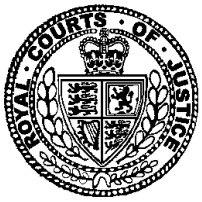

Neutral Citation Number: [2021] EWHC 3321 (TCC)

Case No: HT-2021-000329

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

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

Date: 18/11/2021

Before :

THE HONOURABLE MRS JUSTICE JOANNA SMITH DBE

BETWEEN:

KELLOGG BROWN & ROOT LIMITED

Claimant

-and-

(1) MAYOR'S OFFICE FOR POLICING AND CRIME
(2) METROPOLITAN POLICE SERVICE

Defendants

Sarah Hannaford QC and Rachael O'Hagan (instructed by **Bryan Cave Leighton Paisner LLP**) for the **Claimant**
Joseph Barrett (instructed by **TLT LLP**) for the **Defendants**

Hearing dates: 18 November 2021

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

.....

Covid-19 Protocol: This judgment is to be handed down by the judge remotely by circulation to the parties' representatives by email and release to Bailii. The date for hand-down is deemed to be 9 December 2021.

MRS JUSTICE JOANNA SMITH:

1. There are two applications before the Court:

   i) An application by the First Defendant ("**MOPAC**") dated 20 October 2021 for the lifting of the automatic suspension which arose on issue of a procurement challenge by the Claimant ("**KBR**") pursuant to regulation 96(1)(a) of the Public Contracts Regulations 2015, SI 2015/102 ("**the Regulations**"); and

   ii) An application by KBR dated 8 November 2021 for an expedited trial.

2. The proceedings arise from a procurement conducted by MOPAC, a contracting authority for the purposes of the Regulations. The procurement concerned a framework agreement ("**the Framework**") and call-off contract ("**the Proposed Contract**") for the provision of services designed to support the efficient running of MOPAC's estate of properties through contract, financial and operational management of the property supply chain, supported by systems and information technology ("**the Procurement**"). MOPAC refers to this type of contract as an "integrator" contract.

3. KBR is a large and highly profitable commercial entity specialising in professional services and providing solutions and systems for projects and programmes in the government, aerospace, construction, defence, energy, engineering and technology sectors. It is the incumbent provider of support services to MOPAC pursuant to a contract entered into in April 2013 for a facilities management integrator role ("**the Current Contract**"). Pursuant to the Current Contract, which is due to expire in April 2022, KBR provides support to MOPAC for the management of its estate and supply chain.

4. The proceedings against the Second Defendant ("**MPS**") have been discontinued.

Background

5. It is MOPAC's case that the Current Contract is a legacy contract with outdated systems and architecture such that significant, wide-ranging improvements are now required.

6. On 4 November 2020, MOPAC published a contract notice in the Official Journal of the European Union ("**the OJEU Notice**") advertising the Procurement. The OJEU Notice described the Procurement as being "for a single supplier framework for the provision of a property services integrator for the management of property related services readily accessible by GLA bodies, the Offices of the Police and Crime Commissioner and Central Government Departments". The estimated total value of the Framework was identified as £400 million, excluding VAT, and its timescale was 60 months. The Procurement was to follow the Competitive Procedure with Negotiation pursuant to the Regulations.

7. MOPAC issued two versions of the Invitation to Negotiate ("**ITN**"), before and after the negotiation phase (8 December 2020 and 19 April 2021 respectively). KBR successfully pre-qualified and submitted its initial tender on 4 February 2021. KBR was invited to take part in negotiation meetings on 10, 16 and 18 March 2021 and 14 April 2021 and submitted its final tender on 4 May 2021. It is KBR's case that the

Framework would represent a substantial contract in its Facilities Management Integrator ("**FMI**") portfolio.

8. On 3 August 2021, MOPAC issued an Award Decision Notice notifying KBR that its bid in the Procurement had been unsuccessful ("**the Award Letter**") and stating that Sodexo Limited ("**Sodexo**") had been awarded the Framework ("**the Award**"). The Award Letter stated, amongst other things, that Sodexo had scored a total of 67.42% (44.72% for Quality and 22.70% for Price) and that KBR had scored a total of 66.26% (34.66% for Quality and 31.60% for Price). Accordingly KBR was ranked second. The margin between the scores was only 1.16%.

9. KBR identified concerns with the evaluation and scoring of the bids in the Procurement by letter dated 11 August 2021 and also sought the key evaluation documents by way of early disclosure. MOPAC responded on 18 August 2021, providing limited further feedback and identifying an error in its feedback in the Award Letter.

10. On 24 August 2021, MOPAC provided a four page spreadsheet setting out moderation rationales for each of KBR's responses to the Quality Questions, together with agendas for the meetings between MOPAC and Sodexo. On 2 September 2021, MOPAC provided into a lawyers only Confidentiality Ring moderation rationales in a similar form for Sodexo's responses to the Quality Questions. Although KBR has asked for additional documents, in particular the scores or rationales of the individual evaluators, any notes of the moderation meetings for KBR and Sodexo, and notes of the negotiation meetings with Sodexo, these have not yet been forthcoming from MOPAC.

The Proceedings

11. KBR challenged the Award and issued its Claim Form on 27 August 2021, thereby triggering the automatic suspension under Regulation 95(1) of the Regulations.

12. In summary, KBR claims in the Particulars of Claim that MOPAC owed duties to it under the Regulations and that in breach of those duties:

    i) The Award Letter failed to provide sufficient information as to the reasons for the outcome of the Procurement and subsequent correspondence provided only limited further explanation;

    ii) MOPAC was in breach of its obligations and in manifest error in the scores which it awarded for six of the Quality Questions; and

    iii) MOPAC failed to take proper steps during the negotiation phase to ensure that KBR understood MOPAC's requirements and could put forward the best possible tender or improve its tender, "in particular in relation to those areas of its bid which [MOPAC] thought were weak, namely those areas where it awarded [KBR] scores of 2 and 4". During the course of her submissions, Ms Hannaford QC, acting on behalf of KBR, confirmed that this was intended to be a reference to the specific Quality Questions in respect of which it was alleged that scores of 2 and 4 had been in manifest error.

13. Accordingly, KBR seeks relief in the form of (i) an order that MOPAC's decision to award the Proposed Contract to Sodexo be set aside; (ii) a declaration that MOPAC was

and is in breach of its obligations under the Regulations and/or general principles of EU law; and/or (iii) damages "including its lost profits on the anticipated Contract and/or its wasted tender costs".

14. There has been some dispute during the course of the hearing as to the scope of the challenge that is made by KBR in its Particulars of Claim dated 3 September 2021 and as to whether the Particulars of Claim are sufficiently particularised for MOPAC to know the case it must meet at trial. Mr Barrett, acting on behalf of MOPAC, says that they are not. Given the "uniquely difficult position" inevitably faced by KBR in seeking to challenge the evaluation process (see *Roche Diagnostics Limited v The Mid Yorkshire Hospitals NHS Trust* [2013] EWHC 933 (TCC), per Coulson J (as he then was) at [20(i)]), brought about primarily by the information as to why it lost the Procurement being within the peculiar knowledge of MOPAC, I am not persuaded by MOPAC's submissions on this point. However, insofar as the point may be relevant to the issue of expedition (and has also been raised in the context of submissions as to the balance of convenience), I shall return to it later.

15. In its Defence dated 1 October 2021, MOPAC denies KBR's claims, pointing to a lack of particularisation and often doing little more than simply denying the allegations made. In respect of the scoring claim, it is MOPAC's case that the scores awarded to KBR were appropriate, rational and thus lawful. In its Reply, KBR points out (as it did in its Particulars of Claim) that it was unable to provide further particulars of various of its allegations in circumstances where MOPAC had refused to provide further documentation. KBR has an outstanding application for specific disclosure dated 16 September 2021 which is due to be heard on 3 December 2021.

16. By letter dated 7 October 2021, MOPAC's solicitors, TLT LLP ("**TLT**"), wrote to KBR's solicitors, Bryan Cave Leighton Paisner LLP ("**BCLP**"), requesting that KBR consent to the automatic suspension being lifted. In this letter they noted that "there is a mobilisation and implementation period for the Proposed Contract of **at least six months**" (**emphasis added**). The letter pointed out that MOPAC was concerned that further delay in awarding the Proposed Contract would result in MOPAC not obtaining the benefits that were envisaged under the Proposed Contract until 2023, that it would expose MOPAC to ongoing performance issues under the Current Contract and that it would prejudice the transfer of services from KBR to Sodexo.

17. In a response dated 14 October 2021, BCLP recorded that KBR "does not deny that it is currently operating a legacy system" and that MOPAC would benefit from the Proposed Contract. Nevertheless, KBR rejected the proposal that the automatic stay be lifted.

18. MOPAC now applies formally to the court to lift the suspension by its application dated 20 October 2021. That application is opposed by KBR, which has in turn issued its application for an expedited trial dated 8 November 2021, essentially contending that this is a straightforward case, that there is unlikely to be substantial disclosure and that a realistic time estimate for an expedited trial is 2-3 days. In the premises, KBR argues that the trial could take place, subject to court availability, from late February/early March of next year.

19. MOPAC contends that these proceedings are not suitable for an expedited trial, arguing that there is likely to be substantial disclosure, that MOPAC considers it may be

necessary to call up to 21 witnesses to deal with the evaluation process and that a trial with a 10 day estimate is a great deal more realistic. It says that the earliest the parties could possibly be ready for such a trial would be October 2022 and that a speedy trial along the lines postulated by KBR would be unfair.

