Neutral Citation Number: [2023] EWHC 1157 (TCC)

Claim No: HT-2021-000226

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
TECHNOLOGY AND CONSTRUCTION COURT
KING'S BENCH DIVISION

Date: 19 May 2023

B e f o r e :

MR JUSTICE WAKSMAN

JAMES WASTE MANAGEMENT LLP

Claimant

- and -

ESSEX COUNTY COUNCIL

Defendant

Nigel Giffin KC and Stephen Kosmin (instructed by Nexa Law Limited, Solicitors) for the Claimant
Azeem Suterwalla (instructed by Essex Legal Services, Solicitors) for the Defendant

JUDGMENT

Hearing dates: 17-18 and 23-25 January 2023

REDACTED JUDGMENT – REDACTIONS HAVE BEEN MADE TO THIS PUBLIC VERSION OF THIS JUDGMENT TO TAKE ACCOUNT OF CONFIDENTIAL MATTERS

Note: text which has been redacted is replaced by "XX"

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INTRODUCTION

1. This is a claim brought by James Waste Management LLP ("JW") against Essex County Council ("the Council"). In it, JW alleges that in 2021, the Council acted in breach of the Public Contracts Regulations 2015 ("the PCR") in two respects, which caused loss to JW. First, the Council modified its Integrated Waste Handling Contract with Veolia ES (UK) Ltd ("Veolia") made on or about 28 March 2013 ("the IWHC"). The modification is itself contained in or evidenced by an Authorised Change Request ("ACR") dated 25 June 2021 ("the Modification"). Second, the Council awarded a contract to Enovert South Limited ("Enovert") pursuant to a Service Order made on or about 25 March 2021 ("the Enovert Service Order"). The Enovert Service Order itself was made following a "mini-competition" between contractors who were party to an underlying Framework Waste Agreement made with the Council on or about 11 October 2017 ("the FWA").

2. JW was also a party to the FWA. From June 2020 until 7 June 2021 it provided certain waste services to the Council. JW contends that in the absence of the Council's breaches of procurement law, it would have continued to provide those services until 31 October 2021. That is the date when the Modification in fact ended and after which, it is accepted, JW could have no valid claim against the Council.

3. The only substantive relief claimed is damages. Given that it earned over £10 million for the provision of its services in the year to 7 June 2021, the value of a further 5 months services is substantial.

4. This trial is not concerned with the quantum of any damages claimed. It is, however, concerned with liability, causation and whether any proven breaches are "sufficiently serious" to warrant an award of damages at all.

THE EVIDENCE

5. I have heard from three witnesses. For JW, I heard from Stephen Barthaud, its General Manager. For the Council, I heard from Jason Searles, its Head of Waste Strategy and Circular Economy, and Catherine Martin, it's Procurement Manager. I was to have heard also from James Egan, the Council's Waste Manager. However, he was unable to attend for medical reasons, and so his witness statement ("WS") stands as a hearsay statement. Supplemental WSs from both Mr Searles and Ms Martin sought to address and confirm from their own knowledge, numerous points made in Mr Egan's WS after it became clear that he would not be attending Court.

6. As one would expect, there is a considerable amount of contemporaneous documentation which essentially tells the relevant stories.

BACKGROUND

7. The Council is a Waste Disposal Authority ("WDA"). It has statutory responsibilities for disposing of waste collected by and for the borough and district councils in its area, themselves designated as Waste Collection Authorities ("WCA"s). The WDA gives directions to the WCAs as to where they are to deliver their waste. There are various possible destinations, depending on the waste concerned. It could be delivered to a waste treatment facility of some kind or to a landfill site or to a third-party for disposal thereafter.

Or it could be taken to a waste transfer station ("WTS") at which it will be processed in some way and then taken to its ultimate disposal point.

8. The WCAs under the direction of the Council are 12 borough and district councils in Essex. There are three with whose waste this case is concerned. They are Basildon, Castle Point and Rochford District Councils, which are referred to collectively as BCPR.

9. Following a competitive dialogue procurement process, Veolia was awarded the IWHC whose duration was 8 years and 5 months with an option to extend for a further 7 years. In fact, it expired on 31 March 2022.

10. Under the IWHC, Veolia was responsible for

    (1) managing the Council's Recycling Centres for Household Waste ("recycling centres") i.e. the recycling centres for domestic waste used by the public;

    (2) managing the Council's WTSs; as already noted, these were staging points where waste would be delivered and then bulked for efficient onward transport; and

    (3) the haulage of waste from the recycling centres, the WTSs and some district waste depots, to various treatment and disposal points, including landfill sites.

11. At the time of the IWHC, the Council owned or intended to build 5 particular WTSs. It also holds the leasehold or freehold of 21 recycling centres.

12. At this time, it was also anticipated that in the near future, the ultimate disposal point for all of the Council's residual waste would be a mechanical biological treatment facility ("MBT") located in Basildon. Once onstream, this would replace the various landfill sites then being used by the Council which were themselves filling up and therefore causing a capacity problem.

13. The MBT was intended to alleviate these problems. First, it would produce RDF (refuse derived fuel) from municipal solid waste (MSW) delivered to it. That process would not dispose of the entirety of the waste delivered, but it would reduce the mass, and the output would go to landfill or used to generate electricity.

14. The construction and operation of the MBT was the subject of a 25 year PFI contract made between the Council and UBB Waste (Essex) Ltd ("UBB") in May 2012. Under that agreement ("the UBB Agreement"), the Council was obliged to provide all residual waste requested by the MBT operator.

15. Reflecting the contemplated operation of the MBT, it was specifically referred to in the IWHC in terms of Veolia's haulage responsibilities in transporting waste to and from the MBT. But the latter was not an exclusive destination or starting point for Veolia's transportation of waste which included taking it to any landfill site or other location directed by the Council. The IWHC also contemplated that the WCAs would transport their waste to particular WTSs within the 5 new or existing WTSs although that allocation was not fixed. However, BCPR would not transport waste to a WTS. One reason was their close proximity to the MBT so they could, if required, transfer their waste directly there.

16. Once constructed, the MBT would then require a significant commissioning and testing period during which the Council would deliver (through Veolia) waste to it and collect waste from it.

17. However, the MBT never got past the commissioning stage. It became the subject of a claim brought by the Council against UBB. In a judgment dated 18 June 2020, Pepperall J upheld that claim (see [2020] EWHC 1581 (TCC)). He declared that the Council had been entitled to terminate the UBB Agreement as at 13 June 2019 because the MBT could not pass the relevant tests. Nor could it be appropriately modified. Despite that ruling, it appears that the UBB Agreement (or parts of it) was not in fact terminated, such that in the future, there was a theoretical possibility that UBB could call for waste to be transported to the MBT once again. However, that was not a likely possibility as at June 2020. In fact, on 29 June, UBB told Mr Egan that the MBT would stop accepting waste that day and that UBB itself had gone into administration.

18. At this point, I need to pause the chronology and deal with the making of the FWA between the Council and various suppliers ("Nominated Suppliers"). This was itself the product of a procurement process. It gave the Council the option to enter into specific agreements with Nominated Suppliers which were contained in issued "Service Orders" which covered the transfer, haulage and disposal of waste. The FWA was intended to complement the IWHC and help the Council manage any capacity issues. Nominated Suppliers were eligible to provide services under one or more of 5 different "Lots". There is an issue about the relative scope of these Lots but for present purposes, I simply note that the description of the Lots is to be found in Schedule 1 to the FWA. I set that out in context, below.

19. Service Orders made in respect of particular suppliers and particular Lots were preceded by a mini-competition between suppliers who were eligible to offer their services. Since Service Orders were of limited duration, mini-competitions tended to be held every year or two years. Not all Nominated Suppliers were eligible to offer services under all Lots. Thus, for example, JW was eligible under Lots 4 and 5 only.

20. On 1 February 2018, and following a mini-competition, JW was given a Service Order in respect of transfer, haulage and disposal services under Lot 5 for 14 months, ending on 31 March 2019. This was on a "zero-tonne" basis which meant that the Council was not obliged to call for any services from JW at all if it did not wish to do so. But if it did, there was an upper limit of 25,000 tonnes. This Service Order was then extended to 31 March 2020 (as were other Service Orders with other suppliers).

21. Another mini-competition took place in 2019 which resulted in a further Service Order to JW under Lot 4. This entailed the disposal of waste delivered into JW's own waste transfer facility in Rochford. Again, there was no guarantee of any tonnage and the maximum was 50,000 tonnes. Because this Service Order included processing by JW, there was a "gate fee" payable. That is a price per tonne for processing and disposing of the waste. This Service Order ran from 31 March 2020 to 31 March 2021.

22. Any work allocated under a Service Order to a particular Nominated Supplier was "called-off" under that Service Order.

