and Woods to the twelve relevant questions. I deal with the separate issue of plagiarism in **Section 7**. In **Section 8** I address briefly the issue as to whether, given my findings, a different score would have eventuated. There is a summary of my conclusions in **Section 9**. I am grateful to both counsel for their assistance.

## 2. THE LAW

### 2.1 Transparency

5. In this case, the duty of transparency focused on the award criteria. It is trite law 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 diligent tenderers to interpret them in the same way": see ***SIAC Construction Ltd v County Council of the County of Mayo*** [2001] ECR1-7725, at paragraph 41.

6. The award criteria must be drawn up "in a clear, precise and unequivocal manner in the notice or contract documents so that first, all reasonably informed tenderers exercising care can understand their exact significance and interpret them in the same way and, secondly, the contracting authority is able to ascertain whether the tenders submitted satisfy that criteria applying to the relevant contract": see ***Commission v The Netherlands*** [2013] All ER(EC) 804 at paragraph 109.

7. The true meaning and effect of the published award criteria is a matter of law for the court: see ***Clinton (t/a Aureal Training Services) v Department of Employment and Learning and Another*** [2012] NICA 48 at paragraph 33. A failure to comply with the criteria is a breach of the duty of transparency: see ***Easycoach Ltd v Department for Regional Development*** [2012] NIQB10.

8. Unlike other allegations commonly made during procurement disputes, such as whether or not a manifest error has been made in the evaluation, a breach of the transparency obligation does not allow for any "margin of appreciation": see paragraph 36 of the judgment of Morgan J in ***Lion Apparel Systems v Firebuy Ltd*** [2007] EWHC 2179 (Ch).

### 2.2 Equal Treatment

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

10. Morgan J's observation in ***Lion Apparel***, noted above, is equally applicable to the duty of equality: again, when considering whether there has been compliance, there is no scope for any 'margin of appreciation' on the part of the contracting authority.

## 2.3 Manifest Error

11. The relevant regulation of the Public Contracts Regulations 2006 allows redress where the contracting authority has made a manifest error in its evaluation. As Morgan J makes plain in paragraph 37 of his Judgment in ***Lion Apparel***, this is a matter of judgment or assessment, so in this respect the contracting authority does have a margin of appreciation. The court can only disturb the authority's decision in circumstances where it has committed a manifest error. Morgan J went on at paragraph 38 to say:

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

12. The first (and still best-known) case in which a judge worked through a tender evaluation process to see whether or not manifest errors had been made was ***Letting International Ltd v London Borough of Newham*** [2008] EWHC 158 (QB). There, Silber J followed the approach of Morgan J in ***Lion Apparel*** as to the law, and went on to say:

> "115. Third, I agree with Mr Anderson that it is not my task merely to embark on a remarking exercise and to substitute my own view but to ascertain if there is a manifest error, which is not established merely because on mature reflection a different mark might have been awarded. Fourth, the issue for me is to determine if the combination of manifest errors made by Newham in marking the tenders would have led to a different result."

On the facts, Silber J altered just two of the individual scores, in circumstances where the errors were either admitted or incapable of rational explanation.

13. The only real issue of principle was the extent to which 'manifest error' broadly equated with the concept in UK law of ***Wednesbury*** unreasonableness. Ms Osepciu said that it did; Mr Barrett submitted that the bar for 'manifest error' was not as high as that.

14. In my view there is a broad equivalence between the two concepts. I set out my reasons for that conclusion, together with the relevant authorities, in ***BY Development Ltd and Others v Covent Garden Market Authority*** [2012] EWHC 2546 (TCC). I note that subsequently, in the Court of Appeal decision in ***Smyth v Secretary of State for Communities and Local Gvernement and Others*** [2015] EWCA (Civ) 174, Sales LJ said, when dealing with the review of a planning dispute on environmental grounds, that "the relevant standard of review is the ***Wednesbury*** standard which is substantially the same as the relevant standard of review of 'manifest error of assessment' applied by the CJEU in equivalent contexts…".

15. By contrast, no authority was cited to me which suggests that this broad equivalence is incorrect. I note that my judgment in ***BY Developments*** was cited and followed in ***Wilmott Dixon Partnership Ltd v London Borough of Hammersmith and Fulham*** [2014] EWHC 3191 (TCC). Moreover, in my view there is nothing in the ***SIAC*** or the ***Easycoach*** cases to suggest any different approach, despite Mr Barrett's submissions to that effect. The highest he could put it was by reference to paragraph 53 of the opinion of Advocate General Jacobs in ***SIAC***, but it is clear to me that this was simply a comment on the possibly exaggerated way in which the ***Wednesbury*** test had been expressed at first instance in that case, rather than an exposition of a point of principle, let alone one of such importance. Had it been otherwise, some citation by the Advocate General of at least some authority for this approach might be thought to have been the minimum required. There is none.

16. Finally I should mention the recent case of ***Gibraltar Gaming and Betting Association Ltd v The Secretary of State for Culture, Media and Sport & Others*** [2014] EWHC3236 (Admin). In that case Green J was dealing with a challenge to the legality of an Act of Parliament. The relevant test was whether or not it was 'manifestly inappropriate'. He dealt with that issue at paragraph 100 of his Judgment in these terms:

> "In neither EU nor domestic law is there an articulation of what is understood by "manifest". The phrase is defined in dictionaries as something which is: readily perceived, clear, evident, clearly apparent, obvious or plain. The etymology is from the Latin "*manifestus*" - palpable or manifest. These definitions are helpful only to a degree. What has to be "*manifest*" is the inappropriateness of a measure. There are two broad types of case where inappropriateness is put in issue. First, where it is said that a measure is vitiated by a clearly identifiable and material error. These are the relatively easy cases because the error can be identified and determined and its materiality assessed. The error may be a legal one, e.g. the measure is on its face discriminatory on grounds of nationality (as in *R v Secretary of State for Transport ex Parte Factortame* [1991] ECR I-3905). It may be a glaring error in logic or reasoning or in process. But even here there are complications since whilst it is true that an error which is plain or palpable or obvious on the face of the record may easily be termed "manifest" that cannot be the end of the story. An error which is clear and obvious may nonetheless not go to the root of the measure; it might be peripheral or ancillary and as such would not make the disputed measure manifestly inappropriate. Equally an error which is far from being obvious or palpable may nonetheless prove to be fundamental. For instance a decision or measure based upon a conclusion expressed mathematically might have been arrived at through a serious error of calculation. The fact that the calculation is complex and that only an accountant, econometrician or actuary might have exclaimed that it was an "*obvious*" error or a "*howler*", and even then only once they had performed complex

> calculations, does not mean that the error is not manifest. An error in the placing of a decimal point may exert profound consequences upon the logic of a measure. This suggests that manifest in/appropriateness is essentially about the nature, and, or centrality/materiality of an error. An error will be manifest when (assuming it is proven) it goes to the heart of the impugned measure and would make a real difference to the outcome."

17. Mr Barrett suggested that this analysis was inconsistent with the test of ***Wednesbury*** unreasonableness. Again I disagree. Green J was simply making plain that manifest inappropriateness, or in this case manifest error, is essentially about the nature and centrality (or materiality) of the error in question. In particular he was making the point that the mere fact that the error might not be immediately apparent to the layman is not necessarily a reason to conclude that it is not manifest. The observations of Green J seem to me perfectly consistent with the approach taken to the test of 'manifest error' in the cases to which I have already referred.

## 3. THE BACKGROUND FACTS

18. The Council's Invitation to Tender set out the tendering timetable with an anticipated service commencement date of 1 January 2015. It enclosed a large number of documents, including the Service Particulars and the Most Economically Advantageous Tender document (known as "MEAT"). Paragraph 6.11 of the Invitation to Tender made plain that the Method Statement, which was the document sought at Question 2.1, would become an integral part of the Contract when it was agreed. This was because it was said that the Method Statement will "…demonstrate how the successful tenderer will approach and apply the delivery of the Service, in accordance with the requirements set out in the Service Information".