20. The following witness statements have been served for the purposes of the applications:

    i) On behalf of MOPAC:

        a) The first statement of Martin Joel, Head of Commercial Contract & Finance (Real Estate Management) at MPS, dated 20 October 2021;

        b) The second statement of Martin Joel dated 15 November 2021;

        c) The first statement of Jonathan Hainey, a solicitor and partner in TLT, dated 15 November 2021.

    ii) On behalf of KBR:

        a) The first statement of William Moore, Director of Contracts for KBR since July 2018, dated 8 November 2021;

        b) The first statement of Joanne Jenssen, Director of Real Estates for KBR and part of the Senior Management team within KBR, dated 8 November 2021;

        c) The first statement of Christopher Bryant, a solicitor and partner in BCLP, dated 8 November 2021;

        d) The second witness statement of Joanne Jenssen dated 17 November 2021. KBR issued an application to rely upon this statement at the hearing, which application was not, in the event, opposed by MOPAC.

21. A considerable amount of the evidence focused on the performance by KBR of the Current Contract and what MOPAC describes as "serious failings" in that performance. As Mr Barrett accepted during his submissions, the court is not in a position to make findings on MOPAC's allegations in this regard, although it is Mr Barrett's contention that the impact of these performance issues on the relationship between the parties is relevant to the issue of balance of convenience. I shall return to this in due course.

The Applicable Principles

22. As Stuart-Smith J (as he then was) said in *Alstom Transport Limited v London Underground* [2017] EWHC 1521 at [13], the applicable principles on an application to lift the automatic suspension are "generally settled and well known". Subject to one point to which I shall return below, they are not in dispute on this application, notwithstanding that I was referred to numerous previous decisions. Essentially the court must decide whether it would be appropriate to grant interim relief in favour of KBR on ordinary *American Cyanamid Co v Ethicon Ltd* [1975] AC 396 principles, as if no suspension was applicable (see *Bombardier Transportation UK Ltd v Hitachi Rail Europe Ltd & Ors* [2018] EWHC 2926 (TCC) per O'Farrell J at [37]-[38] and *Draeger*

Safety UK Ltd v London Fire Commissioner [2021] EWHC 2221 (TCC) per O'Farrell J at [20]-[21]).

23. In determining the application in this case, I must therefore consider:

    i) Whether there is a serious issue to be tried;

    ii) If so, whether damages would be an adequate remedy for KBR if the suspension were lifted and it succeeded at trial. An alternative and "modern" way of phrasing this issue is to ask whether it is just, in all the circumstances, that KBR be confined to its remedy of damages (see *Evans Marshall & Co Ltd v Bertola SA and another* [1973] 1 WLR 349 per Sachs LJ at 379H, *Covanta Energy Limited v Merseyside Waste Disposal Authority (No 2)* [2013] EWHC 2922 (TCC) per Coulson J at [48] and *Alstom Transport Limited v London Underground* [2017] EWHC 1521 at [22]).

    iii) If not, whether damages would be an adequate remedy for MOPAC if the suspension remained in place and it succeeded at trial.

    iv) Where there is doubt as to the adequacy of damages for either of the parties, which course of action is likely to carry the least risk of injustice if it transpires that it was wrong, that is, where does the balance of convenience lie?

24. Ms Hannaford also drew my attention to *National Commercial Bank Jamaica Ltd v Olint Corp Ltd* [2009] UKPC 16, a decision of the Privy Council in which Lord Hoffman expressed the view at [17] that, in dealing with an application for an injunction, it may often be hard to tell whether either damages or the cross-undertaking will be an adequate remedy and that "[t]he basic principle is that the court should take whichever course seems likely to cause the least irremediable prejudice to one party or the other".

25. In making their submissions on each of the heads identified above, the parties inevitably focused on different aspects of the many authorities to which I was referred and I shall deal with these as they arise under each head, rather than trying to capture in full the submissions at this stage. Suffice to say for present purposes that it is no surprise that every case in this area turns on its own facts and that insofar as each party is able to identify cases raising issues which appear to point in its favour, there is an obvious need for careful analysis of the reasons for the outcome in such cases and the extent to which the court is here concerned with a similar factual scenario.

Serious Issue to be tried

26. MOPAC concedes for the purposes of this hearing that there is a serious issue to be tried.

27. However, it nevertheless contends that KBR's case is weak, that the Particulars of Claim do not particularise any comprehensible case to establish that the scores awarded by MOPAC were irrational or manifestly erroneous or that there was any breach of legal duty in the conduct of the dialogue. Accordingly, Mr Barrett submits that there are features of this case that are, in his words, "well out of the norm" when seen in the context of other cases in this field and that, in the circumstances, if it is necessary for

the court to consider the balance of convenience, then it can, and should, have appropriate regard to the weaknesses in KBR's case at that stage.

28. I reject this submission. Having conceded the question of serious issue to be tried (and save in exceptional circumstances), it does not seem to me to be appropriate to seek to bring the strengths and weaknesses of the case back into play at a later point in the analysis.

29. Returning to first principles, as Ms Hannaford invited me to do, I note that Lord Diplock was clear in *American Cyanamid* at 407-408 that, on the subject of serious issue to be tried:

> "It is no part of the court's function at this stage of the litigation to try to resolve conflicts of evidence on affidavit as to facts on which the claims of either party may ultimately depend nor to decide difficult questions of law which call for detailed argument and mature considerations. These are matters to be dealt with at trial…So unless the material available to the court at the hearing of the application for an interlocutory injunction fails to disclose that the plaintiff has any real prospect of succeeding in his claim for a permanent injunction at the trial, the court should go on to consider whether the balance of convenience lies in favour of granting or refusing the interlocutory relief that is sought."

30. It is of course with this in mind, that many defendants in the position of MOPAC concede the question of serious issue to be tried, appreciating that the court will rarely be in a position where it can arrive at a definitive view of the merits. I respectfully agree with Coulson J's judgment on this issue in *Sysmex (UK) Ltd v Imperial College Healthcare NHS Trust* [2017] EWHC 1824 (TCC) at [19]-[21] (focusing in particular on [19]):

> "I do not consider, on an application to lift the suspension in a typical procurement case, that this is an appropriate matter for the court to investigate. Such cases are a long way from a straightforward claim for an interlocutory injunction, where a particularly good point on the substantive dispute (an admission say, or an unequivocal contractual term in one side's favour) might well be of assistance to the court's consideration of the application overall. It is not appropriate to have a mini-trial in a complex procurement dispute like this. Where, as here, it is accepted that there is a serious issue to be tried, then (save in exceptional circumstances) both sides should resist any further temptation to argue about merits".

31. Mr Barrett relies upon a passage in *American Cyanamid* at 409 to the effect that:

> "…if the extent of the uncompensatable disadvantage to each party would not differ widely, it may not be improper to take into account in tipping the balance the relative strength of each party's case as revealed by the affidavit evidence adduced on the hearing of the application".

32. However, this was plainly not intended by Lord Diplock as a general invitation to consider the merits on balance of convenience, because he went on to warn that

> "[t]his, however, should be done only where it is apparent upon the facts disclosed by evidence **as to which there is no credible dispute** that the strength of one party's case is disproportionate to that of the other party. The court is not justified in embarking on anything resembling a trial of the action upon conflicting affidavits in order to evaluate the strength of either party's case" (**emphasis added**).

33. Whilst there has been some limited disclosure in this case, both parties envisage the need for a standard disclosure exercise to take place in due course and there is currently an outstanding application by KBR for specific disclosure. Ms Hannaford took me in some detail through the pleadings during her submissions and it was abundantly plain that, absent full disclosure and reasoned submissions, I am not in a position at this stage to determine the merits of the claim of manifest error or the allegations of breach of the Regulations. Furthermore, I cannot identify any exceptional reason why I should do so. This is certainly not a case in which I can find on the evidence available at this hearing that KBR's case is obviously weak, such that there can be no credible dispute. Furthermore, I have already indicated that I am not inclined to take the view that KBR's case is so poorly particularised that it has little prospect of success.

34. Absent a "knock out point" of the type envisaged by Coulson J in *Sysmex*, it is not appropriate for me to engage in any form of analysis over the relative strengths and weaknesses of the respective parties' cases, much less to be drawn into conducting a mini-trial (for a very recent case making exactly this point, see *Vodafone Limited v Secretary of State for Foreign Commonwealth and Development Affairs* [2021] EWHC 2793 (TCC) per Kerr J at [60]). Accordingly I do not intend to take the merits of this case into consideration when it comes to considering the balance of convenience.

Damages an adequate remedy for KBR?

35. During the course of her submissions, I asked Ms Hannaford whether she accepted that if the court were to hold that damages are an adequate remedy for KBR, that would effectively put an end to any further argument on the application to lift the automatic stay. Ms Hannaford immediately conceded the point, but then returned to it later, withdrawing her concession and inviting me to accept that the position was rather more nuanced than she had at first suggested - in particular in cases where it was possible for there to be a swift resolution of the dispute.

36. Ms Hannaford's argument was essentially that whilst Lord Diplock had made it clear in *American Cyanamid* at 408 that "if damages in the measure recoverable at common law would be adequate remedy and the defendant would be in a financial position to pay them, no interlocutory injunction should **normally** be granted…", he had clearly envisaged that there might be occasions on which that would not be the case. The modern expression of the same concept as identified in *Evans Marshall*, to the effect that the court "must assess whether it is just, in all the circumstances, that the claimant be confined to his remedy of damages", also involved the inherent recognition that there will sometimes be scope for additional factors (over and above pure adequacy of damages) to come into play.