23. As at June 2020, JW had not received any work under either of its Lot 4 or Lot 5 Service Orders.

24. However, and as a result of the decision of Pepperall J on 18 June 2020, Mr Egan told Mr James, a proprietor of JW, on 25 June 2020, that the MBT plant would cease to accept waste at the end of June. On 26 June, Mr Egan confirmed this to Mr Barthaud. He also said that the Council now needed the BCPR to deliver their waste to JW at its waste transfer facility for processing and onward disposal by it. This was not a problem for BCPR because JW was based in Rochford. Significant amounts of waste were then processed by JW, once delivered, under this particular "call-off" under the Service Order. This amounted to 79,229.12 tonnes between 29 June 2020 and 13 June 2021. JW's charges for this amounted to £10,933,378.20 plus £4,250 for keeping its site open for deliveries on weekends and bank holidays. For the period up to 31 March 2021, which was the expiry date of the Service Order, JW had received over 63,000 tonnes.

25. Because the last round of Service Orders were all due to expire on 31 March 2021, the Council held a further mini-competition which launched on 5 October 2020 ("the October Competition"). The detail of this procurement will be examined below, but the relevant outcomes for present purposes were twofold. First, JW was awarded a further Lot 4 Service Order again, on a zero-tonne basis and with a maximum of 75,000 tonnes, on 26 March 2021. Its duration was from 1 April 2021 to 30 September 2022. It was pursuant to this Service Order that JW continued to receive for processing and disposal the waste delivered to it by BCPR which ultimately ended on 13 June 2021.

26. Second, the Service Order which is the subject of these proceedings was issued to Enovert on 24 March 2021 under Lots 1, 2 and 3, again for a period of 18 months from 1 April 2021 to 30 September 2022 – the Enovert Service Order. This was for the processing of waste delivered to Enovert's landfill site at Bellhouse, near Colchester, North Essex, a considerable distance from BCPR. For the Lot 1 services, there was a guaranteed minimum tonnage ("GMT") of 200,000 tonnes. For each of Lots 2 and 3 it was zero tonnage up to 75,000 tonnes.

27. The Council's intention was that BCPR's waste (and that from other WCAs) would now go to Bellhouse and the arrangement with JW, made pursuant to its Lot 4 Standing Order and the call-off thereunder, would cease. The Council had the legal power to direct BCPR to deliver its waste to Bellhouse, and did so direct. However, there was a problem because of the distance involved from BCPR's areas to Bellhouse. As they would have to transport the waste outside their own boundaries, the Council would be obliged to pay them extra sums known as "tipping away payments" which would be considerable. But in addition, travelling that distance with their refuse vans would be problematic for BCPR from a timing point of view, given that the vans would first have to make their collections in the relevant areas.

28. By late 2020, the solution envisaged by the Council and BCPR was that BCPR should run their own procurement exercise for the purpose of awarding a transfer and haulage contract to a company which could then bulk the BCPR waste and transport it to Bellhouse. At the outset, it was thought that such a procurement exercise could be launched and completed with a haulage company in place, by 1 April 2021. On that footing, the services provided by JW under its Lot 4 call-off would come to an end and BCPR would, along with other

WCAs, procure the transportation of their waste to Bellhouse. In the event, the procurement exercise took much longer.

29. Also, in late 2020, the Council was considering another alternative for the resolution of the problem of getting BCPR's waste to Bellhouse. This involved Veolia providing a processing service at a WTS other than the existing 5 WTSs then owned by the Council. Once Veolia processed the waste there, with the location of that WTS conveniently close to the BCPR, Veolia would then transport it to Bellhouse. This further WTS became known as WTS 6.

30. However, this arrangement could only be undertaken following a modification to the IWHC (ie the Modification). By early 2021, the Council had decided in principle that the way forward was to implement the Modification for a relatively short period until BCPR had appointed its own haulage contractor pursuant to the impending procurement exercise.

31. This is what happened. The Modification was contained in a document headed "Authorised Change Request" ("the ACR") and signed by Veolia and the Council on 25 June 2021. In fact, Veolia had already started to provide its services on 7 June. The Modification contained the following key terms:

    (1) WTS 6 was a WTS operated by Waste-A-Way Recycling Ltd ("WAW") which would be a subcontractor to Veolia;

    (2) Veolia would charge a gate fee of £**XX** per tonne for the processing of the waste at WTS 6;

    (3) For its haulage services, Veolia would be paid a rate per mile in accordance with the existing IWHC rate in its Schedule 4, but the mileage for any transportation was agreed to be at least 38 miles in any event. 38 miles was the distance between WTS 6 and Bellhouse. However, if Veolia was required under the Modification to transport waste elsewhere, which it could be, the trip would still be charged at a minimum of 38 miles even if the distance was less;

    (4) The duration of the Modification was 5 months, starting on 7 June.

32. Because the Modification took some time to agree and execute, JW's services under its original Lot 4 call-off did not in fact end on 31 March 2021 but continued beyond that, pursuant to the second Lot 4 Service Order until 13 June 2021. This was the day before all the waste would now be going via WTS 6 instead. The period under which the Modification in fact operated ended on 31 October 2021, by which time BCPR were in a position to transport the waste directly to Bellhouse using the new haulage contractor.

33. In March and April 2021, JW's solicitors communicated with the Council, complaining about the fact that its services were not going to be used after 1 April which is what the Council had told JW. As it happened, and as noted above, those services continued until June.

34. Then, on 18 June 2021 JW issued and served the present claim against the Council. Only the Claim Form was issued then. However, it challenged both the Modification and the

Enovert Service Order as both being unlawful. The Council was therefore aware of JW's claim prior to the execution of the Modification on 25 June 2021. This claim was thus underway prior to the termination of the provision of Veolia's services under the Modification on 31 October 2021. The IWHC itself ended on 31 March 2022.

THE ISSUES FOR DETERMINATION

35. The 7 agreed issues for determination at this trial are as follows:

(1) Was the modification of the IWHC contract, referred to in paragraph 21 of the Amended Particulars of Claim ("APoC"), a "substantial" modification within the meaning of Public Contracts Regulations ("PCR") Reg 72(1)(e), because –

(a) It rendered the IWHC materially different in character from the contract initially concluded within the meaning of Reg 72(8)(a);

(b) It introduced conditions which would have allowed for the acceptance of a tender for the IWHC other than that originally accepted, within the meaning of Reg 72(8)(b)(ii);

(c) It changed the economic balance of the contract in favour of the contractor in a manner not provided for in the initial contract, within the meaning of Reg 72(8)(c); and/or

(d) It extended the scope of the IWHC considerably, within the meaning of Reg 72(8)(d)?

("the Substantial Modification Issue");

(2) If the modification of the IWHC was substantial, was it permitted by PCR Reg 72(1)(a). In particular –

(a) Did the modification as effected fall within the scope of the provisions of Schedule 21 of the IWHC relied upon by the Defendant?

(b) Were those provisions of a nature such as to satisfy the requirements of Reg 72(1)(a)?

(c) Is the effect of the Defendant not following the process set out in Schedule 21 in certain respects that the Defendant may not rely upon reg72(1)(a)?

("the Schedule 21 Issue");

(3) Was the use which the Defendant made of Lot 1 of the Framework Agreement unlawful –

(a) For the reasons set out in APofC paragraph 32 concerning the proper scope of Lot 1; and/or

(b) For the reasons set out in APofC paragraph 32(iii) concerning maximum financial limits?

("the Lot 1 Issue"); I should add here that in the event, no positive case was made by JW at trial as to part (b) of this issue and I did not understand it to have been pursued. I therefore disregard it, going forwards;

(4) (a) Did the Defendant owe the Claimant the legal obligations set out in APofC paragraph 31?

(b) If so, did the Defendant breach those obligations in the manner alleged in that paragraph?

("the Regulation 18 Issue");

(5) If the Defendant was in breach of its obligations, was such a breach a sufficiently serious one to justify the award of damages?

("the Sufficiently Serious Issue");

(6) If there was a breach of the Defendant's obligations for which the Claimant is entitled to seek damages, would the Defendant, but for that breach, have continued to use the Defendant's services for all or part of the period between 7 June 2021 and 31 October 2021?

("the Causation Issue"); the actual terms of this issue have in fact been somewhat refined. See paragraph 258 below;

and

(7) Do the grounds for ineffectiveness set out in PCR Reg 99 (2) and/or Reg 99 (5) apply to this case?

("the Ineffectiveness Issue").

36. There are several provisions of the PCR which relate to different issues. I will set out those groups of provisions when dealing with each of the relevant issues.

THE SUBSTANTIAL MODIFICATION ISSUE

The Law

37. The PCR came into force on 26 February 2015. They constitute retained law after Brexit and neither side contend that relevant EU materials should not be considered in determining their application. The PCR implement the EU Parliament and Council Directive 2014/24/EU of 26 February 2014 on public procurement ("the Directive") which replaced Directive 2004/18/EU ("the 2004 Directive"). The latter had itself been implemented by the predecessor to the PCR, namely the Public Contract Regulations 2006 ("the 2006 Regulations"). Neither the 2004 Directive nor (therefore) the 2006 Regulations dealt expressly with the effect of a modification to a contract which itself had been (or should have been) subject to the public procurement procedure. There had, however, been relevant CJEU cases on the subject of which the most significant was *Pressetext v Ostereich* [2008] ECR 1-4401.