19. The Service Particulars contained a number of specific requirements. The IT requirements on page 4 of 13 were there, so it was said, to require the contractor "to price for the development of an interface to transmit copies of the Contractor's diary notes regarding works orders to the client's Housing Management System" and that "the output of the interface should be a CSV file".

20. At page 10 of 13 the Service Particulars set out the Key Performance Targets. These were in table form as follows:

| **Key Performance Indicator [KPI]** | **Monthly** |
|---|---|
| Customer Satisfaction | 90% |
| Zero Accidents on site | 100% |
| Timely and appropriate response to query or complaint | 95% |
| Completed task orders paperwork | 95% |
| Completion of work contained within | |

| | |
|---|---|
| Task Orders to programme | 98% |

21. There was also a document entitled "Definitions of KPI Measurements". This was to enable each performance indicator to be measured. Thus, in respect of query or complaint responses (the third item in the above table), the Council required "Queries responded to within 5 working days". The document went on to say for this item:

> "Formal queries and complaints should be acknowledged in 24 hours, logged, and a reasonable response made within 5 working days. Where the issue is complex, the response may be a reasonable programme for resolution of the issue. The query/complaint must then be resolved within this programme."

22. Similarly, in respect of the completion of work contained within Task Orders to programme (the fifth and final item in the table above), the document made plain that the timescale for each task included 5 working days for reinstatement works.

23. The MEAT document set out the evaluation at the ratio of 60% for cost and 40% for quality. It also set out the relevant questions on quality for the tenderers to answer (12 in all) which I set out in **Section 6** below. As to the scoring criteria, they were expressly stated to be as follows:

| **Number of Points** | **Definition** |
|---|---|
| 0 | Response does not meet requirements and/or is unacceptable. Insufficient information to demonstrate Tenderer's ability to deliver the services. |
| 2 | Response partially meets requirements but contains material weaknesses, issues or omissions and/or inconsistencies which raise serious concerns. |
| 4 | Response meets requirements to a minimum acceptable standard, however contains some weaknesses, issues or omissions which raise minor concerns |
| 6 | Response generally of a good standard. No significant weaknesses, issues or omissions. |
| 8 | Response meets requirements to a high standard. Comprehensive, robust and well justified showing full understanding of requirements. |

| | |
|---|---|
| 10 | Response meets requirements to a very high standard with clear and credible added value and/or innovation. |

24. Just pausing there, I should say that, in my view, these scoring criteria suggest a degree of rigidity which may not have been the intention. The most obvious example is the requirement that any failure to meet the Council's requirements must be scored zero, regardless of the quality of the rest of the bid that did meet the requirements. Of course, to be scored zero, any such failure would have to be significant or material, but it is easy to see the difficulties to which such a criterion might give rise.

25. Putting it neutrally, the Council's evaluation of the tenders followed a rather unusual course. Initially, the evaluation panel consisted of Mr Pink, a council employee who had experience of procurement, and Mr Waghorn, who was an asbestos specialist. Mr Waghorn had previously been employed by Woods, but it does not appear that anyone was alive to the potential conflict of interest in asking Mr Waghorn to evaluate the Woods tender. There were witness statements from both men. Mr Waghorn did not give oral evidence. Mr Pink did give evidence and, for the reasons set out in detail in **Section 6** below, I consider that much of it was important.

26. The result of the Pink/Waghorn evaluation was that, despite the fact the Woods' tender was the lowest priced, there was an overall difference of 30 marks between them, in favour of EAS. This difference led to an ultimate difference between them of 8.03, once weighting had been taken into account. Mr Beaumont, the Lead Client Officer at the Council, was apparently troubled that the present provider of the services (Woods) had not won the bid, despite submitting the lowest tender. He did not give evidence, but it seems a fair inference that he thought something may have gone wrong with the Pink/Waghorn evaluation. At all events, Mr Beaumont asked Mr Jason Grace, the Council's Head of Major Works, to look at the evaluation again.

27. Mr Grace (who also gave important evidence) did not evaluate the tenders from scratch. Instead, he went through the Pink/Waghorn evaluation exercise, and commented upon it. In undertaking that task, he repeatedly increased the score for the Woods tender, or decreased the score for the EAS tender. As a result of that exercise, the difference in raw marks was reduced to 16. This brought the weighted scores even closer together, with EAS on 92.33 and Woods on 88.90, a difference of 3.43%.

28. There was then a third stage of the evaluation, when Mr Grace sat down with Messers Pink and Waghorn and went through his version of their evaluation. It was unclear when this meeting happened or how long it took. No notes were made by anyone. At all events, Messers Pink and Waghorn agreed with each of Mr Grace's changes to their original evaluation. This meant that the final result of the tender process was even closer (3.43%) than the scores which had caused Mr Beaumont concern in the first place.

29. In addition, shortly before the trial (although not at the time that they originally pleaded their defence), the Council discovered an error which resulted in a further increase to the Woods score of 2 marks. This is dealt with in detail in paragraph 125 below. This reduced the difference in raw marks to 14 and the difference in the

weighted scores to just 2.93%, being the difference between EAS at 92.33 and Woods now at 89.4.

30. Although the Council's evaluation process had involved three separate stages (Pink/Waghorn; Grace on his own; followed by Grace/Pink/Waghorn), the process produced next to no contemporaneous documentation or notes. Contrary to the Council's own procurement handbook at paragraph 4.7, model answers were not prepared. More importantly, perhaps, the three stages produced three separate spreadsheets for the evaluators to complete, with a column for each question entitled "Notes on why you have given score". There was a note to explain to the evaluators how to fill in this column which "strongly recommended" that the evaluators "make sufficient detailed notes at both the PQQ and tender evaluation stages to enable the correct quality of information to be provided".

31. In fact, at all three stages, the notes on the spreadsheets were extremely brief. They amounted either to a brief conclusion (rather than a statement of reasons) or a paraphrase of the scoring criteria. Thus, by way of example, for an answer where Woods scored 6, the evaluators noted that the response was generally of a good standard with no significant weaknesses, issues or omissions. That was simply a repetition of the scoring criteria. There was no explanation as to why Woods had achieved that score, much less anything to indicate why it had not received a score of 8 or 10. Similarly, for some of the EAS scores that received 10, the notes simply said "the panel were of the opinion that the response provided was to a very high standard, robust and will add value to the contract". This was another paraphrase of the scoring criteria. It offered no reasons for the score awarded.

32. This lack of detailed explanation can be seen in the letter to Woods of 5 February 2015 which informed them that their tender had been unsuccessful. It identified the marks given to them for each question, the marks given to EAS for each question, and then set out the short notes from the spreadsheet to which I have already referred. There was no other explanation because there were no other contemporaneous notes on which such an explanation could be based.

33. Woods were unhappy with the tender evaluation process and issued these proceedings on 13 February 2015.

## 4. THE ISSUES

34. As noted above, the Woods' claim is put in a number of different ways. There are allegations of breach of the duty of equality and breach of the duty of transparency, together with allegations of manifest error. In effect, what Woods have done is to work through the Council's evaluation of the responses of Woods and EAS, and in respect of each of the twelve questions, they have set out detailed reasons why they should have been awarded more and EAS should have been awarded less.

35. Doubtless in order to get round any difficulties created by the 'margin of appreciation' referred to in ***Lion Apparel*** and the subsequent cases, Mr Barrett sought to play up the transparency/equality element, and play down the allegations of manifest error. Ms Osepciu said that this was artificial, and that what really mattered was the nature of the substantive criticism being made. She maintained that, on analysis, most of these allegations were no more and no less than an allegation of

manifest error, and what she said was an attempt to rescore the whole process. She said it was therefore illegitimate for a case that was really about manifest error to be dressed up as a case about transparency or equality.