37. Although Ms Hannaford did not identify any guidance in the cases as to the circumstances in which the court would be prepared to deviate from the traditional approach, she pointed to a passage in the judgment of Kerr J in *Vodafone* on which she placed considerable reliance. Having pointed out that in *Draeger*, O'Farrell J had found arguable the proposition that damages would not be an adequate remedy at [40]-[41], Kerr J said this at [83]:

> "The apparent threshold of arguability may have owed something to the pragmatic balance of convenience point at [49] that the court had, between the hearing and handing down judgment, become able to offer a speedy trial within three months; illustrating a distinction that may arise between the adequacy of damages in principle and whether it is just in the circumstances to confine a claimant to that remedy".

38. At the outset of this hearing (and having made it clear that I was not in any way pre-judging the decision I would make on the applications), I indicated to the parties that, having made enquiries with listing, there was scope for a 3 day (or longer) expedited trial to take place between 1 and 18 March 2022. It was against this background that Ms Hannaford sought to contend that the availability of a swift trial was effectively a pragmatic solution which should be brought into account in considering the justice of the case in the context of adequacy of damages (just as Kerr J had found it impossible (at [90]) "to ignore, in the real world, the availability of a preliminary issue trial window" at an early date in *Vodafone*).

39. Having considered the authorities carefully, I reject this submission for the following main reasons:

i) Ms Hannaford did not show me any authorities in which the court had identified factors which should displace the "normal" rule. Furthermore, insofar as it is suggested that the modern formulation of the *American Cyanamid* principle, as identified in *Evans Marshall*, somehow broadens the scope of the court's enquiry, I reject such suggestion. In my judgment, this alternative expression of the *American Cyanamid* formulation is intended merely to articulate the principle that if a claimant is to be confined to his remedy in damages, justice requires that those damages must be adequate for the purposes of compensating for loss.

ii) As Stuart-Smith J said in *Openview Security Solutions Ltd v The London Borough of Merton Council* [2015] EWHC 3694 (TCC) at [29]: "…if it would be unjust to leave a party to his remedy in damages, the damages are by definition an inadequate remedy". To my mind, this is a clear indication that the two formulations are to be treated as two sides of the same coin, and indeed in *Alstom*, Stuart-Smith J made this very point at [18]:

> "…*Evans Marshall* is a decision of the Court of Appeal that pre-dated *American Cyanamid*. The House of Lords in *American Cyanamid* did not adopt the Court of Appeal's formulation, asking instead whether damages in the measure recoverable at common law would be an adequate remedy. However, the courts have routinely adopted either or both formulation, implicitly

> treating them as two sides of the same coin, even if, in some cases, the formulations may carry slightly different emphasis".

iii) With the greatest respect to Kerr J, the passage in *Vodafone* to which Ms Hannaford refers does not appear to me either to reflect the exercise that O'Farrell J was in fact carrying out in *Draeger* or to be consistent with existing authority.

iv) In *Draeger*, O'Farrell J expressly considered the issue of adequacy of damages for the claimant at paragraphs 35 to 41, finally deciding that it was arguable that damages would not be an adequate remedy in circumstances where (at [41]) the procurement "…is being watched by a number of other fire and rescue services and is likely to be perceived as setting the standard for improved protective equipment in this sector". Nowhere in this section does she address the potential for a speedy trial, or suggest that the availability of a speedy trial is a relevant consideration in assessing the adequacy of damages.

v) As to existing authority, Stuart Smith J expressly rejected the suggestion that the availability of a speedy review by the court was a relevant factor in considering the question of adequacy of damages in *Openview* at [25]. He pointed out that the duration of the interim relief and its likely effects must always be taken into account when considering whether, or on what terms, to impose interim injunctive relief, saying:

> "[t]hat is conventional in a case where it has been concluded that damages would not be an adequate remedy; but normal application of *American Cyanamid* principles does not suggest that it can as a matter of course be a substitute reason for imposing interim relief in a case where damages would be an adequate remedy. On the contrary, if damages will be an adequate remedy the period to trial should generally not be an influential factor, though special cases might arise such as if the Court were persuaded that one party was using the period to trial as an instrument of financial oppression or the delay to trial might put the continued existence of a party (for whom damages would in theory be an adequate remedy) at risk".

vi) It was not suggested to me that any such special circumstances applied in this case. At [27] in *Openview*, Stuart-Smith J went on to say that

> "[i]f proper application of *American Cyanamid* principles leads to the conclusion that damages would be an adequate remedy for the aggrieved tenderer, I see no justification in binding authority or in the framework created by the regulations for treating the prospect of a prompt final decision as being of itself a justification for maintaining the automatic suspension."

vii) Accordingly, as Stuart-Smith J went on to say at [70], absent the identification of a factor which would justify departing from the "normal outcome", the starting point for the application of the *American Cyanamid* principles is that "no interlocutory injunction should normally be granted". In similar vein, Sir

> Antony Edwards-Stuart remarked in *Circle Nottingham Ltd v NHS Rushcliffe Clinical Commissioning Group* [2019] EWHC 1315 (TCC) at [18] that:
>
> "…if the court is satisfied that it would not be unjust to confine the claimant to its remedy in damages, that is usually the end of the inquiry. Lifting the suspension will then almost invariably follow as a matter of course."

40. I now turn to KBR's primary reasons for maintaining that damages would not be an adequate remedy in this case. Those reasons are set out in the first witness statement of Mr Moore and are summarised in his paragraph 20 as follows:

> "Irrespective of KBR's overall profitability, if the automatic suspension was lifted and the Framework awarded to Sodexo, there are very serious consequences KBR will suffer to its FMI business, specifically (including the loss of staff), and to its business more broadly, which cannot be quantified. This is particularly the case because, as noted in paragraph 6 above, KBR GS EMEA Projects and Programmes runs only a relatively small number of major projects, government programmes and joint ventures, at any given time. There will be significant consequences to KBR's reputation, which could not be remedied by an award of damages."

The Nature of KBR's Business

41. Before looking in detail at the various points made by Mr Moore in his statement, I should begin by examining the nature of KBR's business.

42. In his first witness statement, Mr Joel points out, rightly, that KBR is a very large, established profit-seeking commercial entity. KBR's Annual Report and consolidated financial statements for the year ended 31 December 2019, exhibited by Mr Joel to his statement, show that:

    i) The KBR group has three key business streams: (a) Government Solutions, described as "a wide range of professional services across defence, programme management and consulting, operational and platform support, logistics and facilities, training and security. This business segment concentrates on long-term service contracts particularly for the United Kingdom Government and NATO"; (b) Energy Solutions involving "complex program management, engineering services, front-end consulting and feasibility studies, small capital and sustaining capital construction programs, turnarounds, maintenance services and more…" in respect of which KBR is said to be a leading provider and (c) Technology Solutions involving "a broad spectrum of front-end services and solutions, including licensing of technologies, basic engineering and design services".

    ii) the KBR group had a turnover in 2019 of £868,227,000 (up from its turnover in 2018 of £690,539,000). This turnover was split between the three main business streams as follows: Government Solutions - £594,783,000; Energy Solutions -

£254,626,000; and Technology Solutions - £18,824,000. The group profit for 2019 after tax was £76,897,000. Net assets were £1,569,819,000.

iii) The Government Solutions segment of the business involves a number of substantial contracts, including FMI contracts – the Current Contract being one such FMI contract. Others include contracts with the London Fire Brigade and the Crown Commercial Service.

43. Mr Joel confirms that the value of the Proposed Contract if awarded to KBR would be a maximum of £34 million for a contract term of 7 years; a very small percentage (less than 1%) of the KBR group's total turnover. As for the Framework, in his first statement, Mr Joel said that in practice MOPAC did not expect "any, or many other public bodies" would use the Framework. In his second statement, Mr Joel explains that "The £400 million figure quoted was a headline value and was formulated to cater for call offs by the Department of Work and Pensions, London Fire Brigade, Ministry of Justice and Government Property Agency". However, further to developments which Mr Joel identifies he expresses the view that "…it is not now expected that the Procurement will operate as a framework for other suppliers. Rather it is likely to be used by [MOPAC] only".

44. Mr Joel concludes that, given the size, breadth and depth of KBR's business and commercial activities "it is difficult to see how an award of damages on normal principles would not be a fair and adequate remedy".

45. Mr Moore accepts in his statement that the KBR wider group specialises in a range of professional services, but he says that forming part of the Government Solutions segment is KBR's Projects and Programmes Business in the EMEA region, a key element of which is the FMI model, involving the management of a client's estate, supported by systems and technologies. In this way he seeks to focus attention for the purposes of this hearing (for the most part) on the impact of a lifting of the suspension on the FMI part of KBR's business.

46. Notwithstanding Mr Barrett's attempts to cast doubt on the existence of a discrete FMI division within KBR's business, I accept that KBR has an FMI division (as is evidenced by the Organisational chart exhibited to Ms Jenssen's first statement). I also accept that the Current Contract forms an important part of the FMI division. However, I reject any suggestion that the size of the Proposed Contract itself supports the general proposition that a failure to win it cannot be compensated for in damages (a point I shall return to later). The Proposed Contract would constitute only a very small part of KBR's overall commercial enterprise; the FMI business is an integrated part of the KBR group's global operations. Whilst the Framework originally appeared, at least potentially, to be extremely valuable, I accept Mr Joel's evidence that further contracts within the Framework are unlikely to eventuate and, in any event, as Stuart-Smith J said in *Openview* at [29], framework contracts are unlikely to give rise to particular difficulties owing to the fact that "[n]ormal principles suggest (for good reason) that damages should be awarded on the basis of the contracting authority's minimum or least onerous obligation".

47. It is not suggested by Ms Hannaford that there is any inherent difficulty in formulating a claim for loss of profits on the Proposed Contract; KBR produced a financial model during the Procurement detailing the costs and revenues associated with the Proposed

Contract. Equally I can see no issue with the identification of wasted tender costs, which are historic costs already incurred.