38. The provisions to which I am about to refer seek to put into legislative form a number of important principles that had been set out in *Pressetext*. The first time that the provisions of the PCR in this regard was considered by a Court here was when an appeal was heard by the Supreme Court in *Edenred v HM Treasury* [2015] PTSR 1088 ("*Edenred SC*") in

May 2015 and decided on 1 July 2015. Earlier stages in the case, before Andrews J at first instance ("*Edenred HC*") and in the Court of Appeal ("*Edenred CA*") dealt with the pre-PCR position essentially by reference to *Pressetext*. The second case here was *Gottlieb v Winchester City Council* [2015] EWHC 231, a decision of Lang J made just before the introduction of the PCR.

39. Reg 72 (8) of the PCR governs the position in relation to modification of relevant contracts. The basic rule is in Reg 72 (9):

> "A new procurement procedure in accordance with this Part shall be required for modifications of the provisions of a public contract or a framework agreement during its term other than those provided for in this regulation."

40. Reg 72 (1) (a) – (f) then set out the (exhaustive) circumstances in which a modification may be permitted without the need for a fresh procurement exercise as had been contemplated by sub-paragraph (9) The only relevant sets of circumstances for our purposes are those described in sub-paragraphs (a) and (e) as follows:

> "(a) where the modifications, irrespective of their monetary value, have been provided for in the initial procurement documents in clear, precise and unequivocal review clauses, which may include price revision clauses or options, provided that such clauses—
> (i) state the scope and nature of possible modifications or options as well as the conditions under which they may be used, and
> (ii) do not provide for modifications or options that would alter the overall nature of the contract or the framework agreement;…
> (e) where the modifications, irrespective of their value, are not substantial within the meaning of paragraph (8);…"

41. Reg 72 (8) is important because it governs the operation of sub-paragraph (1) (e) with the bracketed expressions being my shorthand for the characteristic in question:

> "(8) A modification of a contract or a framework agreement during its term shall be considered substantial for the purposes of paragraph (1)(e) where one or more of the following conditions is met:—
> (a) the modification renders the contract or the framework agreement materially different in character from the one initially concluded; [Material Difference in Character]
> (b) the modification introduces conditions which, had they been part of the initial procurement procedure, would have—
> (i) allowed for the admission of other candidates than those initially selected, (ii) allowed for the acceptance of a tender other than that originally accepted, or
> (iii) attracted additional participants in the procurement procedure; [Different Tender]
> (c) the modification changes the economic balance of the contract or the framework agreement in favour of the contractor in a manner which was not provided for in the initial contract or framework agreement; [Change of Economic Balance]
> (d) the modification extends the scope of the contract or framework agreement considerably; [Extended Scope]…"

42. As can be seen from Reg 72 (1) (e) whether a modification is substantial or not depends, and depends only on whether it possesses any of the characteristics set out in Reg 72 (8) (a) to (e). These characteristics have disjunctive effect so that possession of any one of them renders the modification substantial without more. It is not suggested that the circumstances of sub-paragraph (e) apply here, and accordingly, I am concerned with sub paragraphs (a) to (d).

43. In this case, JW contends that the modification is substantial because it possesses one or more of the relevant characteristics. So far as sub-paragraph (b) is concerned, JW contends that the relevant part for present purposes is sub-paragraph (b) (ii). The other limbs are not

themselves an issue although I shall refer to them by way of background when considering the scope and operation of sub-paragraph (b) generally.

44. An initial question arises as to whether the "gateways" in Reg 72 (1) (a)-(f) should be interpreted narrowly because they amount to derogations from the general rule set out in Reg 72 (9). In my view, they should be so interpreted.

45. The point did not arise directly in *Gottlieb* or *Edenred HC* or *Edenred CA*, but the principle of narrow interpretation in respect of derogations was cited by Lord Hodge in *Edenred SC* at paragraph 28. The only rider to this is that the relevant provision must not be interpreted so narrowly that it is rendered ineffective as an available derogation - see paragraph 30 of the judgment of the CJEU in *Advania v Distin Sverige* [2022] PTSR 897.

46. A second question is whether there is an evidential burden of proof on the authority which seeks to invoke any of the gateways, on the basis that they are derogations from the general rule. It is obviously the case that it is for the authority to decide which sub-paragraphs to invoke. Success on any one gateway will be sufficient to disapply the general rule. To that extent, the authority needs to raise the relevant sub-paragraph. Once it does, however, at the end of the day, it will be for the claimant to establish on the balance of probabilities that the gateway relied on by the authority does not apply. JW does not dispute that proposition as far as it goes, but contends (in particular in connection with the Substantial Modification Issue) that if the authority does not raise at least some evidence which *prima facie* goes to the establishment of the relevant sub-paragraph, that is the end of the matter and the general rule will operate.

47. The issue of the burden of proof was only raised by JW in its written opening, and in the context of the Different Tender element at paragraph 65. This stated that:

> "…the Defendant as the party relying upon the "non-substantial" exception to the normal reg 72(9) rule bears the evidential burden of adducing evidence upon the basis of which it might be found that there is no, or no serious possibility that the modification might have affected the original outcome…".

48. The point was somewhat expanded in JW's oral closing submissions including by a reference to the decision of the CJEU in *Commission v Italy* [1994] ECR 1-569.

49. As this point had not been developed fully until oral closing arguments, I permitted the Council to make brief further written submissions which it did on 1 February. JW then responded in writing on 6 February.

50. The first point to make now is that in its post-trial note, JW suggests that the question of burden of proof is only relevant to one or possibly two of the sub-issues between the parties. It is said to be relevant to the question of fact as to Veolia's profit margin in connection with the Modification which arises in the context of the Change of Economic Balance debate. It is then said that it might arise in connection with the Schedule 21 Issue. It was not now said to be relevant to the Different Tender question.

51. Further, as will be seen below, my determination of the questions relating to the Change of Economic Balance and the Schedule 21 Issue do not turn on where the burden of proof lies.

52. In those circumstances, any debate about the incidents of the evidential burden of proof is academic at best. Nonetheless, as there has been focused argument on the point I should say something about it.

53. I start from the fact that the various gateways should be in interpreted narrowly. But from that position, JW then argues that it must follow that in relation to any derogation of any kind, the party seeking to rely upon it must bear the evidential burden of proof. I do not accept this. There are many forms of derogation in EU or EU-derived legislation, in relation to all sorts of contexts, and I do not accept as a matter of logic or law that a rule requiring a narrow interpretation, without more, generates a rule about the evidential burden of proof.

54. Indeed, in some of the elements of Reg 72 (8), an evidential burden of proof does not make much sense. Thus, for example, in the Material Difference in Character or Extended scope, it is very hard to see why these are not essentially exercises of analysis rather than matters on which particular evidence needs to be used other than the agreed fact about the existence of the underlying original contract and the modification.

55. However, JW also relies on EU case-law and in particular the *Italy* case referred to above. This, like a number of other cases relied upon by JW, was a public procurement case but not one about modifications. It was at a less granular level. It concerned a claim brought by the EU Commission against Italy where a helicopter procurement contract had been awarded without a full procurement process, but only by a negotiation procedure, pursuant to legislation enacted to that end. Part of Italy's argument as to why this was not unlawful was that the helicopters were to have a dual use-i.e. both civil and military. Article 296 of the Treaty permitted this. That is because such a provision allows member states to take such measures as are considered necessary for the protection of the essential interests of their security. Italy also relied on Article 2 (1) (b). Article 296 was specifically covered in the relevant procurement directive at the time, namely 93/36 in Article 3. Article 21 (b) related to contracts with special security measures. These were the "exceptional" matters referred to in paragraph 33 of the judgment. Indeed, the Recital to the relevant directive referred to the derogations as exceptional.

56. The other cases referred to by JW in its note on this point are ones where a state had not carried out a full procurement process. They all considered this issue in the context of the relevant directives at the time i.e. 71/305, 77/62 and 93/36.

57. I see all of that and indeed the Council, as it must, accepts that in cases referred to, the court did say that the relevant exceptions must not only be construed narrowly but that the burden of showing their existence is on the relevant authority.

58. But in the public procurement context which applies here, the issue is different and in my judgment more nuanced. The starting point is *Pressetext* where absent express provisions dealing with modifications, the Court said at paragraph 34 of its judgment that amendments which are materially different in character from the original contract and therefore were such as to demonstrate the party's intentions to renegotiate the essential terms, amounted to a new contract for the purpose of procurement law. And in *Edenred SC* (against the backdrop now of Reg 72) Lord Hodge described the issue thus:

> "29 Amendments to an existing public contract will fall within the procurement regime and be treated in substance as the award of a new contract if they involve a material variation of the contract. Thus the central question in Edenred's challenge is whether the proposed amendments of the Atos contract amount to a material variation."

59. Under Reg 72, what were given in *Pressetext* as examples of when there was a material variation, are now set out as different elements of substantial modification and the Court has to find that none of the relevant elements existed. That is quite different from the sort of derogation issue in *Italy* and the other cited cases.

60. For myself, I do not see why this exercise entails the consequence that the authority which has invoked a particular gateway then bears some sort of evidential burden of proof. And where, in any given case, there may be incomplete evidence on a particular point, I do not see that this makes it necessary to have recourse to a burden of proof on the authority in order to resolve the substantive issue.