36. That gives rise to an issue about the proper approach of the court. Is the court required solemnly to consider each of the three ways in which the case has been pleaded, in relation to each answer by each tenderer (12 answers x2 tenderers x3 different pleaded ways of putting the case, equals 72 'issues'), or should the court confine itself to addressing the real issue raised by the criticism of the Council's evaluation of the answers given to the 12 questions? I am slightly surprised to be told that this point does not appear to have arisen in quite this form before, and that it is some while since a judge has been asked to work through the tender process in the way that Morgan J did in ***Lion Apparel***, and Silber J did in ***Lettings International***.

37. In my view, Ms Osepciu is right to say that the court should focus on the nature of the substantial complaint being made about the evaluation of the answers to the 12 questions, rather than ticking off the myriad different ways in which that complaint might be capable of being presented. In this case, I am in no doubt that, adopting that approach, the main thrust of the allegations here is indeed focussed on what are said to be manifest errors in the evaluation of the two sets of responses. Accordingly, I shall take that as my starting-point in respect of each criticism. I only address the alleged breaches of the duties of transparency and equality on those (fewer) occasions when it seems to me that it is they which give rise to the substantive issue.

## 5. GENERAL OBSERVATIONS

38. Before turning to the detail of the tender evaluation to see whether or not there have been manifest errors (or some other breach of duty) in the exercise carried out by the Council, it may, I hope, be helpful if I make some general observations about that process. It may be apparent from what I have said so far that I do have concerns about the way in which it was undertaken.

39. First, I do not think that it was appropriate for Mr Waghorn to be involved in the evaluation. Indeed, he too appears to have been uncomfortable about his involvement, given his previous employment with Woods and his ongoing working relationship with them, and in his witness statement he says that, because of this, he did not tell Woods that he was involved in the evaluation. Instead he told them that "the matter was being dealt with by the 'regeneration' people within the Council". In my view he should have taken that thought process to its logical conclusion and decided that he should not have been involved in the process at all.

40. Secondly, on a simple read-through of the answers, I regard it as surprising that the Pink/Waghorn first stage of the evaluation led to such a marked difference between the quality scores awarded to the tenders of Woods and EAS. In my view, an informed reader would think that the EAS answers were almost studiedly vague, strong on aspiration and management-speak, light on detail. The Woods' answers, on the other hand, could fairly be said to bristle with detail and commitment.

41. Thirdly, if Mr Beaumont was right to conclude that, following the Pink/Waghorn evaluation the matter needed to be looked at afresh, then I consider that Mr Grace should have done exactly that. He ought not to have looked at what the Pink/Waghorn

exercise produced; he ought to have done the evaluation again, himself, from scratch. By looking at the Pink/Waghorn evaluation and taking that as his benchmark, Mr Grace was inevitably going to start with the subconscious assumption that the EAS tender was better than the Woods tender. And that itself raises a concern that this has informed the Council's approach throughout.

42. Fourthly, I think that the notes on the spreadsheets prepared by Messers Pink and Waghorn, then Mr Grace, then subsequently all three of them, are unsatisfactory. They are brief and unhelpful conclusions, not reasons to explain the scores given. Often they paraphrase the scoring criteria, so as to be all but meaningless.

43. The absence of clear reasons to explain a particular score has led to a lack of certainty in the nature of the Council's case. In relation to at least some of the allegations, the defence pleaded a particular point to justify the scores, which was not expressly stated in the de-briefing material provided to Woods; the witness evidence then said something different; and sometimes the oral evidence relied on something else again. Such a lack of clarity can occur if brief reasons for a particular score are not recorded contemporaneously.

44. I have no wish to be too critical of the Council. Whilst I consider that these aspects of the tender process were unsatisfactory, I doubt whether any of them, whether taken separately or even together, would amount to a material breach of the Public Contracts Regulations. But I make these points at the outset because they are an important background to any consideration of the Council's evaluation of the answers to the individual questions. They inevitably mean that I am rather more sceptical about the appropriateness of the Council's individual scores than might otherwise have been the case.

45. I now turn to the individual questions and the scores given for each answer, principally to evaluate whether or not, in each case, a manifest error has been made. **Section 6** is divided into 12 sub-sections, by reference to each of the 12 quality questions. Most are then sub-divided into an analysis of the EAS answer and the Woods answer in order to see whether or not there were manifest errors, save on those occasions where I consider that the underlying issue arises out of the possible differences between the treatment of the two answers, and gives rise instead to an issue of equality or transparency.

## 6. THE TENDER EVALUATION

### 6.1 Method Statement

#### 6.1.1 The Question

46. Question 2.1 asked: 'Provide a method statement (of two A4 pages maximum) setting out your proposals to meet the requirements of the service information.' This was by far the most important question in respect of functional and technical compliance (Questions 2.1-2.5 inclusive), because it was worth 50% of all the marks available for those 5 questions. Moreover, as noted at paragraph 18 above, it was (or should have been) clear to everyone that it mattered very much, because it was the only question that required the tenderers to produce a document that would then have contractual status and effect.

### 6.1.2 The EAS Tender

47. EAS received a score of 10 for their answer. Woods said that, according to the scoring criteria set out at paragraph 23 above, EAS should have received a score of zero, because they wholly failed to deal with the reinstatement works in their Method Statement. The undisputed evidence was that the reinstatement element of the work would be worth approximately 40% of the total contract value of £8 million (say £3.2 million) and was therefore a significant element of the work to be carried out.

48. Mr Pink was cross-examined on this aspect of the Council's tender evaluation. He said that the fact that the Method Statement was going to be incorporated into the contract was not something that had been discussed at the evaluation meeting with Mr Waghorn and Mr Grace, although he agreed that it was an important question because it resulted in a contract document. He also accepted that the EAS answer did not address reinstatement works at all, despite the fact that the contract was all about working in people's homes, and that one of the Council's KPIs was about customer satisfaction, and another was about the reinstatement works (paragraphs 20-22 above).

49. Importantly, Mr Pink agreed that the carrying out of reinstatement works (which EAS had omitted altogether from their Method Statement) was not the subject of any of the other questions. There was then this exchange:

> "Q: IS it really acceptable for £3 million of public money to be spent on reinstatement works in response to a tender where you have not received a single proposal in relation to how that £3 million worth of work is going to be done?
>
> A: [Pause] If you put it like that, No. "

50. In addition to EAS's failure to address the reinstatement elements of the work, there was a raft of other matters which Mr Pink accepted were not within the EAS Method Statement. He agreed there were no proposals in relation to IT, or quality assurance, or progress reports, or protecting the premises during the works. He went so far as to agree that, on analysis, there were no specific proposals from EAS in respect of how the asbestos removal works themselves were going to be performed. That can be fairly categorised as a major omission from a contractual Method Statement for an asbestos removal contract. It was no answer to say that this question required 'a broad overview' of the way in which the work would be delivered – it plainly required much more than that – but in my view, it failed even as an overview.

51. I remind myself that the scoring criteria are a matter of law and that, if a response did not meet the Council's requirements and/or was unacceptable in a significant or substantive way, then it required to be given a zero score. That would make any other score a manifest error. In my judgment, given that:

(a) Mr Pink accepted that EAS did not deal with reinstatement works at all, despite the fact that this was a major part of the project;

(b) Mr Pink accepted that their failure so to do was "unacceptable";

(c) Mr Pink accepted that there were a range of other omissions from the EAS tender, including a lack of any explanation for how the asbestos removal works themselves might have been performed;

I am obliged to find that the score of 10 was a manifest error. It was incapable of rational explanation. The omissions should, on Mr Pink's evidence, have led to a score of zero, pursuant to the Council's own scoring criteria.