48. In her skeleton argument, Ms Hannaford suggested that KBR might not be able to recover damages if MOPAC "persists in arguing that the breach is not sufficiently serious" (see 26 of the Defence), a reference to the *Francovich* conditions. However, I agree with Stuart-Smith J in *Alstom* at [37] that:

> " …in the context of a procurement challenge, although each case must be examined on its merits, if a breach of EU-based law is not sufficiently serious to satisfy the *Francovitch* conditions for an award of damages, it is unlikely to be sufficiently serious to justify setting aside the contract under challenge "

49. Further, and in any event, during the course of the hearing, Mr Barrett conceded that if KBR succeeds in establishing that MOPAC awarded the Proposed Contract to the wrong bidder, that breach would be sufficiently serious to justify an award of damages.

50. Against that background, I now turn to consider in more detail the reasons identified by Mr Moore in support of the proposition that damages would not represent an adequate remedy for KBR.

Potential Redundancies

51. In paragraphs 21 and 22 of his statement, Mr Moore says that of some 103 FMI staff employed by KBR at its specialist national service hub in Swindon, there are currently 31 staff members who work exclusively on the help desk to support MOPAC and the delivery of services under the Current Contract. Mr Moore goes on to note that Sodexo is based in Leeds and that accordingly "it is likely that around 30 KBR members at the Swindon call-centre facility and 3 Swindon-based finance roles will be made redundant, on the basis that they are highly unlikely to relocate to Sodexo's offices and their roles are specifically to support MOPAC under the Current Contract rather than other KBR contracts".

52. Thus says Mr Moore, if the automatic suspension were to be lifted and KBR ultimately succeeds in these proceedings, "33 redundancies could and should have been avoided". Further, it is likely that there will be "other damage to KBR's business and its soft synergies such as damage to team morale, owing to the loss of a significant portion of it Swindon-based office".

53. In my judgment, this evidence falls far short of establishing that damages will be an inadequate remedy. Whilst the loss of a "highly and uniquely trained workforce" has been held to give rise to irremediable harm (see *Counted4 Community Interest Co v Sunderland County Council* [2015] EWHC 3898, per Carr J (as she then was) at [40]), there is insufficient evidence to conclude that the KBR employees who are "likely" to be made redundant have specialist skills which are not available on the wider market (whether they are properly to be described as "back office" employees, as Mr Barrett contends, or not).

54. As to whether redundancies are likely, Mr Joel points out that the relevant staff members are subject to TUPE and so will be able to transfer to Sodexo. Whilst Mr

Moore casts doubt on the desire of such staff members to relocate to Leeds, there is no evidence one way or the other as to what individuals may wish to do and ultimately the choice will be a matter for them. I agree with Mr Barrett that while redundancy is a potential detriment for an individual employee, it is irrelevant to the adequacy of damages as a remedy for KBR, and, as Kerr J said in *Vodafone* at [86], the transfer of staff to another organisation is "a normal incident of losing a tender of this kind, and unavoidable". Insofar as KBR is required to make redundancy payments to staff, those are losses which are capable of quantification on an assessment of damages in the event that KBR succeeds at trial. Potential damage to team morale is hopelessly vague and would not give rise to any recoverable form of loss.

55. Finally, I note the evidence from Mr Joel to the effect that Mr Moore's assertion that staff would choose not to transfer to Sodexo is based on an incorrect assumption as to where, geographically, Sodexo may choose to locate its staff. In particular, Mr Joel said in his second statement that "[w]ithout entering into discussion of confidential information, the factual assumption that Mr Moore's argument is predicated on is simply incorrect". I agree with Ms Hannaford that it is wholly inappropriate for MOPAC to rely on evidence which it says it cannot show to KBR or to the court. However, in this instance, such reliance adds nothing to the conclusion I have already arrived at.

Impact on KBR's FMI Portfolio

56. Mr Moore's evidence at paragraphs 23-29 of his statement is that the Current Contract is the largest contract in KBR's FMI portfolio by total value and will have generated revenues of approximately £48.5 million, representing 47% of FMI's proportion of total revenue, by the end of the Current Contract term. Mr Moore says that there are limited integrator contracts in the market and that other than the Framework opportunity KBR is aware of only two current opportunities: (i) a contract being procured directly by the Department for Work and Pensions in respect of which KBR has submitted a bid and is awaiting an award; and (ii) a contract being procured under the Crown Commercial Service Framework (on which KBR has a place) with an anticipated Invitation to Tender release in April 2022.

57. Mr Moore points to the investment (in time, knowledge and costs) made by KBR into the FMI model, including in the creation of the Swindon office and the devotion of core resources and costs and says that if the automatic suspension is lifted "this is **likely** to mean that the overhead costs of the office are shared across fewer contracts, making the other KBR contracts serviced from that office more expensive…" (**emphasis added**). Mr Moore also points to the fact that the Current Contract was awarded an internal award within KBR for social value and that he believes that "the loss of this contract would have negative consequences for KBR's wider social value initiatives". Finally, Mr Moore says that the lifting of the automatic suspension "**may** also lead to a discussion internally on the long term position of KBR's FMI business, and in any event it will result in the need to restructure KBR's FMI business" (**emphasis added**).

58. I am not persuaded that any of these matters supports the proposition that damages would be an inadequate remedy. If Mr Moore is correct (for example) that, absent the Proposed Contract, the FMI division will become less profitable because overheads will be shared between fewer contracts, that appears to me to be a quantifiable loss which will be capable of calculation in due course.

59. The core proposition made by Mr Moore in these paragraphs is that, without the Proposed Contract, KBR will become less competitive in relation to other opportunities, which will, in any event, be few and far between. However, this proposition is unsupported by evidence and fails to acknowledge the extent to which the resources and prospects of the wider business would likely be brought into play. Such a proposition plainly demands scrutiny, but Mr Moore has provided the court with nothing to suggest that his evidence is more than mere speculation. Absent evidence, I consider that it is impossible to subject Mr Moore's assertions to the scrutiny they require in the context of this application (see *Alstom* per Stuart-Smith J at [29]-[35]).

60. Further and in any event, the possibility of a restructuring at some unidentified time in the future is entirely a matter for KBR and appears to me to be irrelevant to the adequacy of damages as a remedy. Equally irrelevant are any (wholly unexplained) negative consequences on KBR's social value initiatives. I did not understand Ms Hannaford seriously to contend otherwise during the course of her submissions.

61. Insofar as KBR has invested in the Current Contract, that is an investment which was necessitated by an existing contract; it does not support the proposition that damages would be an inadequate remedy. Ms Hannaford contends that if KBR is deprived of the Proposed Contract this will have been an investment that KBR "cannot leverage off", i.e. it cannot take advantage of such investment in attracting new contracts. However, she accepts that this is "part and parcel" of KBR's case as to references for other contracts, and I shall return to it in a moment.

62. Particularly given the size and resources of the KBR group, unsupported assertions of the type appearing in Mr Moore's evidence under this heading are, in my judgment, insufficient to establish that there is a real prospect of KBR suffering irremediable and uncompensatable loss if it is confined to its remedy in damages. In any event, these are the sort of entirely predictable commercial consequences likely to be encountered in any situation where an incumbent provider fails to win the tender competition for a future contract or contracts.

Impact on KBR's business – reference for other contracts

63. In paragraphs 30-34 of his statement, Mr Moore explains that the Current Contract, has provided an "invaluable reference contract" that has been cited in relation to other core KBR business opportunities, including aspects of the KBR business falling outside FMI. In contrast to other parts of his statement, Mr Moore supports the propositions made in these paragraphs by reference to documents, in particular Certificates of Past Performance provided, respectively, to the Crown Commercial Service and the Ministry of Defence. Both certificates rely upon the Current Contract with MOPAC and include signed confirmations from MOPAC as to satisfactory past performance.

64. I accept that KBR has been able to take advantage of its investment in the Current Contract in competing for new FMI contracts, as well as for contracts in other areas. The Regulations expressly envisage (at Regulation 58(16)) that contracting authorities may require that economic operators have a sufficient level of experience demonstrated by suitable references from contracts performed in the past. Regulation 60(9) provides that proof of "technical and professional ability" may, subject to Regulation 58(16), be provided by, amongst other things:

> "a list of the principal deliveries effected or the main services provided over at the most the past 3 years…but, where necessary in order to ensure an adequate level of competition, contracting authorities may indicate that evidence or relevant supplies or services delivered or performed more than 3 years before will be taken into account".

65. It appears to be common ground that KBR will be able to use the Current Contract with MOPAC as a reference for up to three years after its termination. Nevertheless, Mr Moore says that in the event of the suspension being lifted "…this is likely to impact and prejudice KBR's ability to win other business, the impact of which cannot be quantified or compensated through an award of damages".

66. In my judgment, however, KBR has not established that there is a significant risk that it will lose any competitive edge if it loses the Proposed Contract. No prospective tenders have been identified as likely to be affected by the inability to use the Proposed Contract as a reference contract, and Mr Moore does not suggest that KBR has no other relevant FMI reference contracts on which it could rely as evidence of its "technical and professional ability". He says that the Current Contract is the largest contract in KBR's FMI portfolio by total value and observes that it is of "considerable benefit" as a reference because it involves a varied number of elements, but he does not say that the other contracts in KBR's existing portfolio (which, as I have said, include contracts with the London Fire Brigade and the Crown Commercial Service) are incapable of providing evidence of KBR's expertise in the provision of integrator services. Further, Mr Moore does not suggest that the loss of the Proposed Contract means that KBR will be unable to bid for other large FMI contracts or that the failure to win the Proposed Contract will have a detrimental effect on KBR's future tendering generally (whether in the specialist FMI field or otherwise).