61. I should add that Recital 12 of Directive 93/36 stated that the negotiated procedure should be considered to be exceptional and therefore applicable only in limited cases, something specifically mentioned by the CJEU in the 2008 case of *Commission v Italy* C-337/05. And in the Directive, Recital 50 states that:

> "In view of the detrimental effects on competition, negotiated procedures without prior publication of a contract notice should be used only in very exceptional circumstances. This exception should be limited to cases where publication is either not possible, for reasons of extreme urgency brought about by events unforeseeable for and not attributable to the contracting authority, or where it is clear from the outset that publication would not trigger more competition or better procurement outcomes, not least because there is objectively only one economic operator that can perform the contract…"

62. On the other hand, Recitals 107-111 deal with the modification provisions. Recital 107 says this:

> "It is necessary to clarify the conditions modifications to a contract during its performance require a new procurement procedure, taking into account the relevant case-law of the Court of Justice of the European Union. A new procurement procedure is required in case of material changes to the initial contract, in particular to the scope and content of the mutual rights and obligations of the parties, including the distribution of intellectual property rights. Such changes demonstrate the parties' intention to renegotiate essential terms or conditions of that contract. This is the case in particular if the amended conditions would have had an influence on the outcome of the procedure, had they been part of the initial procedure."

63. In my judgment, this difference of approach in the Recitals is important. It reflects the obvious fact that the cases relied on by JW are all concerned with real and substantial derogations from the primary rules supporting competition in a free market i.e. that public procurement requires a competitive bidding process and that any departure from this, including a negotiation procedure, is generally exceptional. On the other hand, it would be very odd and call for immediate qualification to say that <u>any</u> modification to a procured contract should itself be treated as a new contract and therefore require a further competitive procurement exercise. This is reflected in Recital 107. This is not the same "derogation" as that referred to in the context of not having a public procurement process in the first place.

64. Moreover, although I accept that the question of the burden of proof was not directly in issue, in *Gottlieb*, Lang J stated at paragraph 69 and in connection with sub-paragraph (8) (b) (i) of Reg 72 that:

> "In my judgment, the Claimant has to satisfy the Court, on the balance of probabilities, that a realistic hypothetical bidder would have applied for the contract, had it been advertised, but he is not required to identify actual potential bidders."

65. I also accept, however, that this observation was made in the context of an issue as to whether a claimant had to identify specific other tenderers for the purpose of that provision.

66. For its part, JW points to paragraph 134 of the judgment of Andrews J in *Edenred HC* when dealing with Changing Economic Balance where she said:

> "…As the Defendants were able to demonstrate, the (projected) profit margin shown in the baseline financial model for the Amendment Agreement is consistent with that in the baseline financial model for the main contract."

67. I do not think anything turns on the use of the word "demonstrate" here. In context, it was just that it was the defendant which had been able to show that the claimant's argument was wrong by reference to the facts.

68. Of course, in neither *Gottlieb* nor *Edenred HC* was the Court considering Reg 72 since it was not yet in force. Nonetheless, I think that the passage in *Gottlieb* referred to in paragraph 64 above is at least a pointer.

69. Accordingly, had it been necessary for me to decide the point I would hold that a defendant authority wishing to invoke one or more of the gateways does not bear an evidential (or any other) burden of proof in relation to it. In any particular case, if a defendant could have adduced evidence on a particular point but chose not to, or is found to have given inadequate disclosure of documents which are essentially in its possession, of course, the Court will take account of such matters when assessing where the facts lie; but a reverse burden of proof is not needed in order to assist it.

70. There are some other, highly discrete points of law in relation to particular arguments raised under Substantial Modification but I will deal with them in context below.

The Facts in Detail

The Descriptive Document

71. The first relevant document is the IWHC "Descriptive Document" which was annexed to the Pre-Qualification Questionnaire issued to potential tenderers on 16 July 2012. It explains that the Essex Waste Partnership Area is constituted by the county of Essex and the administrative borough of Southend on Sea ("Southend"). It refers to the 13 relevant WCAs. They are shown on the map at page 5. Paragraph 3.1 states that the Council did not own or operate any WTSs but a project to deliver 5 new WTSs was underway. Southend did have a WTS operated by its waste collection contractors but the operation of that WTS was outside this procurement.

72. Paragraph 4.1 stated that the putative contract awarded would include the maintenance and operation of the 5 new WTSs in Essex but the Council reserved the right to increase or decrease the number of WTSs during the procurement process. The forecast tonnage for the 5 new WTSs was 232,889 tonnes of residual waste and 53,938 tonnes of bio waste. Those figures excluded BCPR because their residual waste would be delivered to the new MBT facility with a total forecast tonnage of 87,000 tonnes. The detail of the contractors

for management and operational responsibilities in relation to the WTSs was set out at paragraph 5.5.3.

73. The duration of the contract was stated as 8 years plus an optional extension of 7 years. Paragraph 4.10 referred to the published estimated value of the contract in the OJEU Notice.

The OJEU Notice

74. There were at least two versions of this Notice, one being produced prior to 16 July 2012 and the other on or about 19 October 2012. The differences between them are immaterial for present purposes. Paragraph II. 1.5 gives a short description of the contract and states that

> "Essex County Council is seeking to procure a contractor to provide a county-wide, integrated waste handling service to include the following services:
> a. The operation and maintenance of Recycling Centres for Household Waste (RCHW) within Essex;
> b. The commercial disposal arrangement for all materials collected at the RCHWs, excluding residual waste and garden waste;
> c. The operation and maintenance of new Waste Transfer Stations (WTS) within Essex;
> d. The provision, operation and maintenance of a licensed haulage fleet to move various waste types and outputs to designated locations.
> The contract between Essex County Council and the successful bidder will be for a period of 8 years commencing on 1 July 2013 with an option at Essex County Council's sole discretion to extend for a further period of 7 years, such option being exercisable with the initial 8 years.
>
> The services described above are not exhaustive and in order to maximise resources over the life of the proposed contract, the Authority reserves the right to include additional services or options for additional services within Essex which will assist in delivering both the services stated above and a comprehensive range of integrated waste handling services…"

75. The estimated value of the contract on the basis of the full 15 years was £300 million. That implied average yearly revenue to the contract of £20 million.

Invitation to Final Tender ("ITT")

76. This was issued on 18 January 2013. Paragraph 1.2 describes the IWHC as being for "the provision of operations services for ECC Recycling Centres for Household Waste… which assist the Authority in delivering municipal solid waste… from landfill the provision of Waste Transfer Station… operations and the provision of bulk haulage operations for waste movements of ECC and SBC waste". Paragraph 8.2 refers to the Council's acquisition of 5 WTS Sites.

The IWHC Competition

77. Ultimately, there were 4 candidates for the final evaluation and selection. They were Veolia, Amey Cespa ("AC"), May Gurney and Urbaser.

78. The ultimate marks were a function of their quality scores and the prices they bid. The formula was to divide the former by the latter. It is common ground that it was a very close win for Veolia, as against AC. Veolia's (using a single figure based on a formula applied to the underlying costs quoted) was 89.523. That gave a final score of 76.768. For its part, ACs quality score was 68.017 (in other words below Veolia's) but its costs figure was

89.115 (also below Veolia's). Its final score was 76.325. I should add that the other two bidders actually scored higher on quality but their costs were significantly higher namely at 104.064 and 105.361, yielding final scores of 73.612 and 66.064 respectively.

79. The IWHC was awarded to Veolia on 8 March 2013 and it was executed on 14 May 2013.

The IWHC

80. It is convenient if I recite all of the relevant provisions of the IWHC "in one go" as it were, regardless of the issues to which they relate.

81. The expiry date was 31 March 2022 or the date of any earlier termination. The "Services" to be provided by Veolia as defined were any of the waste disposal and related services set out in the Specification. The "Authority Requirements" were those set out in Schedule 2. The Project was defined in Schedule 1 as the provision of waste management services to the Council by Veolia as contemplated by the IWHC including the provision of the Services. Sites were defined in Schedule 1 as:

> "…the sites listed in the site information spreadsheet in Part 1 of Schedule 7 (Site Information) being the land, buildings and other facilities to be provided and maintained for the purposes of the providing the Services together with all relevant service ducts and media for all utilities and services serving such Sites as replaced or closed from time to time in accordance with the provisions of this Contract and "Site" shall be construed accordingly;…"

82. Schedule 2 itself is divided into 6 different requirement sections (A1 to A6) and some additional provisions. Section A2 is entitled "WTS Requirements". Paragraph 2.1.1 requires Veolia to operate the 5 Council WTSs and paragraph 2.1.2 required the Council to provide the infrastructure for the WTSs. Paragraph 2.2 set out the specification for the WTSs which were located in Harlow, Uttlesford, Chelmsford, Colchester and Braintree, with tonnage forecasts.

83. Section A3 dealt with the requirements in connection with recycling centres. Section A4 dealt with haulage requirements. These had two main elements. First, the haulage of containers with household waste to the MBT facility, designated landfill sites or other locations as directed by the Council. And second WTS bulk haulage. This comprised residual waste output from the WTSs to the same locations as above, with bio waste from the WTSs to designated landfill or other locations. It also included haulage of outputs from the MBT facility to landfill or to contractors. As to the MBT output, the expression "SRF" is defined in Schedule 1 as "solid recovered fuel" and the expression "SOM" meant "solid output material".