52. I should add one final point about the EAS answer to this question. This is a good example of the trend noted above, where the EAS response is light on substance. It is ironic that this is one of the EAS answers where many of the phrases used have been taken by Woods' former employee, Mr Berry, from the Woods' tender archive. I deal with that as a separate issue in **Section 7** below. On any view this example of plagiarism, if that is what it was, did not do EAS any favours.

### 6.1.3 Woods

53. The Woods' answer received a score of 8. Woods say that, because it plainly added value and/or included innovation, it should have been scored with a 10. This is the first of a number of allegations of the scoring of the Woods' tender that fall in the same category: 'we got 8 but we should have got 10'. I therefore deal with this one at length and then the others rather more shortly, because (with a couple of exceptions) my approach, and the result, is the same each time.

54. Woods say that their answer added value because of the use of their IT system, EasyBOP; and because they proposed to undertake the reinstatement work in-house.

55. Although the Council's witness statements seem to suggest that both these matters were already catered for in the proposed contract (without giving any references as to where), it became apparent during the oral evidence that this was not so. Mr Pink accepted that, if Woods did the reinstatement works in-house, that would add value to their tender. And as to EasyBOP, the Council's position fluctuated wildly. At one point they suggested that EasyBOP 'lacked credibility', whereas at another they said that everyone used it, and it was not an added value. Mr Grace in his cross-examination eventually agreed that there was no contractual requirement for EasyBOP, and Mr Pink agreed to the suggestion that it would add value.

56. However, although I accept that evidence, I am unable to find that the Council made a manifest error by scoring the Woods' tender at 8 rather than 10 for Question 2.1. A score of 10 required that the successful tenderer not only met the contractual requirements "to a very high standard", but also provided "clear and credible" added value and/ or innovation. Those are very subjective tests. And they were a matter for the Council. So, although the evidence has demonstrated that Woods could potentially have been awarded a 10 for this answer, and although the evidence has also demonstrated that the Council's stance as to why they were not was muddled and confused, I cannot find that they necessarily made a manifest error in failing to award Woods a score of 10. The margin of appreciation provides the Council with a defence to this aspect of Woods' case.

### 6.1.4 Summary

57. Accordingly, the Woods score of 8 for this question must remain unchanged. There was, however, a manifest error in the scoring of the EAS tender and the score of 10 should have been a score of zero. Because of the percentage weighting, this is obviously a significant difference in the scores to be awarded. However, pursuant to an agreement reached with counsel on the last day of the trial, counsel will take the new 'raw' scores which I identify and then carry out the weighting process so as to arrive at agreed final conclusions. However, given the importance of Question 2.1 in the scoring system, I can see that my change from 10 to zero will have a significant effect.

## 6.2 MOBILISATION

### 6.2.1 The Question

58. Question 2.2 asked the tenderers to "explain your mobilisation plan and your proposals to ensure that all task orders are completed within the given time scale (maximum one A4 page)." This was worth 20% of the total score awarded to the functional and technical compliance questions (Questions 2.1-2.5 inclusive).

### 6.2.2 EAS

59. The EAS tender was scored at 6 which, according to the scoring criteria, meant that it was a response that was generally "of a good standard with no significant weaknesses, issues or omissions".

60. Woods' complaint was that the EAS answer dealt with mobilisation, but wholly omitted to deal with the second half of the question, which was concerned with proposals that ensured that all task orders were completed within the given time scale.

61. This was an important matter. The Council's KPIs stressed the importance of ensuring that, every month, 98% of the works contained within Task Orders were completed to programme: see paragraphs 20-22 above. Yet when Mr Pink came to give evidence, he could not recall that he was aware of the KPI and the required time scales, despite the fact the he subsequently agreed that these time scales were "of critical importance" to the Council.

62. Even more damagingly, so it seems to me, Mr Pink was obliged to accept in cross-examination that the EAS response contained no proposals as to how they were going to meet those 'critical' time scales. That was an admission that Mr Pink was bound to make, because I find that there was no reference to this aspect of the Council's requirements in the EAS response. It was therefore unfortunate that he then endeavoured to justify the mark on the basis that "overall" it answered the question. Not only was that approach outside the Council's own scoring criteria (see paragraph 23 above), but it suggested that he was overly enthusiastic to promote EAS' position, whatever the merits, a concern that I have already noted in another context (paragraph 41 above).

63. For the same reasons as are explained in **Section 6.1**, I consider that there is no sensible alternative but to conclude that the Council made a manifest error in not

scoring the EAS response at zero. This question asked for two things: mobilisation **and** proposals to ensure that the Task Orders were completed within the time scales required by the Council. EAS wholly failed to address half the question, and the omission was, on the Council's own MEAT document, a very important element of the proposed contract. There was therefore a material and substantive failure to meet the Council's requirements, which had to result in a score of zero.

64. Woods also criticised the EAS response because it did not say where they were going to mobilise from. I do not regard that as a significant or substantial point. The Council's failure to mark down EAS on this basis would not have amounted to a manifest error.

### 6.2.3 Woods

65. Woods' answer dealt with both mobilisation and complying with Task Orders. They were awarded 6 points. They say they should have been awarded 10 because of the reference to EasyBOP and the fact that there was going to be a single visit to the relevant property to include reinstatement works.

66. The general inadequacy of the Council's response to this criticism was demonstrated by some of the evidence given by Mr Pink in answer to these points. Although he admitted the proposed use of EasyBOP went far beyond the contract requirements, he also seemed to suggest that Woods should have provided more detail of their proposed use, a response which failed to acknowledge that any detail in these answers was provided by Woods, not EAS. In addition, although Mr Pink said in evidence that he was sceptical as to whether reinstatement works could be done in a single visit, he accepted that this scepticism was not in his witness statement, nor in any spreadsheet scoring comment, and he was unable to say on what basis his scepticism was being advanced.

67. For these reasons, if I had been evaluating the Woods tender, I may well have given it an 8 or even a 10. But that is not the test. Although tempted so to do, I consider that I ought not to conclude that the Council's score of 6 for the Woods response was a manifest error. Again, the Council's margin of appreciation means that, although lower than I would have awarded, I cannot say that the score of 6 amounted to a manifest error. Putting it another way, it was not irrational.

### 6.2.4 Summary

68. Accordingly, for Question 2.2, I reduce the EAS score from 6 to zero. I leave the Woods score unchanged.

## 6.3 Roles and Responsibilities

### 6.3.1 The Question

69. Question 2.3 asked the tenderers to "specify the members of delivery/project team, including their roles and responsibilities (including CVs)".

70. The single issue here arises in respect of two pieces of terminology used by the tenderers. EAS scored 8 because, as Mr Pink explained, they had identified a Contract

Manager whom the Council interpreted would work on this contract alone, whereas Woods referred to a Project Director who, the Council thought, would have other duties. They therefore scored Woods 6. This is therefore the first of the items in issue which can be analysed on a comparison basis, and where transparency and equality considerations are more important than the manifest error principle.

### 6.3.2 Transparency / Fairness

71. It was common ground that the difference of two marks for this item was wholly explained by the Council's desire for a dedicated Contract Manager who would not be involved on any other project. Yet the Council never made that requirement clear. Mr Pink was asked about this. He agreed that, although the Council wanted somebody who was going to be responsible for this project on a day to day basis, they had not expressly asked for such a person in their documents. I asked him how somebody would know that that this was what the Council wanted. He replied: "They wouldn't".

72. In my view, if this was an important matter to the Council, such as to justify giving different scores to different tenderers solely on this basis, then it ought to have been disclosed in the scoring criteria. I find that the failure to do so was a breach of the rule as to transparency, in respect of which there is no margin for error. It was an undisclosed sub-criterion.