67. Borrowing from the analysis of Stuart-Smith J in *Alstom* at [37]: (i) I have seen no evidence to support the proposition that loss of the Proposed Contract would mean that KBR lacked expertise in relation to the services required in an FMI context; (ii) there is no reasonable basis for doubting that KBR will continue to tender for FMI contracts as and when they arise and that it will continue to do so as a proven player in that market with other "reference contracts" on which it can rely – it will be able to use the Current Contract as a reference for a period of three years after termination in any event; (iii) there is even less basis for doubting that KBR will continue to tender for other core KBR business opportunities (outside the FMI area) and that it will continue to do so with the additional muscle and expertise inherent in being part of a very substantial global group – I refer in particular to the "Competitive Advantages" page of its Annual Report and consolidated financial statements for the year ending 31 December 2019; and (iv) there is no reason to suppose that a future tender outcome would be determined by the fact that KBR had won the Proposed Contract and nor is there any reason to suppose that a future tender outcome would be determined by the fact that it had not. I reject Mr Moore's suggestion that Sodexo's ability to use the award of the Proposed Contract as a live reference will give it a competitive advantage when competing for other contracts against KBR.

Reputational Damage

68. In paragraphs 35-36 of his statement, Mr Moore contends that "The Current Contract is well-known in the facilities management and procurement market, and KBR's reputation as a leading player in the FMI market is intimately connected with MOPAC". This connection is said to have arisen in circumstances where MOPAC and KBR together pioneered this form of FMI contract and worked together to develop and promote the Integrator service. Mr Moore points out that, in the circumstances and having regard to the relatively small nature of the FMI market, the Current Contract is an "exemplar contract" (far beyond its profit margin). Accordingly, he says that "it is clear that both clients (current and potential) and other companies operating in the industry will be aware of MOPAC's decision to award the Framework to Sodexo" and that he considers this will "cause irreparable reputational damage to KBR".

69. During her submissions, Ms Hannaford contended that in light of this evidence, the Framework and Proposed Contract are to be regarded as "prestigious", that prestige is "in the eye of the beholder" and that a contract which might not appear particularly prestigious when looked at in isolation, may nevertheless be prestigious from the point of view of the relevant market or industry, i.e. it might be <u>the</u> contract, or <u>one of the</u> contracts in the field.

70. This court has held in a number of cases that reputational harm cannot be compensated for in damages. Ms Hannaford points in particular to *DWF LLP v The Secretary of State for Business Innovation and Skills* [2014] EWCA Civ 900, a case in which the contract in issue was for the provision of legal services to the Government's insolvency service by DWF, a firm of solicitors. Sir Robin Jacob concluded that damages would not be an adequate remedy and in his brief reasons he accepted the proposition at [52] that general damage to an insolvency department, including loss of reputation was "quite impossible to quantify fairly".

71. More recently, O'Farrell J considered the issue in *Bombardier*, observing at [58] that:

> "[e]ach case must be considered on its own facts. In most cases, unsuccessful bids are part of the normal commercial risks taken by a business and will not have any adverse impact apart from potential wasted costs of the tender and lost profits. Not every failed bid will result in damage to reputation causing uncompensatable loss. There must be cogent evidence showing that the loss of reputation alleged would lead to financial losses that would be significant and irrecoverable as damages or very difficult to quantify fairly: *Alstom Transport v Eurostar International Ltd* [2010] EWHC 2747 per Vos J at [129]; *NATS* (above) at [84]-[85]; *DWF* (above) at [52]; *Openview* (above) at [33]-[40]; *DHL v Secretary of State for Health and Social Care* [2018] EWHC 2213 at [45] & [46]"

72. On the facts of *Bombardier* which involved a "distinctively prestigious" procurement in size, location and value, O'Farrell J held that failure through unlawful procurement procedures would place the unsuccessful bidder at a disadvantage in competing for other commercial opportunities; "It would be very difficult to prove a causal link between the loss of reputation and loss of subsequent business; for that reason, it would be very difficult to quantify" (at [59]). Accordingly, she held that damages would likely not be an adequate remedy. Similarly in *Alstom Transport v Eurostar International Ltd*

[2010] EWHC 2747, Vos J (as he then was) accepted that there would be uncompensatable damage to Alstom's international reputation owing to the loss of a "highly prestigious contract" (at [129]).

73. Finally, Ms Hannaford relied upon *Vodafone*, a case in which it was argued that Vodafone's bid concerned a contract of international standing and prestige, the like of which came to the market only infrequently, an argument which was accepted by Kerr J at [84] and [85]. The Judge went on (at [87]) to accept the proposition that it would not be just to confine Vodafone to its remedy in damages in light of the "unquantifiable loss of opportunities to bid for and win other contracts on the back of this one".

74. In this context, it appears to me that *Openview* bears closer consideration, not least because Stuart-Smith J considered in detail what the "test" or "touchstone" might be in a case involving the question whether loss of reputation renders damages an inadequate remedy. At paragraphs [36]-[40], he said this:

> "36. … Two questions arise. The first is whether "loss of reputation" is an abstract notion or one that requires to be closely linked to the concept of compensatory damages. The second is whether what matters is "loss of reputation" in general or whether the reputation needs to be lost in the eyes of any particular constituency. The questions are to some extent interrelated.
>
> 37. I am not persuaded that loss of reputation as such affects the question of adequacy of damages as a remedy. If damages were otherwise an adequate remedy, I see no reason why the "reputation" of a tendering party as such should affect the giving or withholding of interim relief. With commercial parties, what ultimately matters is whether the loss of the contract in question will reduce their profitability in a way that is not recognised by the normal principles on which damages are awarded. This in turn suggests that what is generally of concern is whether the aggrieved tenderer will lose out on other contracts which it might have obtained if it had added lustre to its reputation by getting the contract at issue. In other words, the real subject of the "loss of reputation" argument is financial losses which the law of damages does not normally recognise. This must surely be the end point of the "specific and uncompensatable benefits" that Alstom would have hoped to achieve if it got the Eurostar contract; equally, DWF must surely have hoped that its reputation as the legal adviser to the Insolvency Service would help it to get other profitable work in the future; and in NATS, what persuaded Ramsey J was the evidence that "the loss of the contract to provide air traffic control at Gatwick airport will significantly impair NATS's ability to secure international air traffic control contracts and other related contracts."…
>
> 38. This points to the answer to the second question: the constituency of interest is future prospective contracting authorities (or other contracting parties) who might be

> influenced to give work to a party which has the contract at issue rather than to a party which has not. The answers to the two questions explain in many cases why the "loss of reputation" does not normally sound in damages in the first place: the loss is speculative and legally too remote. They also provide good reason for restraint on the part of a Court which is urged to adopt "loss of reputation" as a reason for holding that the damages that would be awarded are not adequate compensation.
>
> 39. What then are the criteria to be applied before a court accepts that "loss of reputation" is a good reason for holding that damages which would otherwise be adequate are an inadequate remedy for *American Cyanamid* purposes? In the absence of prior authority directly in point (none having been cited by the parties) but with an eye to the approach adopted by the Court in *Alstom*, *DWF* and *NATS* I suggest the following:
>
> i) Loss of reputation is unlikely to be of consequence when considering the adequacy of damages unless the Court is left with a reasonable degree of confidence that a failure to impose interim relief will lead to financial losses that would be significant and irrecoverable as damages;
>
> ii) It follows that the burden of proof lies upon the party supporting the continuance of the automatic suspension and the standard of proof is that there is (at least) a real prospect of loss that would retrospectively be identifiable as being attributable to the loss of the contract at issue but not recoverable in damages;
>
> iii) The relevant person who must generally be shown to be affected by the loss of reputation is the future provider of profitable work.
>
> 40. These are general criteria, which need to be reviewed and considered in the light of the facts of each case. I readily accept that there is more to be said on the subject and that principles such as those I have suggested are not to be applied by rote."

75. In my judgment, KBR has not produced sufficient evidence with which to satisfy the court that there is (at least) a real prospect of loss that would be retrospectively identifiable as being attributable to the loss of the Proposed Contract but not recoverable in damages. I am certainly not in a position where I could conclude that a failure to impose interim relief would lead to financial losses (consequent upon a loss of reputation) that would be significant and irrecoverable as damages. Once again I draw attention to the "Competitive Advantages" page of the Annual Report and consolidated financial statements for the year ending 31 December 2019, in which KBR identifies various areas in which it has a competitive advantage including in Project Delivery: "a reputation for disciplined and successful delivery of large, complex and difficult projects globally – using world class processes…". There is no evidence to suggest that the loss of the Proposed Contract will in any way undermine this global reputation.

76. In any event, I accept Mr Barrett's submissions that, whilst the Proposed Contract is important to KBR in the context of its FMI division (as Mr Moore explains in paragraphs 8 and 35 of his statement) it is not "highly prestigious" or "distinctively prestigious" and there is not a single document to suggest otherwise. There is no objective evidence from which I could conclude that this is "the contract" in the FMI field. In any event, even if the Proposed Contract is "prestigious", that would not in itself be enough to show that a failure to win it cannot be compensated for in damages (see *Sysmex* per Coulson J at [39]).

77. The Proposed Contract is a very modest contract in the context of KBR's overall business and Mr Moore himself describes it in paragraph 47 of his first statement as "a contract providing back office support…". Moreover, Mr Moore has produced no evidence whatever to support the proposition that the loss of the Proposed Contract will reduce KBR's profitability in a way that is not recognised by the normal principles on which damages are awarded, or that it will lose out on other contracts which it might have obtained if it had won the Principal Contract. I am not satisfied that KBR has established a genuinely unquantifiable loss of opportunities to bid for and win other contracts on the back of this Framework and Proposed Contract (in contrast to the position in *Vodafone*).