84. Schedule 4 to the IWHC dealt with the payment mechanism. There were various monthly charges including the WTS Management Charge and haulage payments in relation to the WTSs, the MBT facility and recycling centres. Paragraph 4 dealt with the WTS charges. There is a complex formula to be used here, but the important thing to note is that it does not vary according to how much waste was brought into or taken out of a WTS. That is why it has been referred to as a fixed fee.

85. As for haulage, there was a formula but it was dependent essentially on the total miles travelled in each trip with a set rate per mile. The particular haulage rates do not matter but they are set out in Appendix 1 to Schedule 4. Appendix 2 contained a mileage sheet

showing the mileage between particular points which would be travelled by Veolia when performing its haulage duties.

86. I deal with Schedule 21 in context, below.

Events of Summer 2019

87. By July 2019, there had been a proposal to use a further WTS, being WTS 6, which was then owned and/or operated by a sister company of WAW called Clear Away ("CAW"). According to Mr Searles, this proposal was to use WTS 6 in the event that the MBT facility was shutdown permanently.

88. An email to Mr Egan from Mr Fassnidge, the Veolia's Senior Contract Manager dated 11 July 2019 referred to previous discussions on WTSs and said that there would be a handling and bulking charge payable to Veolia of £10.50 per tonne. That comprised the CAW rate and a Veolia management percentage. The charge of £10.50 was what is known as a "gate fee", representing a charge for the use of the WTS based on the tonnage of waste processed. In his reply email, Mr Egan said that there were some concerns about the rate, as compared with those applicable to the other 5 WTSs (I refer to what their implicit rate was, below). Mr Egan pointed out that the contractual costs of the Council's 5 WTSs were considerably less than those for the proposed WTS 6. This would need to be explained. While he accepted the need for a management charge for Veolia if it was to be contractually responsible for WTS 6, albeit this was operated by CAW, the level of service provided by CAW needed to be considered and then presented to the Council in terms of value for money. He asked Mr Fassridge try and satisfy the decision-making process in terms of final due diligence. There was every possibility that they may not get financial sign-off in which case this service might have to be "procured in the open market in order to satisfy the financial part of the procurement process ".

89. In the event, this proposal was not taken forward at that time. At paragraph 33 of his WS, Mr Egan explained that the plan to use WTS 6 in the context of the Modification was a resurrection of the contractual arrangement postulated in 2019.

Events of 2020

90. I have already explained in paragraphs 24-25 above what happened immediately after Mr Egan was told on 25 June 2020 that the MBT facility was ceasing to operate. JW now took in the waste from BCPR which had previously gone to the MBT facility and disposed of it, pursuant to the call-off under its Lot 4 Service Order which in the event continued until 13 June 2021.

91. However, by then, it was clear that JW's services were at some point coming to an end because by 24 March 2021, the Enovert Service Order had been made, whereby BCPR's waste (and that from other WCA's) would be processed at Bellhouse. That response to the closure of the MBT facility had been known for some time because by late 2020, Bellhouse had been designated as the alternative disposal facility and the need for BCPR to find a contractor to transfer its waste to it had already been identified. Equally, and pending the BCPR procurement to find such a contractor, the solution of using Veolia as an operator of WTS 6 for BCPR waste and then transporting this to Bellhouse had also been identified.

92. By December 2020, Veolia was complaining about the loss of income it had suffered as a result of the cessation of haulage work to and from the MBT facility. A reflection of this is the email from Mr Quilter to Mr Egan and others dated 1 December 2020. It referred to a confrontational meeting with Veolia and that it (and apparently WAW) was being unreasonable in relation to certain haulage charges it was seeking to impose on the Council. This followed a letter from Veolia received around 25 November 2020 in relation to the closure of the MBT facility and the costs which Veolia had to incur as a result.

93. On 9 December 2020 Mr Egan emailed Mr Hodges of Veolia after a more positive discussion. This is when he mooted again the question of WTS 6 in relation to the transportation of BCPR waste which had to go to Bellhouse as from 1 April 2021. He said that in the light of recent discussions about haulage and margins in particular, he thought "we have a real opportunity here for Veolia and their subcontractor(s) to put this waste through our contract so any financial benefit stays on contract". He wanted a rate for transfer and haulage ideally from the Basildon area to Bellhouse. In his WS (although of course he could not be cross-examined on it), Mr Egan said that the "real opportunity" for Veolia was so that it could have "visibility" of some of the tonnage it had lost following MBT's closure. The losses were significant as can be seen from the spreadsheet which Mr Egan prepared, referred to in paragraph 34 of his WS. By "visibility" he must have meant getting back or recovering at least some of the haulage work it had previously lost. I do not accept that the expression "real opportunity" meant the chance to earn excess profits, as it were.

94. Mr Egan later supplied Veolia with an estimated tonnage figure. His email of 15 December gave a total projected tonnage for BCPR for 2021/22 of 82,838. In the course of January 2021, there were further discussions which also involved WAW which had bought a new WTS with an annual capacity of around 75,000 tonnes and which could be made available. This became the actual WTS 6. According to Mr Egan, he also expressed concerns that the new arrangement which would form a modification to the IWHC would only be an interim one, with no guaranteed tonnage and Veolia proposed that it should receive a minimum mileage payment.

Events in 2021

95. On 8 February, Mr Weaver of Veolia sent out its proposal. It would accept up to 75,000 tonnes into the new WTS in Basildon as from April 2021. The lack of any guaranteed tonnage was reflected in a handling fee (i.e. gate fee) of £**XX** per tonne. Veolia would be happy to use the current contractual haulage rates (i.e. in the IWHC) for the additional tonnage to come from Basildon to Bellhouse.

96. On 10 February, Mr Egan wrote to BCPR to say that the Council would be progressing the WTS 6 option as from 1 April 2021, until their procurement was complete. The additional cost of staying with the JW arrangement of £139,000 per month was not sustainable. The WTS 6 option would be compliant and viable. It was not ideal but it was affordable.

97. In addition, Mr Egan suggested some changes to the Veolia proposal. These were then reflected back in a further proposal emailed to Mr Egan from Mr Weaver on 12 February 2021. This added the fact, in relation to the gate fee to be charged, that there was no exclusivity, no minimum period and that the arrangement would cease immediately upon BCPR having secured their own transport arrangements (following their procurement). On

haulage, it now added that any deviation from haulage to Bellhouse, to other facilities which would result in lower haulage earnings (because the other facilities would be nearer than Bellhouse) would affect the overall costs agreed with Veolia's contractor. Ideally, therefore, Veolia would like to lock in the Bellhouse mileage so that shorter routes would still attract the Bellhouse rate, as it were. Longer journeys would be charged per mile on the existing haulage rate. Mr Egan said in his WS that he had written to Veolia to have these points added to its proposal because this is what he and Mr Weaver had previously discussed and he wanted the proposal to reflect it completely. There is no reason not to accept this evidence even though Mr Egan has not been cross-examined on it.

98. Also on 10 February, Ms Martin sent to Mr Egan the first draft of the ACR purportedly made pursuant to Schedule 21 to the IWHC. I do not consider that the change of language to "Authority Change Request" from "Authority Change Notice" (being the language of Schedule 21) is material. The ACR specified that the Contractor (i.e. Veolia) should provide a brief report explaining its approach, the location of the contingency transfer facility, the gate fees offered by each operator (i.e. any sub- contractor engaged), Veolia's margin, and other details.

99. In the meantime, WAW was preparing for the opening of WTS 6. Mr Price, acting as a consultant for WAW emailed Mr Weaver at Veolia. In it, he asked for some practical support from Veolia after launch "… (As it's such a nice little earner for you in the last year of IWHC-ha!")

100. It is common ground that Mr Price was referring to the proposed Modification involving the use of WTS 6. Mr Egan had no comment on it save to say (at paragraph 51 of his WS) that the context of the email was WAW seeking Veolia's assistance on getting the weigh bridges properly set up.

101. On 17 March 2021, Mr Simpkins of the Council sent a report on the proposed variation to the IWHC. It said that the variation was short-term and it was likely that the BCPR procurement would be finished as from the end of May, i.e. it would be for a two-month period. The financial implications set out in this report were on the basis of the variation being in place for two months at Veolia's proposed gate fee and deliveries to Bellhouse. The variation would be put through Schedule 21 to the IWHC. The report also said that for the purposes of Reg 72 (8) the proposed changes did not render the IWHC materially different.

102. On 29 March, Mr Egan sent a reworded ACR to Ms Martin to "make it more in keeping with a confirmation than a proposal?". This document now had in it a minimum haulage distance of 38 miles to be applied to new/contingency journeys i.e. other than those to Bellhouse. The duration was now from 1 April 2021 to whenever BCPR had procured its own haulage arrangements.