73. In addition, the evidence made plain that the different treatment of the two tenderers was a breach of the duty of equal treatment. The EAS tender referred to a Contract Manager, but did not expressly say that that person would only work on this project. The high watermark was the statement that the Contracts Manager was intended to be part of a 'dedicated contracts team'. That is not the same thing as saying that he personally would have no other responsibilities. And although the Woods response referred to a Project Director, there was nothing to say that that person was *not* going to be dedicated to this project and nothing else. That element of the cross-examination of Mr Pink concluded as follows:

> "Q: The fact that Woods used the title Project Director rather than Contract Director or Project Manager cannot provide any proper basis to penalise the Woods tender, can it?
>
> A: [pause] At the time we looked at it, that is how we looked at it.
>
> Q: I'm not asking you that question Mr Pink. We have looked at the tenders properly now. This did not provide any proper basis, did it, to penalise the Woods tender?
>
> A: [pause] No."

74. I consider that this answer was an admission of breach of the duties of both transparency and fairness. The expression 'penalise' might have been shorthand but its meaning was clear: it meant giving Woods a lower mark than EAS. Because of these failures, there is therefore no question of any margin of appreciation. In the light of Mr Pink's admissions, it is plain that the Woods' score needs to be increased by 2, from 6 to 8, so that they receive the same score as EAS.

### 6.3.3 Summary

75. For the reasons set out above, the Woods score falls to be increased by 2 to reflect the breach of transparency/equality obligations on the part of the Council.

## 6.4 Training and Competencies

### 6.4.1 The Question

76. Question 2.4 required the tenderers to "specify the training and competencies of your directly employed staff in relation to the safe removal of Asbestos Containing Materials and reinstatement of non-asbestos products". EAS scored 8, as did Woods.

### 6.4.2 EAS

77. Woods complain that EAS failed to address reinstatement or customer care training. Mr Pink properly accepted that there were no references to these matters in the EAS response. There was also a subsidiary argument about whether the reinstatement was going to be done by sub-contractors or kept 'in-house'.

78. I am not persuaded that these alleged omissions were of any great significance. They were not a substantial element of the question, in contra-distinction to the omissions analysed in **Sections 6.1 and 6.2** above. Moreover, the failure to deal with reinstatement has already been dealt with, and I have already found in Woods' favour on that point in **Section 6.1** above. It does not seem to me to be appropriate for the same point to be relied on again here, where it could only be of only marginal relevance.

79. Accordingly, I do not consider that there was a manifest error in the scoring of the EAS tender in relation to Question 2.4.

### 6.4.3 Woods

80. Woods scored 8 but say they should have been given 10 because of the added value contained in their proposals. Mr Pink accepted that the matters Woods identified, such as reinstatement and customer care, did add value. But again the position is the same as noted in **Section 6.1.4** above in respect of Question 1.1. It is simply not possible for the court to find a manifest error on these facts, when the given score is 8 but could have been 10. That was a matter for the Council and their subjective judgment.

### 6.4.4 Summary

81. I dismiss the allegations of manifest error in respect of Question 2.4, both in relation to the EAS response and the Woods response.

## 6.5 Health and Safety

### 6.5.1 The Question

82. Question 2.5 asked the tenderers: "how do you propose to ensure the Health and Safety of employees, residents and other stakeholders on site?"

83. EAS scored 10, because of a bonus scheme which they identified to reward their employees for complying with Health and Safety legislation. Woods originally scored 4 but Mr Grace increased this to 6. Woods say they were entitled to 8 or 10 for this question and the reasons provided by Mr Grace for why that did not happen remain very unclear.

### 6.5.2 Transparency/Fairness

84. Again, this item can properly dealt with on a comparison basis: taking the EAS tender and the Woods tender together, were they equally and transparently treated?

85. In my view, this was the most borderline of the equality/transparency allegations. But I have concluded that Woods have made out their case on this item. The evidence makes clear that, if the Council had acted fairly and transparently, EAS and Woods ought to have been awarded the same score. In particular:

    a) The EAS proposal is extremely light on details. Indeed Mr Grace accepted that there were no specific proposals within it. In the end, he said that "it is generic", as if that justified the maximum score it was awarded. I regard the answer as another example of EAS' preference for aspirational management-speak, as opposed to hard-edged proposals.

    b) I remind myself that the question asked for proposals "to ensure" protection for a wide variety of people who might be exposed to asbestos. The EAS response contained nothing specific to give the Council the necessary comfort that such protection would be provided.

    c) The decision to award EAS a score of 10 simply because of the proposed bonus scheme (which is what the Council's evidence amounted to) seems questionable at best, given that the employees in question were obliged to comply with the Health and Safety provisions in any event.

    d) The Woods response is set out in a much crisper fashion, identifying both the typical risks, and the appropriate control warnings. Mr Grace accepted that the detailed proposals in the Woods response were not all contractual requirements, and therefore added value. He expressly admitted in his cross-examination that the Woods' response in respect of on-site safety measures exceeded the contractual requirements.

    e) Mr Grace accepted that the detailed proposals in the Woods answer could not be found in the EAS response.

    f) Accordingly, the only justification for treating Woods differently that was offered in Mr Grace's witness statement, namely that the Woods tender "didn't go the extra mile" was demonstrated, by his own admissions, to be plainly wrong.

86. Given that evidence, it is impossible to say that results whereby EAS scored 10 and Woods scored just 4 (later upgraded to 6), was or could be justified. I therefore consider that, on the Council's own evidence, there was an inequality of treatment. What is more, I think that it stemmed from the fact that, after the flawed first stage of

the process, the EAS tender was regarded by the Council as being in pole position, a position which it never properly reviewed. I therefore find that, because of the breach of the duty as to equality of treatment, the Woods score requires to be re-rated as the equivalent of the EAS score of 10.

87. If I am wrong about that, I consider that this item would also qualify as a manifest error. Although, for the vast majority of the criticisms of the evaluation of the Woods tender, I have tended to side with the Council because of the margin of appreciation, I consider that, for this item, the Council's complete failure to justify any differential leaves it on the wrong side of the line. A higher score for EAS was irrational and incapable of being justified. It is one of the few occasions where I accept Mr Barrett's colourful phrase that, if I had not upheld Woods' complaint, "the claim would be lost in a sea of discretion". Notwithstanding the margin of appreciation, for this item, a manifest error was made.

### 6.5.3 Summary

88. For the reasons set out above, I would increase the Woods score from 6 to 10 in relation to this item, so that it equates to the EAS score.

## 6.6 QUALITY SYSTEMS

### 6.6.1 The Question

89. Question 3.1 was the first of the questions said to be designed to measure quality. Each of these four questions (Questions 3.1-3.4) were worth one quarter of the total for this section. That section was in turn worth 10% of the total of 40% awarded for quality. The question asked: "please provide details of the quality systems you will use to ensure all works are fully compliant with the Specification and are completed in accordance with each Task Order programme".

### 6.6.2 EAS

90. EAS scored 8 for their answer. Woods complain that the EAS answer did not deal with reinstatement in accordance with the Council's Service Particulars and the Task Order programme. Mr Grace's response was to say that this question did not require detail on those points.

91. I do not accept the Woods criticism of the EAS response to Question 3.1. There is no evidence on which I could find that Mr Grace's response was wrong. Furthermore, both the question of reinstatement and the question of performance in accordance with the Task Order programme have already been (rightly) identified by Woods as significant omissions from the EAS response under **Sections 6.1 and 6.2** above, and on both occasions I have accepted those criticisms. It is neither appropriate nor fair for those criticisms to be made all over again by reference to Question 3.1.

92. Accordingly, I do not alter the score of 8 awarded to the EAS response.

### 6.6.3 Woods

93. Woods were scored 8 but complain that they were not awarded 10. Their arguments concern their references to the EasyBOP system and the fact that the 'traffic light'

system to which they expressly refer in their response was well beyond that which was required by the contract.