78. In any event, in paragraphs 35 and 36 of his statement, the specific damage on which Mr Moore relies in the context of his assertion of loss of reputation, is rather different. He says that if the automatic suspension were to be lifted and KBR ultimately succeeds in these proceedings "the reputational damage will already have been suffered by KBR, meaning that KBR will suffer ongoing prejudice despite it being ultimately successful. For example, KBR's client/suppliers may have already moved to working with Sodexo and potential new relationships may be prejudiced".

79. A similar argument was advanced in *Sysmex* and emphatically rejected by Coulson J at [49]-[50]:

> "49. Behind this point was, I think, the suggestion that their reputation would not be restored by an award of damages at the end of the case, and that their reputation would only be restored by the award of [the contract]. To the extent that that is Sysmex's case, I emphatically reject it. There is no evidence put forward by Mr Howes (or anyone else) to support it.
>
> 50. Moreover, it is fundamentally wrong in principle to say that an award of damages would not restore a reputation lost because of the rejection of a tender, but the award of the contract itself would. What would matter in those circumstances would be the public acknowledgement that their bid had been wrongly rejected, not the precise remedy which the court provides in consequence of that finding. By way of example, if an individual claimant is wrongly deprived of a contract under which he or she would have provided personal services, the court would be most unlikely to order specific performance of such a contract even if the claimant is successful, so damages are inevitably the claimant's remedy. It could not be suggested in those cases that damages are not, in principle, proper compensation."

Loss of Knowledge

80. Mr Moore contends, in paragraphs 37 and 38 of his statement that the Current Contract "has been and continues to be an indispensable tool from the perspective of KBR's knowledge development…This knowledge gives KBR significant market leverage over and above its competitors, particularly given the small number of opportunities in the market…". In short, says Mr Moore, if the automatic suspension were to be lifted and KBR wins at trial, "KBR would have already lost this ongoing ability to develop its institutional, public authority knowledge-base and would have therefore lost its ability to leverage this as against competitors".

81. Given the size of KBR's overall commercial operation, I am afraid that I consider this to be a substantial overstatement and I can see no basis on which damages would not be an adequate remedy. Mr Moore produces no documentary evidence with which to corroborate this assertion and it is difficult to credit when seen in the context of the "Competitive Advantage" page in KBR's Annual Report and consolidated financial statements for the year ending 31 December 2019 which points out that KBR operates in "global markets with customers who demand added value, know how, technology and delivery solutions…".

Loss of Efficiencies

82. In circumstances where the Swindon office services a number of KBR clients, Mr Moore says in paragraph 39 of his statement that if the suspension is lifted and the Framework is awarded to Sodexo, and if the redundancies he has already referred to occur, "this will inevitably increase the share of KBR's overall, overhead business costs for the KBR Swindon office to be borne by other contracts". He goes on to say "I consider that these increased costs will likely mean that other opportunities, including those outside the FMI space, become less viable as higher overhead costs means higher pricing leading to KBR submitting less competitive bids".

83. I have already dealt with the issue of increased overheads. As for the suggestion that other opportunities, including those outside the FMI space will become less viable, it seems to me that this is little more than assertion, unsupported by any evidence whatever. It is wholly unpersuasive and very difficult to square with the evidence as to the size of KBR's business.

Summary

84. As an overarching submission, Ms Hannaford sought to characterise MOPAC's argument at this hearing as depending upon the proposition that KBR is a substantial company which seeks to make a profit and that accordingly damages must be an adequate remedy. She pointed out that this could not possibly be correct as its logical effect would be that (i) no substantial profit making company could maintain an automatic suspension and (ii) the automatic suspension would not be continued in any large procurement, as bidders taking part in such procurements are inevitably large companies which seek to make a profit.

85. However, as I have explained in the earlier paragraphs of this judgment, MOPAC's argument was rather more nuanced. Ultimately, as I have already said, the outcome of every case will depend on its own facts, including (importantly) the strength of the

evidence. Whilst it may be more difficult in cases involving very substantial commercial enterprises to establish that damages will not be an adequate remedy, it is always open to unsuccessful bidders to serve evidence which supports, say, a loss of reputation (as was the case in *Bombardier*); a case-specific reason (such as the procurement that was being closely watched by other fire and rescue services in *Draeger* and so was likely to be perceived as setting the standard for improved protective equipment); or "unquantifiable loss of opportunities" to bid for and win other contracts on the back of the lost contract (as was the case in *Vodafone*). In this case, however, KBR's evidence fell short of what is required.

86. In all the circumstances, I conclude that, on the available evidence, damages would be an adequate remedy for KBR and that it would be just in all the circumstances to confine KBR to that remedy. However, in the event that I am wrong, I turn now to deal with the remaining elements of the *American Cyanamid* test.

Adequacy of damages for MOPAC?

87. KBR has confirmed that the usual cross-undertaking in damages would be available to MOPAC, if required by the court.

88. Mr Barrett submits (very briefly) that MOPAC is a public body that exists solely to discharge important public functions relating to policing and the protection of the public. He contends that it is clear on the evidence that MOPAC will suffer considerable non-financial prejudice to its ability to discharge its public functions and public service mission if the suspension is maintained and the introduction of the Proposed Contract, bringing with it new, enhanced services, is significantly delayed.

89. Support for these submissions is to be found in the evidence of Mr Joel, who confirms that the Proposed Contract will be a "key enabler for improving the quality, timeliness and value for money of services delivered by the Integrator and the whole property supply chain", that it will replace the dated legacy system and that any delay to the award of the Framework and the Proposed Contract will be prejudicial to MOPAC and contrary to the public interest. In particular, such delay will result in:

    i) MOPAC not obtaining the benefits and financial savings that will be delivered under the Proposed Contract until circa April 2023 (based on a trial in October 2022 and a 6 month mobilisation period); and

    ii) Prejudice to the transfer of service provision from KBR to Sodexo.

90. In his first statement, Mr Joel also identified the prospect of extending the Current Contract for at least a year to preserve the delivery of the services and thereby being exposed to "ongoing, escalating performance issues under the Current Contract". However, in his second statement, Mr Joel says that MOPAC now considers that Sodexo will be able to commence service provision on 28 April 2022 (the date of termination of the Current Contract), notwithstanding that it will not have a 6 month mobilisation period. In the circumstances, Mr Joel explains that MOPAC now has no intention of extending the Current Contract.

91. KBR contends that any losses caused to MOPAC would be financial and capable of remedy in damages, essentially on the grounds (some of which overlap with issues that

arise in respect of the balance of convenience) (i) that the letting of the Framework is not urgent and that there is no reason why the Current Contract may not be extended; (ii) much of MOPAC's case as to it not obtaining benefits and financial savings is overstated; (iii) insofar as MOPAC relies on poor performance by KBR of the Current Contract, the court should not give any weight to this aspect of MOPAC's case; and (iv) MOPAC's arguments concerning the alleged prejudice to the transfer of services to Sodexo are weak.

92. Having carefully considered the competing arguments of the parties and the evidence, I accept that MOPAC will inevitably obtain benefits and savings from the Proposed Contract, as BCLP acknowledged in its letter of 14 October 2021.

93. I also accept Mr Joel's explanation in his first statement that "The legacy system applications and architecture are now at least 7 years old and are designed to standards required at the commencement of the Current Contract. The New System [under the Proposed Contract] is an industry leading solution utilising 'Cloud Based' functionality with standardised and advanced levels of security and flexibility to provide secure access." I also find that the introduction of a new system will have the various benefits described in considerable detail by Mr Joel in paragraph 27 of his first statement. They would include Estate Management and Project Management which are not provided for in the Current Contract.

94. Ms Jenssen, on behalf of KBR, accepts in her evidence that "there are some enhanced IT functionalities that are not being delivered under the Current Contract" but contends that "**some** of [the] technical functionality referred to in paragraph 27 is already available under the Current Contract" (**emphasis added**) and cites a handful of examples. However, her evidence does not begin to address the numerous benefits identified by Mr Joel. Ms Hannaford's skeleton, which contends that "**much** of the technical functionality is already available via KBR" (**emphasis added**) is, in my judgment, put too high.

95. On balance, it seems to me that any significant delay in implementing technological and operational advancements which will have the effect (amongst other things) of improving security, centralising the IT solutions, improving customer experience, setting up a common data environment and creating a new strategic property support function would likely cause non-financial prejudice to MOPAC which it would be very difficult to quantify for the purposes of claiming damages.

96. However, I agree with Ms Hannaford that this is not a case of real urgency (a submission which I understood Mr Barrett to accept in his reply). On MOPAC's original case (that the Framework required a mobilisation and implementation period of at least six months) the lifting of the suspension now would not enable Sodexo to commence service provision on 28 April 2022, when the Current Contract expires. In her skeleton Ms Hannaford pointed out that this would then necessitate an extension to the Current Contract (which envisages the possibility of three extensions for up to 1 year each) and that KBR is willing to provide continuing services under such an extension.

97. This position is complicated by two additional factors. First, MOPAC's new case now advanced by Mr Joel in his second statement to the effect that, if the automatic suspension is lifted, Sodexo would be in a position to mobilise in time to take over from

KBR at the end of April 2022 (thereby avoiding the need for an extension of the Current Contract). Second the dispute between the parties as to KBR's performance of the Current Contract.