103. Subsequently, it became clear that the BCPR procurement would not be completed by the end of May. In a further report dated 1 June 2021, the new procurement was expected to be finalised now by October 2021. It said that the variation discussed with Veolia had been concluded in May. On the basis that the new WTS would be ready (now) to start on 7 June, the estimated payment to the end of October was £775,000. In respect of that, the Council would not have to make "tipping payments" to BCPR which it would have to do if BCPR

transported their waste directly to Bellhouse. The additional £52,000 would come from the existing budget within the Council if it could not be recovered elsewhere. Again, it said that this variation would comply with Reg 72.

104. In April and May, Ms Martin did not chase Veolia to conclude the ACR. She says in her WS that this was partly because she was seeking internal legal advice on the Modification and because it was necessary to re-run the Council's internal governance procedure since the original approval had now time-expired. Veolia was also trying to bring a legal challenge against the Council in relation to its loss of work due to the closure of the MBT facility, although in cross-examination she described it as a dispute with a "little d", and Mr Searles confirmed in evidence that there were no "legal letters". She thought that chasing them at this point would give Veolia the upper hand in those other negotiations. (In fact, as she said in cross examination, that other dispute continued beyond the making of the Modification). However, by 26 May, Mr Egan was chasing Veolia, making the point that it had now been 2 months since this arrangement was due to be in place. He asked whether Veolia would agree to the modification by the following day. On the 28 May Veolia's Board approved the ACR. It was in turn agreed on behalf of the Council on 4 June but not signed off. The operation of WTS 6 started on 7 June. At some point before 15 June, after Ms Martin had returned from holiday, she realised that the formalities had not been completed. She also saw that the 5 month duration needed to be put into the ACR.

105. On 16 June, the final version of the ACR was emailed to Veolia with the duration now being 5 months, asking that it be signed as soon as possible. There was then something of a further gap because there was a question as to who was the proper signatory for Veolia (see paragraph 22 of Ms Martin's first WS). On 24 June, Ms Martin explained to Mr Smiles of Veolia that the Council's governance approach was for no longer than 5 months and if longer was needed, they would need to go through the governance process again. Mr Smiles responded that he would now sign the ACR and get it back to her, which he did the following day. Mr Searles signed it on behalf of the Council the same day. The final version of the ACR was dated 4 June, with the start date of 7 June and signed off by both parties on 25 June.

106. The Modification was in place for almost the entire 5 month period. In the event, 31,437.13 tonnes left WTS 6, of which 64.79% went to Bellhouse and 35.21% went to an alternative facility called Suez in Barking. This was because of operational or access issues at Bellhouse caused, for example, by poor weather conditions which necessitated the diversion to Suez, according to Mr Searles.

107. The actual amount earned by Veolia was something more than the estimated £775,000. It was £808,936.49. This meant that the excess over the tipping payments which would otherwise have to be paid, was £46,640.80. Over the period from 29 June 2020 to 13 June 2021, when JW was disposing of the BCPR waste, it received 79,229 tonnes for which it was paid £10,933,378.2.

108. Notwithstanding what had been asked in the first version of the ACR, drafted by Ms Martin, in the event, Veolia was never asked to state its margin (or management) percentage charge over and above what it paid to WAW as its subcontractor to operate WTS 6. Nor was there ever a counter-proposal to the proposed rate of £**XX**, from the Council.

109. At paragraph 48 of his WS, Mr Egan says that he did not seek a breakdown of the proposed gate fee because it was an urgent situation. He thought the rate was in line with the flexibility which the Council needed and which the Modification provided, and the lack of guaranteed tonnage to Veolia. He also thought that the minimum mileage of 38 was reasonable as Veolia should not have to take a reduced mileage amount (the Suez site at Barking was 24 miles from WTS 6) just because of any operational problems at Bellhouse. For his part, Mr Searles agreed with that last observation.

110. As for Ms Martin, she explained in paragraph 30 of her WS that she did not think that £**XX** was expensive or unreasonable although she did not interrogate Veolia about its breakdown, either. This was based on her experience of seeing gate fees bid by other operators. She noted that a JW bid for 2018-2019 had quoted £10, while a later mini-competition in July 2021 saw it quote £25. For dates between 2019 and 2020 for Lot 4 (transfer only) on the Bio-waste Framework, JW had quoted between £10 and £25. Using these figures, £**XX** was midway between the highest and the lowest.

111. One should also note here that the quoted fee from CAW back in 2019 for the operation of the new WTS was £10.50. This, of course, was in the context of a permanent operation there.

112. In cross-examination, Mr Searles said that the lack of knowledge of Veolia's actual margin did not matter if ultimately, the rate quoted was at market value. He said that it was, and that the Council had used comparators.

113. This completes the recital of detailed facts necessary for the purposes of the Substantial Modification Issue. I now turn to analyse the various elements of substantiality, as set out in Reg 72 (8).

Material Difference in Character

114. The comparison here is between the IWHC without the Modification and the IWHC with it.

115. The Council agrees that the Modification had not made WTS 6 into another Site within the meaning of the IWHC with all the obligations and other provisions that operate in relation to Sites. It is also true that WTS 6 is not owned by the Council and for that reason, there is a different fee structure. It is also correct that it is in a different part of Essex to the others, namely Basildon.

116. However, I fail to see that any of those factors, taken individually or collectively, rendered the IWHC now materially different in character. It was still concerned with the haulage and disposal of waste from the WCAs for which the Council is responsible and the change only affected 3 of them, namely BCPR. In its closing submissions, JW seemed to suggest that because the ACR did not make provision for WTS 6 to be a Site, it meant that in some way, the modification was unworkable, but I do not see why. WTS 6 was obviously to be made available during the specified operational hours and performance standards were set out in paragraph 7.2 of the ACR and at Appendix 1 thereto. It is correct that there are a number of provisions in the IWHC for the granting of leases as between the Council and Veolia but that is hardly surprising since the Council did not own WTS 6; WAW did.

117. Nor do I see why the location of WTS 6 in Basildon, as opposed to another part of Essex is a material change. The fact is that BCPR is located in the south of Essex and one way or another, this waste had to be transported to its final disposal site. The IWHC did not stipulate only one or any particular disposal site and Veolia would have to have taken the waste to wherever the relevant site was.

118. The IWHC actually contemplated that additional Sites might be introduced which would include further WTSs – see the definition of Change in Schedule 21 and paragraph 10.2 (f) thereof (discussed below). Although WTS 6 did not constitute a Site, this provision at least shows that there was some flexibility intended, going forwards.

119. Moreover, there is a temporal aspect to all of this. The Modification was on any view a short-term contingency measure to operate for only 5 months pending completion of the BCPR procurement. In contrast, the primary term under the IWHC was 8 years and 5 months with the option for another 7 years. So the changes, such as they are, applied only for a very short period both in absolute terms and relative to the duration of the IWHC as a whole.

120. As to price, the estimated cost of the Modification to the Council was given as £775,000. It was in the event slightly more (see paragraph 107 above), but it seems to me that the comparative analysis should be as at the date of the Modification. Either way, the increase in payments to go to Veolia did not render the IWHC materially different in character.

121. The estimated value of the IWHC as a whole was £300 million, based on an annual cost per year of £37.5 million. £775,000 is 2% of that yearly income and 0.26% of that income over 8 years. In fact, the fees paid by the Council were less, over the length of the IWHC and amounted to around £12 million per year. At the time of the Modification, the IWHC had been running for 7 years 7 months and it seemed that it was not contemplated that it would be extended. If one uses a figure of £96 million as being the earnings of Veolia over 8 years (if it were 8 years and 5 months as it happened to be, the income would be *pro rata* £101 million), £775,000 represents 6.45% of an annual cost of £12 million for the IWHC and 0.81% of a total of £96 million. I do not consider that the price element of the Modification entailed the IWHC now to be materially different in character, whether by itself or in combination with other factors.

122. Moreover, although my conclusion remains the same without it, I think it important to note that in essence, the Modification was not providing for additional services in the overall scheme of things. As before, Veolia had to transport and process the waste from BCPR along with the other WCAs' waste. This did not change. It is not as if, for example, the waste from some <u>other</u> WCA was now added. Indeed, as Mr Egan's spreadsheet showed, once the MBT closed, there was actually a loss of income going forwards, for Veolia. That is why, on closure of the MBT, JW was able to earn the sums that it did under a separate contract and not pursuant to the IWHC.

123. Accordingly, for all those reasons, there is no material difference in character in the IWHC, caused by the Modification.

Extended Scope

124. I consider this element next because it can be taken shortly. For all of the reasons just set out in relation to Material Difference in Character, there is no basis for concluding that the Modification considerably extended the scope of the IWHC, either.

125. JW contends none the less that the extension is considerable, because sub-paragraph (8) (d) (like the other elements of Reg 72) should be construed narrowly. In other words, it does not take much to render an extension of scope "considerable". Indeed, JW submits that any extension which has a value of more than or not much more than the operative threshold for the engagement of the PCR (at the time £189,330 for services) is enough. Hence the £775,000 estimated additional income for Veolia would render the extension of scope considerable.