94. I accept that, again, the Council's evidence about EasyBOP was confused: indeed it was in relation to this answer that Mr Pink said that he had a doubt about the EasyBOP system as a whole, before he was reminded that, although that had been his view first time round, that doubt had been expressly removed from the spreadsheets by the time they were provided to Woods as part of the debrief, so that was therefore *not* a reason for their final score. I note too that Mr Grace agreed that a traffic light system was something which EAS were not providing.

95. However, just as with the majority of other items where Woods scored 8 and claimed 10, it is not possible for the court to say that a manifest error was made. The margin of appreciation was sufficient to allow these two responses to be marked in the same way.

### 6.6.4 Summary

96. For the reasons, therefore, I do not alter the scores of 8 awarded to both EAS and Woods in respect of this question.

## 6.7 Good Working Relationship

### 6.7.1 The Question

97. Question 3.2 asked the tenderers to "provide a statement of your commitment to develop a good working relationship with the client and other stakeholders of the contract. Please describe measures to be taken to maintain this relationship (maximum one A4 page)".

98. EAS and Woods both scored 8 in respect of their respective responses.

### 6.7.2 EAS

99. Woods complained that EAS made no reference in their response to working with to "other stakeholders". In his witness statement Mr Grace said that this was covered by the setting up of Core Groups "consisting of all interested parties, Client, residents, lease-holders, analytical contractors and EAS". He was not cross-examined on that evidence, which seemed to me to answer the point.

100. It therefore follows that, since this was the only criticism made of the EAS response to Question 3.2, that there is nothing to justify a reduction in the score of 8.

### 6.7.3 Woods

101. Again Woods say that, although they were scored 8, they should have received 10. This is because, Woods say, their proposals included a direct login to the EasyBOP system for all their partners.

102. Although Mr Grace's witness statement suggested that this requirement was in the contract, he was obliged to accept in cross-examination that it was not, and that using the EasyBOP system in the way proposed by Woods, providing "all partners with real

time statuses of each task order" went beyond the contract. Nevertheless, I am unable to say that the score of 8 was a manifest error. For the reasons already given, there was a margin of appreciation and an element of subjective judgement in awarding scores of 8 or 10. It is therefore inappropriate for me to alter the Woods score.

### 6.7.4 Summary

103. For the reasons set out above, the EAS score of 8 and the Woods score of 8 both remain unchanged.

## 6.8 Defect Correction Period

### 6.8.1 The Question

104. Question 3.3 asked each tenderer: "please describe how you would manage the defect correction period. Please describe what procedures you have in place for managing complaints (maximum one A4 page)". Both EAS and Woods scored 8 for this question.

### 6.8.2 EAS

105. Woods made two separate complaints about the EAS response. First they said that the proposal that EAS "would look for all complaints to have been addressed and resolved within 10 working days from receipt of the complaint" was a failure to comply with the Council's own KPIs, and should therefore have resulted in a score of zero. Secondly they said that EAS failed to deal with customer care training.

106. It was agreed that what the Council wanted was set out in the relevant KPIs at paragraphs 20-22 above (namely complaints acknowledged within 24 hours; and a reasonable response made within 5 working days). Mr Grace had originally said in his witness statement that EAS' proposal, that they would 'look for' all complaints to have been addressed and resolved within 10 working days, was not inconsistent with those more detailed time scales in the contractual KPIs.

107. As a matter of common sense, I am bound to say that I struggled to see how that was the case. The Council required the contractor to deal with everything (save possibly for 'complex issues') within 5 days. On the face of it, EAS appeared to require a doubling of that timescale. But my doubts were then confirmed by Mr Grace when, during his cross-examination, he expressly accepted that the EAS proposals did *not* comply with the Council's requirements. There was this exchange:

> "Q: There is no mention, is there, of queries and complaints being acknowledged within 24 hours?
>
> A: No.
>
> Q: There is no mention, is there, of a reasonable response being made within five working days?
>
> A: No.
>
> …

> Q: So if it is not complex, it has to be the subject of a reasonable response and has to be dealt with within five working days, yes?
>
> A: Yes…
>
> Q: Let me put a very simple example to you. If you have a non-complex complaint and EAS acknowledges it after 7 days, logs it after 8 days and remedies it on day 9, that is in direct breach and is directly and clearly non-compliant with contractual KPI requirement, is it not?
>
> A: I did not see that, I thought I saw –
>
> [Repeat question]
>
> A: Correct."

108. The only proper inference that I can draw is that, when the tenders were evaluated, the Council's contractual requirements in terms of response times were forgotten. The EAS tender plainly did not comply with them, as Mr Grace admitted. It matters not for this purpose whether that was a breach of the duty of transparency or a manifest error, given that the Council's own scoring regime made plain that a materially non-compliant response had to be scored zero.

109. Accordingly, based on the Council's own evidence, the EAS score should have been zero for this answer. Their proposals did not comply with the contractual requirements on a matter which was of such importance that it was incorporated into the Council's KPIs.

110. In these circumstances, it is strictly unnecessary for me to deal with the criticism about customer care training. However I should say that this did not strike me as being a significant or substantial matter. It would not, on its own, have justified a reduction of the EAS score.

### 6.8.3 Woods

111. Woods said they should have been scored a 10, not an 8. The complaint is that, although the Council justified the score on the basis that Woods were not proposing a situation where there would be no defects altogether, that was irrelevant to this question, because this was dealing with improving customer satisfaction, which pre-supposed that there already was a defect. Moreover Woods argued that they did have a policy of avoiding defects altogether (the 'zero defects' delivery referred to their answer to Question 3.1), so the Council failed to address the necessary criteria.

112. I have some sympathy with Woods' criticisms. Not for the first time, the Council's response was muddled, and their attempts to explain away the complaint were so unconvincing that, again, they appeared to be motivated by a simple desire to stick with EAS, whatever the circumstances. But again, with a certain reluctance, I conclude that this is covered by the Council's margin of appreciation. I cannot say that there was a manifest error in failing to give Woods a score of 10. Moreover, I

consider that breaches of equality and transparency are not directly relevant to this item.

### 6.8.4 Summary

113. For the reasons given above, the EAS score falls to be reduced from 8 to zero. The Woods score remains unchanged.

## 6.9 Communication Procedures

### 6.9.1 The Question

114. Question 3.4 asked for the provision of "details of your proposed communication procedures in relation to the requirements of the contract". EAS scored 10, Woods scored 6. In my view, this is another item which needs to be addressed by reference to the duties of transparency and fairness, and a comparison between the Council's treatment of the two responses.

### 6.9.2 Transparency/Fairness

115. Although EAS scored 10, their proposal failed to address the question of communication with residents. That criticism, made by Woods in their pleading, was not dealt with at all by either Mr Grace or Mr Pink in their witness statements. When he came to give oral evidence, Mr Pink admitted that the EAS response did indeed omit the issue of communication with residents.

116. Mr Pink was also asked what there was about the EAS tender that could be regarded as innovative or adding value. Mr Pink was quite unable to say. Furthermore, when Mr Pink was reminded that Mr Grace had said in his statement that one of the reasons that EAS had scored 10 for this item was because of *their* use of EasyBOP (a point which in itself caused some concern, given the Council's repeatedly lower scores for EasyBOP whenever it appeared in the Woods answers), Mr Pink expressly rejected that as an explanation for the maximum score awarded to EAS. Although at one point he said that EAS scored extra because of a reference to a free-phone, he had to accept that Woods had offered the same thing, albeit in answer to Question 2.1, for which they were not awarded a score of 10.