98. As to MOPAC's revised case, I am bound to say that I have considerable sympathy with Ms Hannaford's submissions. There is no evidence from Sodexo itself to support a shorter mobilisation period and Mr Joel's evidence in his second statement that "If full commencement of service provision is subject to any unforeseen delay, this will be managed as necessary by in-housing and utilising other suppliers, where necessary and appropriate" is little more than assertion and is unsupported by any documentary evidence. Mr Joel does not explain why the previous conclusion that had been arrived at as to the likely mobilisation period has turned out to be inaccurate and nor does he identify the "contingency plans" he says will be put in place in relation to bringing services in-house. Given the unheralded change in MOPAC's position, it is difficult not to arrive at the conclusion that, as Ms Hannaford contends, this new case has been advanced with a view to bolstering MOPAC's case on this application.

99. In the circumstances, whilst I am prepared to accept that (i) if the suspension is lifted it is now MOPAC's intention to try to mobilise in time for the 28 April 2022 deadline; (ii) Sodexo has experience of mobilising comparable services for the Police Service of Northern Ireland in a shorter period of 3 months; and (iii) Sodexo has expressed its willingness to work at risk to ensure service provision commences in good time (as set out in Mr Joel's second statement), nevertheless, I remain doubtful that full service provision under the Proposed Contract can be commenced at the end of April 2022.

100. As to the question of KBR's performance of the Current Contract, I am not in a position at this hearing to determine the merits of a hotly contested dispute over contract performance. However, Mr Barrett contends that I can and should find that the relationship between the parties is obviously in a state of failure and that the court should be slow to put the parties in a position where they must work together.

101. Having considered the very recent correspondence between the parties attached to Ms Jenssen's second statement, I reject this characterisation. The letters of 5 November 2021 from MOPAC and the reply to this letter of 16 November 2021 from KBR illustrate that whilst there are disagreements between the parties as to the delivery by KBR of its services under the Current Contract, nevertheless there is also a desire on the part of senior management in both organisations to continue to work together "constructively and collaboratively" – a phrase used in both letters. It is apparent from this correspondence that a face to face meeting between Mr Fihosy, the Director of Property Services at MOPAC and Mr Jacobs, the Vice President of Operations for Infrastructure and Programme Management at KBR will be taking place with the express purpose of exploring ways in which the issues raised can be resolved. I do not consider that in the circumstances I can properly attach any weight to the contention that the parties would be unable to work together going forward, were that to be necessary.

102. In any event, Mr Joel now maintains in his second statement that if the suspension is not lifted, MOPAC does not consider that it would be appropriate to extend the Current Contract, owing to the "increasing deterioration in the level of service provision being provided by [KBR] under the Current Contract and the regrettable manner in which

[KBR] has responded to these failings". MOPAC would instead seek to adopt a strategy based on "in-housing, supported by other suppliers, where necessary and appropriate".

103. Ultimately, and for these purposes setting to one side the possibility of an expedited trial which I shall address in the context of balance of convenience, in my judgment the position is as follows:

i) There is no real urgency in putting the Proposed Contract in place. It was always envisaged that the Current Contract could be extended;

ii) If the suspension is not lifted, there will be a delay to the implementation of the services under the Proposed Contract. Notwithstanding that the parties have each expressed a desire to resolve their differences over performance of the Current Contract, MOPAC does not intend to grant an extension to that contract at the end of April 2022. Instead it intends to take on the existing services in-house and/or by the retention of other suppliers. There is no suggestion that MOPAC considers it will be in any way prejudiced by this solution, but nor will it benefit from the technological and operational advances provided for under the Proposed Contract. Even if MOPAC and KBR resolve their differences and MOPAC decides (contrary to Mr Joel's evidence) to extend the Current Contract, MOPAC will still be deprived of those technological and operational advances. If a trial of the action does not take place until October 2022 and mobilisation then takes up to 6 months, the benefits and financial savings envisaged by MOPAC as arising out of the Proposed Contract will not be achieved until, at the earliest, April 2023. Allowing time for judgment and for a possible appeal, the delay may be many months longer than this.

iii) Whilst lost financial savings ought to be capable of assessment, any harm that MOPAC may suffer by reason of a significant delay in the introduction of enhanced services and the benefits they will bring with them would be difficult to quantify in damages.

iv) If the suspension is lifted, MOPAC intends immediately to activate the implementation and mobilisation of the Proposed Contract with a view to commencing service provision under that contract by the end of April 2022 and thereby seeking to ensure a relatively seamless transition from the Current Contract to the Proposed Contract. Whilst there is little evidence to support the proposition that this can now be achieved by the end of April, there is no reason to suppose that it could not be achieved within a relatively short time frame after that date, thereby limiting any harm that may be suffered by MOPAC.

104. In all the circumstances, I conclude that there is a serious risk that in the event that the suspension is continued and MOPAC ultimately succeeds at trial, damages will be an inadequate remedy.

Balance of Convenience

105. The applicable principles were recently summarised by O'Farrell J in *Draegar* at [48]:

> "[48] The balance of convenience test requires the Court to consider all the circumstances of the case to determine which

> course of action is likely to carry the least risk of injustice to either party if it is subsequently established to be wrong. As set out by this court in *Alstom Transport UK Ltd v Network Rail infrastructure Ltd* [2019] EWHC 3585 (TCC), [2020] BLR 95 at [51], when determining where the balance of convenience lies:
>
> (i) the Court should consider how long the suspension might have to be kept in force if an expedited trial could be ordered: *DWF LLP v Secretary of State for Business, Innovation and Skills* [2014] EWCA Civ 900 at |[50] per Sir Robin Jacob;
>
> (ii) the Court may have regard to the public interest: *Alstom Transport v Eurostar International Ltd* [2010] EWHC 2727 (Ch), at [80] per Vos J;
>
> (iii) the Court should consider the interests of …the successful bidder, alongside the interests of the other parties: *Openview Security Solutions Ltd v London Borough of Merton Council* [2015] EWHC 2694 (TCC), [2015] BLR 727 at [14] per Stuart-Smith J;
>
> (iv) if the factors relevant to the balance of convenience do not point in favour one side or the other, then the prudent course will usually be to preserve the status quo (or, perhaps, more accurately, the status quo ante), that is to say to lift the suspension and allow the contract to be entered into: *Circle Nottingham Ltd v NHS Rushcliffe Clinical Commissioning Group* [2019] EWHC 1315 (TCC) at [16]"

106. I note that in *Kent Community Health NHS Foundation Trust v NHS Swale Clinical Commissioning Group* [2016] EWHC 1393, at [34], Stuart-Smith J expressed doubt over what Sir Robin Jacob meant in his judgment in *DWF* at [50], but said that he was content to assume that that passage required the court to have regard to the likely length of duration of any suspension in considering the balance of convenience. I shall take the same course.

107. On the subject of public interest, Stuart-Smith J made clear in *Openview* at [16] that: "…there will frequently be a public interest in contracting authorities being able to go ahead with their plans promptly".

108. Mr Barrett submits that insofar as it is necessary for the court to consider the balance of convenience, it favours MOPAC, in short because, as I have already recorded above, if the suspension is maintained there will inevitably be a substantial delay to the introduction of the Proposed Contract and new services. That, he says, will be to the considerable detriment of MOPAC in the exercise of its public functions.

109. This submission, requires the court to consider the application by KBR for an expedited trial of the dispute (see *DWF* at [50]).

110. It is common ground that the test for expedition was set out by Lord Neuberger in *WL Gore & Associates GMBH v Geox SPA* [2008] EWCA Civ 622 at [25] by reference to

four factors: (i) whether the applicant has shown good reason for expedition; (ii) whether expedition would interfere with the good administration of justice; (iii) whether expedition would cause prejudice to the other party; and (iv) whether there are any other special factors. This test was recently applied in the context of a public procurement challenge in *Vodafone* at [186].

111. As I have already indicated, KBR's position is that the issues in this case are short, that the disclosure will be limited and that there is no reason to suppose that the parties cannot be ready for a 2-3 day trial in March 2022 (when the court has availability). MOPAC vigorously disputes this. It submits, by reference to the evidence of Mr Hainey, that the disclosure will be substantial, that some 21 witnesses may need to be called by MOPAC to deal with the evaluation of the bids and that an expedited trial fixed for March 2022 would neither be fair to MOPAC nor possible. Mr Hainey says that the trial in this case is more likely to last for 10 days and that the parties will not be ready for such a trial until late summer or early Autumn of next year.

112. Having regard to the test identified by Lord Neuberger, I accept that this is a case in which there may be good reason for expedition (see Appendix H of the TCC Guide at 62-64). The court has availability for an expedited trial of 3 days in March 2022 and could potentially increase the hearing time if I were to take the view that, say, a 5 or 6 day trial would be more appropriate. However, attractive as this may seem at first sight, I have concluded that in the circumstances of this case, expedition would interfere with the good administration of justice and would be inconsistent with the requirements of the overriding objective. In particular:

i) Disclosure has not yet taken place and may be more extensive than KBR suggests. I understand from Mr Barrett that MOPAC has, as yet, taken no steps to carry out preliminary searches or undertake enquiries and Mr Barrett informed me, albeit without any real supporting evidence, that there would be a "significant volume of documentation". What is clear from the evidence of Mr Hainey is that it appears that MOPAC will have at least 17 different custodians and varying date ranges. It is his view that disclosure alone will take 3 months. Both parties envisage that a standard disclosure exercise will need to be undertaken.

ii) The current pleadings are (inevitably) based on limited information and there is every possibility that disclosure will necessitate amendments to the Particulars of Claim, which will then have to be addressed by MOPAC in an amended Defence. Whilst I accept that, as things stand, the majority of the allegations appear to be focused and limited in scope, nevertheless, I note in particular the extent to which KBR has reserved its right to plead further once proper disclosure has been provided, including in paragraph 19(1) of the Particulars of Claim which presently appears to be a wide-ranging attack on the Procurement process.

iii) MOPAC says that it may be necessary to call 21 witnesses. Whilst I doubt the necessity for quite so many witnesses, nevertheless I am certainly not in a position at this stage to say that they will not all be required, nor do I think it appropriate to make an order which might have the effect of making it impossible for MOPAC to rely on all of the factual evidence it considers necessary to defend the claim. I accept that, if 21 witnesses are required, the

preparation of their statements is likely to be a time consuming exercise, notwithstanding that the evidence of each witness may be relatively limited in content. Once that evidence has been prepared, it will need to be exchanged, considered and (if necessary) responded to.

iv) Whilst I consider that a 10 day trial may well be too long, nevertheless it does seem to me that a trial of at least 6 days is likely to be required on the information available to date.

v) Given the approaching Christmas vacation, the work I have already identified that will be required on disclosure and witness statements, and the potential for further amendments to be made to KBR's case, I do not consider that the parties could sensibly be ready for a 6 day trial at the beginning of March.