126. I disagree. "Considerable" should be interpreted in a common-sense way. A generally narrow approach to the construction of these elements does not mean interpreting parts of them in a way which deprives them of real meaning, as JW's approach would do, in my view. JW contends that any approach other than its own would make a nonsense of the way in which the Reg 72 (1) (b) and (f) gateways work. I do not see this. They are quite separate gateways. The first gateway here concerns additional works etc. which have become necessary where a separate contract with another different contractor cannot be made. The only reference to cost is that this addition must not cost more than 50% of the value of the initial contract. The second gateway applies if the modification is both less than the appropriate threshold and less than 10% of the initial contract value in respect of services. I accept that both of these gateways have financial limits. But I fail to see why any approach to the expression "considerable" than that proffered by JW, makes them unworkable.

127. Accordingly, there is no considerably extended scope here.

A Different Tender

128. Here, there is an initial issue as to what Reg 72 (b) (ii) requires (or does not require). The Council contends that what must be established is that the conditions introduced by the modification would have entailed the acceptance of a different tender. Put in context here, this means that AC would have won the bid, not Veolia. The Council then says that this cannot be shown here.

129. As against that, JW contends that all that needs to be established is that the introduction of the conditions created a real possibility or prospect that another tender (i.e. AC's) would have won. On that footing, and bearing in mind the very close scores, this is established here.

130. Much of the debate before me focused on a detailed parsing of what Andrews J said in *Edenred HC* and what Lang J said in *Gottlieb*. It needs to be remembered, however, that neither was dealing with this limb of Reg 72 (8) (b). They were dealing with sub-paragraph (i) or (iii) which concerned the introduction of other tenderers who had not originally bid. Moreover, both were in the pre-PCR, *Pressetext* world, though only just. That said, the phrase "allowed for" does come directly from the language of the judgment in *Pressetext*.

131. In *Edenred HC*, the allegation was that HM Treasury acted unlawfully by commissioning National Savings and Investments ("NSI") to provide banking facilities for a new scheme of family care payments. The unlawfulness arose because NSI intended to fulfil that function by modifying its existing (publicly procured) contract with ATOS, so that the new function was wholly subcontracted to the latter. Edenred contended that the modification fell foul of *Pressetext* and that had there been a procurement instead for the modified contract, it would have attracted another tender, namely from itself, even though it did not bid for the original contract.

132. Andrews J comprehensively rejected Edenred's claim. She found that the variation was not one which was a variation from the services originally advertised as part of the procurement. But even if it was, it did not fall within the examples of material variation set out in *Pressetext*. In that context, she said that she failed to see how the variation would have had any bearing on the tender process at all. Any hypothetical tenderer still had to be able to deliver all the services required and Edenred could not have done this. She held that there no other bidder would have bid or even been attracted to do so. In particular, she said the following:

> "123. Mr Coppel's position was that it was enough for Edenred to show that if the services in the Amendment Agreement were included from the outset, then hypothetically other bidders (not necessarily Edenred) would have been admitted or would have been allowed to have been admitted or would have wished to have been admitted. However, in my judgment the examples of material variation given by the CJEU have to be interpreted as examples of scenarios in which, in substance, a new contract has been concluded, unfairly conferring a competitive advantage on the existing contractor over someone else who would have participated in the process. There would be no such unfairness, and no distortion of competition, if no-one else would have bid or if the complainant's putative bid would never have got off the ground, which is the case here…
>
> 128. There is much to be said for the approach taken by Coulson J of requiring evidence that someone beside the original bidders would have bid for the contract, because the EU procurement rules are designed to protect against real, not hypothetical, distortion of competition. However I do not need to decide the point, because even if one approaches the question on the basis that a hypothetical bidder has been shut out of the bidding process by the absence of reference to the subject-matter of the proposed amendment, it seems to me that in principle that must necessarily be a realistic hypothetical bidder – i.e. the evidence must demonstrate that there would be someone else who would have been ready, willing and able to bid and who would have wished to have done so if the opportunity had been made clear, but who did not do so because it was not…
>
> 132. Thus no reliable evidence was placed before the court that there was in fact any detriment to any other putative tenderer or any distortion of competition by reason of the fact that childcare accounts were not specifically mentioned when the procurement exercise for the Outsourcing Contract took place. Indeed there is no reliable evidence that there would have been any other bids for that contract if they were mentioned, and it seems to me to be inherently unlikely that mention of one further species of bank account would have made any difference to the cadre of actual or potential bidders. Therefore Atos was not being placed in a position of competitive advantage over Edenred in that regard."

133. Taken as a whole, I do not think that these observations amounted to a holding that the expression "would have allowed for" in paragraph 35 of the judgment in *Pressetext* meant "would have entailed". Andrews J did not have to decide that issue, she was dealing with a different aspect of paragraph 35 and as she found, that Edenred's position, even as a possible hypothetical bidder, was hopeless.

134. I should add that this question did not arise again for consideration in either the Court of Appeal or Supreme Court. The point had been dropped by the time the case was heard in

the latter. As to the Court of Appeal, all that can be pointed to is paragraph 89 of the judgment of Etherton LJ. This was part of his rejection of Edenred's argument on appeal that Andrews J was wrong to have found that no other tenderer would have come forward. He said this at paragraph 80:

> "…The fact that Edenred or other CVPA members would have been interested in participating in the TFC scheme is of no relevance unless realistically some other bidder would or (or the basis of the test advanced by Edenred, but which does not have to be decided) might have come forward. The Judge concluded and was entitled to conclude that the evidence fell far short of that."

135. That takes the position no further.

136. In *Gottlieb*, there had been no original procurement exercise for the contract, although there should have been. To that extent, the defendant had already acted unlawfully, but it was too late to do anything about it. As the Directive had not been introduced at the time, Lang J decided the case entirely by reference to Pressetext. In contrast to the result in Edenred HC, Lang J found comprehensively that there had been a material variation, such that a procurement exercise should have been run at that point.

137. In her judgment, she said this:

> "62. Mr Elvin submitted that, in order to succeed, the Claimant had to identify other economic operators who would have wished to bid for the contract, and would have had a realistic prospect of success. He pointed to the use of the "would" in paragraph 35 of Pressetext rather than "might". He also relied upon the judgment of Andrews J. in Edenred, at [128]:…
> 64. Mr Palmer did not object to the requirement of a "realistic hypothetical bidder" but he submitted that Pressetext and other CJEU cases on the procurement Directives did not require firm evidence of an alternative potential bidder in order to satisfy the test in paragraph 34 of Pressetext. In my view, Mr Palmer's analysis is correct."

138. This was in the context of whether it was necessary to identify a particular (i.e. named) bidder who would have come forward. Lang J answered the point in this way:

> "69. In my judgment, the task of the court is to apply the test in Pressetext on the evidence before it. Evidence of actual or potential bidders may assist but it is not a pre-requisite. Here the Claimant relies on evidence of the commercial appeal of this development contract to potential developers, and the significantly more favourable terms offered in 2014, compared with 2004. In my judgment, the Claimant has to satisfy the Court, on the balance of probabilities, that a realistic hypothetical bidder would have applied for the contract, had it been advertised, but he is not required to identify actual potential bidders."

139. In other words, some other bidder had to have bid, but they at least had to have been a realistic hypothetical bidder. "Realistic" here refers to a bidder who could put forward a realistic bid as opposed to a hypothetical bidder who might have tried, but with no real prospect of success. That reflects the notion that the procurement rules are designed to protect against real and not hypothetical distortion of competition.

140. Lang J went on to find that the variations were made because the terms of the original contract made it unviable, and it could not proceed without them. Unsurprisingly, in the light of that, she found that the varied contract was materially different in character. Had the original contract been presented with the terms as varied in a procurement exercise, then there would have been other bidders in that commercial field who would have come forward with realistic proposals, even without identifying who they might have been.

141. I agree that Lang J was saying that what had to be shown was that another bidder would have come forward, not might have come forward, and the "realistic" qualification was about the nature of their bid, not the prospect of them bidding. That analysis works in the context of other tenderers, but it does not necessarily translate into the proposition that where it is a question of a different tender being accepted (from a tenderer who did bid), what must be shown is that the other tenderer would have won. I think that goes too far, not least because it would mean that it had to be shown, or found by the court at any rate, that the other tenderer would have achieved the highest score, on the basis of what would now be a different bid i.e. one that addressed the putative contract as modified.

142. It seems to me that JW is correct here to say that the test in Reg 72 (8) (b) (ii) is whether there was a real prospect that the other tenderer would now have won. Real as opposed to fanciful, much as in the sense of CPR 24. That formulation of the test pays appropriate heed to the principal of protecting against real not hypothetical distortion of competition, but without creating too high a burden.

143. There is a further question of law which I should address, although it was not debated before me because the underlying point was common ground. It is how the hypothetical of considering the position of other tenderers or tenders, had the original contract contained the modification, is worked out. Both sides agree that this notional procurement is to be assessed as at the time when the original contract was (or should have been) procured and not as at the date of modification. In Edenred, this did not cause a problem because it was so obvious that the modified contract would not have attracted Edenred or any other further bidder because they could not have complied with it as a whole.