117. In other words, there was nothing in the Council's written and oral evidence which justified (even arguably) EAS receiving a score of 10. Moreover there was clear evidence that their tender omitted communication with residents, which was an important element of the proposed works, and which might suggest that a much lower score was appropriate.

118. My concerns about the score awarded to EAS on this answer were strengthened by two further matters. First, contrary to the advice that the evaluators had received, there was no cogent material within the Council's skeletal contemporaneous notes which justified a score of 10.

119. Secondly, Mr Pink's written evidence was that he personally would have given EAS a score of 10 solely because of the following paragraph in their proposal:

> "As part of any pre-contract start meeting we will always endeavour to meet with the client's representative and other nominated parties to look at the project requirements from all angles, ensuring that the working relationship between our company and the client's representatives is always in the best interests of, and provides complete compliance for, the client and their residents. We can also draw on previous experience from a removal perspective as well as an analytical one to ensure that any proposed method of removal is the best option specific to the requirements of the contract whilst providing Value to Money for the clients."

120. That paragraph is a good example of what I have elsewhere called the aspirational management-speak that can be repeatedly found in the EAS responses. Ultimately, it commits to and promises nothing. For Mr Pink to alight on that paragraph in particular as justifying a score of 10 seems to me to be incomprehensible.

121. By contrast, the Woods proposal is again much more detailed, including detailed provisions relating to communications with the tenants and a proposed communication process map. Although the Council's witness statement suggested that much of this was in the contract, Mr Pink accepted in his cross-examination that it was not. In my view, the setting out of a detailed communications procedure involving the residents of the Council – the people in whose homes this work would be done – was a very important and substantial element of adding value.

122. Accordingly, this is a further item where I consider that there has been a breach of transparency and/or equality. On any view the Woods proposal is just as good as the EAS proposal: indeed, were it relevant, I would say that it was considerably better. But there is no basis on which these answers should have been scored differently: the Council have been repeatedly asked to justify such a difference, and they simply have not been able to do so. To put the point another way, I find that any difference in the scores was irrational.

123. In order to reflect my conclusion, I can either reduce the EAS score to 6 or increase the Woods score to 10. It is, I think, consistent with my approach on other items, and the evidence that the EAS' response failed to address communication with residents, to reduce the EAS score to 6, so that it is the same as the Woods score. I do that principally because of what I consider to be the breach of the duties of transparency and equality, although if necessary I would also find that it was a manifest error which cannot be rescued by any margin of error.

### 6.9.3 Summary

124. For the reasons set out above, I would reduce the EAS score to 6 so that it was the same as the score awarded to Woods.

## 6.10 Protecting the Environment

### 6.10.1 The Question

125. Question 4.1 asked for a statement "detailing the initiatives you will take to protect the environment. Please describe how it would affect the environment of the Borough of Milton Keynes (maximum one A4 page)". EAS scored 8. Woods scored 4, and the score of 4 was maintained and justified in the council's pleaded defence. However, in the amended defence and in the Council's written opening, it was agreed that the score for Woods should have been 6. It was also agreed that this was a manifest error, an indication that, even on the Council's hard-fought case, they were capable of making such errors.

### 6.10.2 Transparency/Fairness

126. I consider that this was another item best analysed by reference to the duties of transparency and fairness. And, as for so many of these individual items, the difficulties for the Council stemmed directly from Mr Pink's oral evidence.

127. He agreed that two of the most important environmental impacts were in respect of fuel use/carbon reduction and the disposal of waste. As to the first, Mr Pink agreed that, in the EAS response, there was no commitment to reduce carbon. Although there was a reference to electric vans, which the Council's written evidence seemed to suggest had an important impact upon their evaluation of the EAS score, that was couched in very vague terms ("we are currently undertaking an assessment of electric vans"), so Mr Pink was obliged to agree that this was absolutely *not* a commitment by EAS to use such vans.

128. As to the disposal of waste, the second important environmental consideration, Mr Pink accepted in cross-examination that this too had not been addressed by EAS in their response. On that basis, therefore, what Mr Pink described as the two most important environmental impacts had both been ignored by EAS in their response.

129. It is right that, in her closing submissions, aware of the damaging nature of these admissions, Ms Osepciu endeavoured to persuade me that, just because Mr Pink had agreed that carbon reduction and the disposal of waste were the two most important environmental issues here, that did not mean that they necessarily were, or that his view was automatically correct. But her difficulties with that submission were two-fold: first, that was the evidence from an experienced Council employee; secondly, on the basis of the information with which I have been provided, it appears that those were indeed the two most important aspects of the protection of the environment raised by the asbestos removal.

130. I then compare EAS' score of 8 with the Council's evaluation of Woods' response. In order to justify the score of 6 awarded to Woods, Mr Pink suggested that their proposals in respect of a reduction of carbon were not quantifiable. This was a reasonable point in its way, until he was obliged to accept that that was exactly the same as the EAS proposal. In addition Mr Pink agreed that Woods' suggestions of ways of reducing fuel use did add value. Most important of all, he agreed that there was a statement in the Woods response dealing with waste disposal.

131. I do not consider that the Council's evidence on the evaluation of the answers to Question 4.1was satisfactory. It demonstrated that the EAS tender contained important omissions, whilst the Woods tender did not contain any and, at least in one respect, added value. The Council failed to explain how it was even arguable that EAS were entitled to a higher mark than Woods; on an objective view of the Council's evidence, it should perhaps have been the other way round.

132. Making every allowance, I consider that there is, on any view, a broad similarity between the proposals from Woods and EAS on the environmental protection required. Fairness can only be achieved by leaving the Woods score as it is, and reducing the EAS score to 6, so that the scores would then be the same.

133. For the avoidance of doubt, I consider that there was also a manifest error in giving EAS a score of 8, given the agreed omissions from their tender. But I think it is unnecessarily harsh to reduce their score to anything below 6, particularly given what I have found to be the overall similarities between the EAS proposal and the Woods proposal.

### 6.10.3 Summary

134. For the reasons set out above the EAS score is reduced to 6, the same as the unaltered score for Woods.

## 6.11 Waste Materials

### 6.11.1 The Question

135. Question 4.2 required the tenderers to provide "a statement detailing how you would deal with waste materials i.e. friable and bonded asbestos waste and all associated product, including waste disposal methods (maximum one A4 page)". EAS scored 10; Woods scored 8.

### 6.11.2 EAS

136. Wood complained that, although EAS scored 10, they failed to deal with how the waste would be dealt with at the work site; how it would be transferred to the disposal point; and how it would finally be disposed of. The Council's witness statements do not address those criticisms head on. All Mr Grace's witness statement said about them was that the EAS answer struck the right balance between cost and delivery, which was itself an odd observation, given that cost was irrelevant to this question.

137. The Council's witness statements did not suggest how and why it could be said that EAS' proposals were innovative or added value. There was a reference to EAS' use of its own waste transfer station in Sunbury on Thames, although again, as is often the way with the EAS proposals, there was nothing to say that this transfer station would actually be used for the waste produced by this contract. In addition, although the Council seemed to have set some considerable store by the reference to the waste station in Sunbury, its possible use would have necessitated transporting asbestos waste some 60 miles across southern England.

138. Once again, the pleaded criticisms made by Woods of the scoring of the EAS response were given considerable impetus by the oral evidence of Mr Pink. Mr Pink accepted that the EAS proposal did not address how waste would be dealt with on site. He also agreed that, other than that the removal would be undertaken by company transport, there was no detail in the EAS answer as to how the transfer was going to be carried out safely, securely or lawfully. In addition Mr Pink agreed that there was nothing in the EAS response that indicated how they were finally going to dispose of the waste. Although Mr Pink repeatedly qualified his agreement to these omissions by saying that there was 'no detail' on them, he was repeatedly pushed on this attempted qualification, and had to agree that, in reality, there was no proposal from EAS at all on these three topics, whether detailed or otherwise.