113. In the circumstances, I take the view that expedition would prejudice MOPAC in its preparations for trial. I accept Mr Hainey's evidence that seeking to comply with an expedited timetable would place huge demands on the relevant MOPAC employees, who are all likely to be facing significant demands in their day jobs during the coming months. I accept that seeking to combine the existing work of those employees with the workload necessary to prepare for an expedited trial would be neither realistic nor fair. I do not consider that the other special factors identified in the witness statement of Mr Bryant on behalf of KBR are capable of outweighing the extent of this prejudice.

114. For all these reasons, I refuse the application for an expedited trial. In my judgment, the balance of convenience analysis must take place on the assumption that, in the event the suspension is not lifted, there will be a delay of at least 18 months until the Proposed Contract is implemented. Whichever of the service providers is eventually installed, that is an undesirable delay.

115. In addition to its application for an expedited trial, KBR relied upon four additional factors in support of its case that the balance of convenience favoured maintaining the suspension. I can deal with three of these quite shortly:

i) First, KBR submits that MOPAC delayed in making its application to lift the stay (a delay of some two months from the date of issue of the Claim Form). However, MOPAC did not file its Defence until 1 October 2021 and issued its application on 20 October 2021. I accept Mr Barrett's submission that the application could not have been dealt with in the absence of a defence and that the period of just under 3 weeks between the filing of the Defence and the issue of the application was not significant in the context of the balancing exercise. I do not consider that this delay in itself demonstrates a lack of urgency on the part of MOPAC and I note that in *Sysmex* at [84], Coulson J did not regard a delay of some two months to be particularly serious or significant.

ii) Second, KBR relies on its submissions as to the inadequacy of damages for it and the adequacy of damages for MOPAC, which I have already rejected.

iii) Third, KBR says that it is willing to continue to provide services under the Current Contract, which is capable of being extended, a submission which I have already addressed. I accept that MOPAC's current intention is to take a different course.

116. Fourth, KBR submits that it is in the public interest for the automatic suspension to be maintained, (i) because there is no real urgency; (ii) because of the likely additional cost to the public purse; and (iii) because there is a strong public interest in an authority such as MOPAC complying with its legal obligations in respect of a public procurement.

117. I have already dealt with the question of urgency. In my judgment, whilst there is no serious urgency, the delay which would result from a refusal to lift the suspension would be unacceptable.

118. As to the likely additional cost to the public purse, Ms Hannaford submits that the public may have to pay twice over for the services if KBR is left to its remedy in damages. However, this point, together with her submission that there is a strong public interest in MOPAC complying with its legal obligations in respect of procurement, appear to me to be answered by the judgments of Stuart-Smith J in *Openview*, *Kent* and *Alstom*, as follows:

i) At paragraph [27] in *Openview* Stuart-Smith J said this:

> "The suggestion that compliance with the law and the benefits of implementing the public procurement scheme are compromised by setting aside the automatic suspension where proper application of *American Cyanamid* does not justify its continuation seems to be very questionable."

ii) At paragraph [38] in *Kent*, Stuart-Smith J said this:

> "I do not ignore or underestimate the public interest in procurement exercises being conducted lawfully. But the likely knock-on effect of even a modest delay in resolving this case at trial must be brought into account as a significant counter-balance since it will prevent the efficient and timely introduction of the arrangements which the CCGs consider to be in the best interest of the people of Kent for whose welfare they too are responsible. As I have indicated, the public interest of the people of Kent is in principle a material factor that may affect the balance of convenience in an appropriate case."

iii) At paragraph [39] in *Alstom* Stuart-Smith J said this:

> "Ms Hannaford advanced two submissions in relation to the public interest. Her first was that there is a public interest in procurements being carried out properly. I agree. However, for the reasons that I gave at [27] of *Openview*, which I repeat and adopt, I do not accept that the undoubted public interest in procurements being carried out properly tends of itself to support the maintenance of the automatic suspension. Ms Hannaford made the point that the Regulations provide more than one possible remedy. I agree; and, in my judgment, that supports the conclusion that the appropriate remedy should be identified without preconception or prejudice as to which one may be

> appropriate. Despite Ms Hannaford's submissions to the contrary, I remain of the view that the appropriate course is for the Court to apply established principles and that it will only be in an exceptional case that it can be said that the application of *American Cyanamid* principles fails to give adequate support to the public interest in procurements being carried out properly. Of course, setting aside the automatic suspension at a time when the Court does not know what the final outcome of the Claimants' allegations will be gives rise to the possibility that the Defendant will end up paying a contract sum to the successful tenderer and damages to the aggrieved Claimant. However, that possibility is not a reason for maintaining the automatic suspension if it is otherwise inappropriate to do so. On the contrary, the prospect of paying damages as well as a contract price if it breaches its obligations is an integral part of the scheme under the Regulations for encouraging proper and principled procurements since it is to be assumed that contracting authorities will (in general) wish to avoid double payment. If there were even a whiff of corruption in a given case (e.g. that the procurement had deliberately been conducted in breach of the regulations to achieve a given end irrespective of the risk of double payment), I have no doubt that any Court would regard that as a feature tending to support the maintenance of the automatic stay. However, I make plain that there is no evidence to give rise to even a whiff of that sort in the present case."

119. Equally, there is no such evidence in this case and, in the circumstances, I reject Ms Hannaford's submission that the public interest militates in favour of maintaining the suspension in this case.

120. I should add that in making her submissions on this point, Ms Hannaford relied upon *Covanta Energy v Merseyside Waste Disposal Authority* (No 2) [2013] EWHC 2922, per Coulson J at [60]-[61], where it was accepted that the potential for taxpayers to "pay twice" was a relevant factor in the balance of convenience equation. However, I note in this regard that Coulson J records in those paragraphs that counsel for the authority did not contradict that aspect of Covanta's case. Accordingly, he had no contrary submissions.

121. In the circumstances, and given that *Openview*, *Kent* and *Alstom* have been decided more recently, should it be necessary, I prefer the decisions of Stuart-Smith J. I also note that in *Sysmex* at [98], Coulson J revisited the "pay twice" argument, but dismissed it for two reasons on the facts of that case: first that he agreed with the remarks made by Stuart-Smith J in *Kent* at [38] and in *Alstom* at [39], and second that the point "butts up against another obvious public interest, namely that the NHS should provide the best possible service to the public without disruption and with minimal risk to its patients. Public interest in proper procurement does not become irrelevant, but it has to be seen in its proper context". Whilst back office services are unlikely to involve issues of risk and disruption to the public of the type intrinsic to services provided by the NHS, nevertheless, I accept Mr Barrett's submission that there is a public interest in MOPAC

putting in place an up to date contract to ensure the efficient and effective management of those services.

122. Finally, Ms Hannaford contends that if the automatic suspension were lifted, MOPAC would have to pay circa £10 million more for a solution which (on the scores) was broadly comparable to KBR's solution (i.e. there was only a 1.16% point difference). In my judgment, however, this point is irrelevant. By reference to the criteria established by MOPAC, Sodexo prevailed in the Procurement, achieving the highest aggregate score. I agree with Mr Barrett that the fact that MOPAC did better on one limb of the assessment is neither here nor there for present purposes.

123. Finally, Ms Hannaford pointed out that, somewhat unusually in this case, there is no evidence from the successful bidder, Sodexo. In such circumstances, she contends that I should not take account of Sodexo's position, notwithstanding Stuart-Smith J's acknowledgement at [14] in *Openview* that the fact that the successful bidder is not a party to the application "does not mean that its interests are irrelevant. This multi-partite context is itself a reason why the Court should be slow to interrupt the status quo by maintaining the suspension of the contracting process". Indeed, Ms Hannaford contended that in the absence of any evidence from Sodexo, the court could infer that it was not sufficiently worried about the continuation of the suspension to make any effort to support MOPAC's application to lift it.

124. I am not prepared to go that far, particularly where there is evidence from Mr Joel that Sodexo has already expressed its willingness to work at risk to ensure service provision commences in good time if the suspension is lifted. However, I do not give this issue very much weight on the facts of this case and, given my overall conclusions, I do not need to do so.

125. In conclusion, in my judgment, the balance of convenience clearly favours the lifting of the suspension. This is not a case in which an expedited trial is appropriate and the potential delay if the suspension is not lifted is likely to be significant. There is a public interest in MOPAC achieving the benefits and financial savings it envisages from the Proposed Contract without the period of substantial delay that would otherwise ensue.

126. Following the *American Cyanamid* test, I conclude that damages would be an adequate remedy for KBR, that there is a risk that damages would be an inadequate remedy for MOPAC and that the balance of convenience does not support the grant of an injunction. The *status quo* favours not granting one. Approaching the question by reference to the modern approach, I am satisfied that it is just in all the circumstances that KBR should be confined to its remedy in damages.