139. Given that this was a contract for the removal of asbestos, I find that the failure to offer any proposal as to how waste would be dealt with at the work site, or by way of transfer, or by way of ultimate disposal, amounted to fundamental omissions, similar to the omissions in the EAS answers to Questions 2.1 and 2.2, noted in **Sections 6.1 and 6.2** above. The answers were non-compliant because what was required was some detail as to how the waste material would be dealt with by EAS: instead, in relation to these critical elements of the operation, there were no proposals at all.

140. For those reasons, therefore, just as with Questions 2.1 and 2.2 (**Sections 6.1 and 6.2** above), and Question 3.3 (**Section 6.8** above), I consider that the only score for the EAS response to this question is zero. That is the only permissible score for an answer that was so fundamentally non-compliant with the Council's requirements.

### 6.11.3 Woods

141. Woods say that they should have been given a 10, principally because of their proposed use of specially adapted vans with sealed compartments for the asbestos waste. It had originally been suggested by the Council that those were part of the contract specification and/or that the law required the use of such vans, but it is plain to me that neither suggestion is correct. The relevant regulations simply require an appropriate container, and there was no contractual requirement for the specially adapted vans of the type proposed by Woods.

142. In addition, Mr Pink accepted that the disposal of waste on site (as opposed to elsewhere) was not something that was required by the contract. Again, therefore, that would be an added value, although Mr Pink accepted that that was not something which he appreciated at the time.

143. However, the problem that Woods have with this part of their case is the same as they have for most of the items where they got a score of 8 but seek a score of 10. There is a margin of appreciation; there is a subjective element of judgment involved. I might have scored their answer 10 but that is not the test. I cannot find that the score of 8 resulted from a manifest error. This is not a dispute that raises the question of transparency or equality. Accordingly the Woods score must remain unchanged.

### 6.11.4 Summary

144. For the reasons set out above, the EAS score falls to be reduced to zero. The Woods score of 8 remains unchanged.

## 6.12 Housing Stock

### 6.12.1 The Question

145. Question 5.1 said this:

> "This contract is focussed on improving the safety and living standard of our housing stock, in order to improve the social, economic and environmental wellbeing of our residents. Therefore please explain what specific steps you will take to contribute to this objective."

### 6.12.2 Summary

146. Although there are pleaded criticisms of the EAS tender, which was given a score of 8, and the evaluation of the Woods' tender, which scored 8, there was no cross-examination on these individual items, and they were not addressed in Mr Barrett's closing submissions. It seems to me that, on all the evidence, both these two scores fall within any margin of appreciation. Accordingly, there is nothing in the pleaded points arising in respect of Question 5.1.

## 6.13 Conclusions

147. My conclusions as to the individual allegations can be tabulated as follows:

| **Section / Question** | **EAS Score** | **Woods Score** |
|---|---|---|
| 6.1 / Q 2.1 | 0 (Reduced from 10) | 8 (Unchanged) |
| 6.2 / Q 2.2 | 0 (Reduced from 6) | 6 (Unchanged) |
| 6.3 / Q 2.3 | 8 (Unchanged) | 8 (Increased from 6) |
| 6.4 / Q 2.4 | 8 (Unchanged) | 8 (Unchanged) |
| 6.5 / Q 2.5 | 10 (Unchanged) | 10 (Increased from 6) |
| 6.6 / Q 3.1 | 8 (Unchanged) | 8 (Unchanged) |
| 6.7 / Q 3.2 | 8 (Unchanged) | 8 (Unchanged) |
| 6.8 / Q 3.3 | 0 (Reduced from 8) | 8 (Unchanged) |
| 6.9 / Q 3.4 | 6 (Reduced from 10) | 6 (Unchanged) |
| 6.10 / Q 4.1 | 6 (Reduced from 8) | 6 (Unchanged) |
| 6.11 / Q 4.2 | 0 (Reduced from 10) | 8 (Unchanged) |
| 6.12 / Q 5.1 | 8 (Unchanged) | 8 (Unchanged) |
| **TOTALS** | **64**<br>(A reduction of 40) | **94**<br>(An increase of 6) |

## 7. PLAGIARISM

148. I ought to deal with one matter which was separately raised by Woods, to which I have already made brief reference.

149. Woods complain that their former employee, Mr Berry, took model answers from the Woods' tender library and then used those answers when completing the EAS tender. The Council called Mr Berry, whose written evidence was to the effect that, because he had no written contracts with Woods, he was somehow entitled to take that information. As something of an alternative, Mr Berry said that he had the express permission of Mr Petri, the managing director of Woods, to take and use the information.

150. It is unnecessary for me to resolve the issue as to whether or not Mr Berry did have a written contract with Woods. I am content to assume that he did not. But he had an oral contract of employment and had worked for Woods for some time. In those circumstances, he owed Woods obligations in respect of their confidential tender

information. It would not follow that, simply because there was no contract in writing, Mr Berry was entitled to take the information without permission. Ms Ospeciu did not suggest otherwise.

151. As I pointed out at the start of the trial, the only issue therefore was whether Mr Petri gave Mr Berry express permission to take with him the Woods tender library, or parts of it, when he left to work for a competitor. Mr Berry said he did; Mr Petri said he did not. I have no hesitation in concluding that Mr Petri's evidence on this point is to be preferred. I found Mr Petri to be a clear, honest and straightforward witness. I could not describe Mr Berry in the same terms.

152. Two other factors support that conclusion. First, the departure of Mr Berry engendered a certain amount of email correspondence. Many of those emails dealt with the terms on which Mr Berry would be allowed to leave. There is no mention in any email of any proposal, let alone any agreement, that Mr Berry would be allowed to take the library of quotation information. I consider that, on the balance of probabilities, if there had been any such agreement, it would have been recorded in writing.

153. Secondly, I consider that it is wholly fanciful to suggest that Mr Petri expressly consented to Mr Berry going to work for a competitor, taking this information with him, so that it could be used by that competitor. It is an entirely implausible scenario, with nothing other than the assertion of Mr Berry to support it. For these reasons, therefore, I reject it.

154. In the circumstances, I find that the EAS tender was based, at least in part, on material which Mr Berry unlawfully took from Woods. But that does not seem to me to make any significant difference to the issues before me. The Council would have had no way of knowing that at the time of the evaluations. Even when they were alerted to it, after the evaluations, it would not necessarily follow that the Council were obliged to disqualify EAS' tender as a result.

155. Thus in my view the plagiarism allegations do not give rise to any separate or free-standing ground of complaint. If, however, my conclusions at **Section 6** above mean that the competition is to be re-run, then it is something else of which the Council may need to take account.

## 8. DIFFERENT RESULT?

156. It seems clear to me that my alterations of the scores, set out in the table at the end of **Section 6** above, will have a material effect on the outcome of this process. Indeed I confidently expect it to demonstrate that a different result should have eventuated. As agreed with counsel, I shall leave them to work out what the adjusted scores should be. I will then hear submissions as to what relief the claimant will seek in consequence.

## 9. CONCLUSIONS

157. For the reasons set out in **Section 5** above, I consider that there were certain aspects of this procurement exercise which were unsatisfactory. However, those matters form

the background to my analysis of the tender exercise, rather than providing any free-standing grounds that would give rise to judgment against the Council.

158. I have concluded in **Section 6** above that there were a number of manifest errors in the tender evaluation process, and certain instances where the Council was in breach of its duties of equality and transparency. Taken together, those conclusions reduce the marks awarded to EAS by 40 and increasing the marks awarded to Woods by 6. It is for counsel to tell me what effect that has on the overall weighted scores but I am confident that this will mean that Woods outscored EAS so that there should have been a different result. I will listen to counsel's submissions as to what relief should be granted to the claimant as a result of my findings.