144. In *Gottlieb*, equally, in broad terms, the now-viable contract was found to have been of obvious interest to realistic hypothetical bidders. That said, Lang J recognised that the commercial market in 2004 was not the same as in 2014. She noted that the evidence tendered to show how attractive the contract would have been, as varied, was all post-2004. That was obviously so since such evidence was only provided for the purposes of the case. She took this into account because she said this at paragraph 133:

> "I appreciate that this evidence all post-dates 2004, the date at which the original contract was entered into. According to Mr Owen, the terms of the Development Agreement in 2004 were "fairly typical of the sort of arrangements that were being agreed in the market as it then existed" though the 10% minimum return to the developer was at the lower end of the likely range (1st witness statement, paragraph 15). In my view, the key features which make Winchester a thriving City, as identified by Mr Tilbury and Mr Perry, have not changed. The varied terms of the contract are considerably more favourable to the developer than the original terms in 2004. On the basis of the evidence before me, I am satisfied that the contract as varied would have been an attractive commercial opportunity for other potential bidders, in 2004."

145. She added in paragraph 135 that the sort of companies identified by the evidence which would have expressed interest in 2014, would also have done so in 2004. She concluded on this point in paragraph 137 as follows:

> "In the light of all the evidence, I am satisfied, on the balance of probabilities, that a realistic hypothetical bidder would have applied for the contract (as varied), had it been advertised."

146. I can understand why it is necessary to consider the position at the time of the original procurement. That is because this was the time when the original contract was procured and, as with the other elements of substantial modification, a comparison has to be made between the contract as modified, and the original contract. That is so, even though, of

course, if there should have been a further procurement exercise, because of the modification, it would take place as at the date of the modification when, for all sorts of reasons, the situation might have changed. Nonetheless, the actual situation as at the time of the original procurement, which is the basis of the hypothesis, has to be taken into account, as Lang J accepted in *Gottlieb*.

147. In some cases, this kind of hypothetical exercise is going to be difficult. It was not in *Edenred HC* or in *Gottlieb* because the position was so stark. Nor was it difficult in *Succi di Frutta* [2004] ECR 1-380. There, the challenged variation was to allow the relevant suppliers to take payment in kind for their supplies in product other than apples and oranges and in particular, now, peaches. This was in a context where (rather like in *Gottlieb*) the original contract had become impossible to perform due to the lack of availability of sufficient numbers of apples. The CJEU upheld the Court of First Instance which decided that there had been a variation to one of the essential conditions of the contract as procured, which went to the form of payment. And this, "had it been included in the notice of invitation to tender would have made it possible for tenderers to submit a substantially different tender" - see paragraph 116. In that case, the claimant had been one of the unsuccessful tenderers. So it was able to say why its own tender would have been different.

148. In the case before me, of course, JW does not suggest that it could or would have tendered for the IWHC, in modified form, itself. It did not tender for the original IWHC either. It simply invokes Reg 72 (8) (b) (ii) to show that there was a substantial modification.

149. It seems to me that the hypothesis or counterfactual required is an initial procurement where the contract contains the actual modifications at issue and in this case, that must mean the modifications during the life of the contract when they actually occurred. In other words, the putative modified contract the subject of the counterfactual would include a provision for a 5 month period from 7 June to 7 November 2021 which would be less than a year before the expiry of the primary period and some 8 years away from the time of the original procurement. There would be a £**XX** gate fee and a fixed minimum mileage of 38 miles. Otherwise, the ultimate payment terms would depend on what the tenderers had offered in their costings.

150. In this context, JW says that it was not provided with all the documents relating to the Council's evaluation of the actual bids made by Veolia and AC in particular. The original disclosure order made on 26 November 2021 at paragraph 6 (a) (ii) was:

> "Documents which show the scores achieved by tenders for the IWHC, or how bidders' proposals in respect of the number, location or cost of operation of waste transfer stations were taken into account in the evaluation of tenders."

151. In the event, the disclosure was not as complete as it might have been and was essentially limited to the evaluation methodology and the final scores achieved but JW accepts (see paragraph 65 of its Opening Submissions) that no doubt, the other materials did not survive; so it is not a case of the Council having been able to disclose any more than it did. And JW did not make any further disclosure application.

152. The Council's pleaded case here in paragraph 30 (iv) (b) (iii) of its Defence was that:

> "It is not possible to predict the particular outcome which the Claimant contends for, or in fact any outcome, on the basis of the scenario set out therein, and it is therefore denied that there is at least a realistic possibility that the outcome of the procurement might have been different."

153. In evidence, Mr Searles said that he could not categorically state what the tenderers other than Veolia would have offered in the counterfactual scenario.

154. JW's essential point in closing is that in the light of that, and without more, it must inexorably follow that there was a real prospect that in the putative original procurement, AC would have won, not Veolia. This is allied to the fact that the end result was very close.

155. I see the force of those points, but I do not think that they take JW as far as it contends, regardless of the question of the incidence of any evidential burden of proof.

156. It cannot be enough to say that there is a real prospect of a different result, simply on the basis that one assumes a slightly different contract offered. What is surely required is a real prospect of a different outcome because the contract now contains the modification. But JW does not point to any element of the Modification which might have had a particular appeal to AC so as to at least encourage it to be more competitive in its tender, as against Veolia, than it actually was in the original competition. In the admittedly different scenarios of *Edenred HC* and *Gottlieb*, that is exactly what the Court concluded. It may be that such evidence, here, would be difficult to establish because it would have required JW or the Council to approach AC with the counterfactual, in circumstances where it may have had no interest in assisting them since this is not its claim (cf *Edenred HC* and *Gottlieb* and indeed *Succhi di Frutta*.)

157. Moreover, the absence of any such evidence is perhaps unsurprising since the counterfactual is about adding to the contract a Modification which was, for a very short period occurring some 8 years away, and with no guaranteed minimum tonnage at all. There is really no basis for assuming that the quality scores would be any different because the Modification element was so insignificant, in my view. The only question is whether AC could have come up with a costing that was now so much less than Veolia's (it was always less) that the results of the ultimate evaluation had a real prospect of now favouring AC. By my calculation, in order to win, but with the Quality scores remaining the same, ACs costs figure would now have to be 88.599 (as opposed to the costs figure originally submitted which was 89.115). Or at least this would be an indication of the costs advantage as against Veolia that AC would need to establish.

158. But the fact is - close scores or not - there is no reason to suppose that this would occur. I appreciate that the Council's case is that the counterfactual outcome would be impossible to predict but this is really a matter of analysis, not fact, given the lack of evidence about the attributes and inclinations of AC as a bidder. It is simply impossible to predict a different result favouring AC as being a realistic possibility. I accept that a function of that consideration is indeed what I view here to be the insignificance of the Modification, when compared with the original contract as a whole. The position here is completely different from that in *Edenred HC* and *Gottlieb* where the court had many more facts to go on. The point is in my judgment truly speculative. Insofar as JW still maintains (as it did in paragraph 67 of its Opening) that a different outcome might have occurred (but not with a real prospect) that is wrong as a matter of law for the reasons given above.

159. Looked at overall, it is quite impossible for me to conclude on the balance of probabilities (*pace* Lang J in *Gottlieb* paragraph 137) that there is a real prospect that AC would have won this putative counterfactual procurement. Accordingly, I resolve this element of the Substantial Modification analysis in favour of the Council.

Change of Economic Balance

Introduction

160. Finally, I turn to Reg 72 (8) (c) where the question is whether the modification "changes the economic balance of the contract … in favour of the contractor in a manner which was not provided for in the initial contract…"

161. There are thus two parts to this question. First, was there a change to the economic balance of the contract in favour of the contractor? Second, if there was, was it such a change that was or was not provided for in the initial contract? The argument before me has focused on the first part of the question.

162. Obviously, the two features of the Modification which require consideration are (a) the gate fee of £**XX** and (b) the guaranteed mileage provision. Equally obviously, Veolia was not agreeing to do nothing in return for these provisions. It had to provide WTS6 as the initial receptacle for BCPR's waste and then onward transportation to Bellhouse (or elsewhere).

The Law

163. Here, JW first makes the point that the question of a change in economic balance is to be decided (or at least it is to be decided initially) by reference to what the existing terms, usually as to remuneration one way or another, provided for. Thus, in *Edenred HC* the contractual charging mechanism for the modification was in fact the same as in the original contract, as opposed to some more advantageous basis.

164. I follow that but of course, the change may be such that the original remunerative scheme cannot simply be applied to the services or supplies contemplated by the modification. That is in fact the case here in respect of the gate fees - see below. In such cases, where a different payment mechanism has to be adopted, there is surely force in the suggestion made at paragraph 6-277 of Arrowsmith's *The Law of Public and Utilities Procurement*, 3rd edition that "reasonable compensation" is the appropriate yardstick by which to judge a price increase.

165. Further, if the original contractual mechanism could have been used without more, but is altered in some way (again, the case here with the guaranteed minimum mileage), I do not accept that without more, this must mean that the economic balance question is to be resolved against the authority. There must surely be a consideration of whether the change is itself justified, and again, a useful yardstick would be reasonable compensation. That is pertinent, especially where, as here, one is not talking about an amount to permeate throughout the original contract but rather a very short-term and a very small "one off" addition, to the original contract.

166. Next, it is to be remembered that the question is about the economic balance of the contract and in that regard, it must surely be looked at as a whole. There is no other way that one can consider what the economic balance is between the parties and which is now to be putatively changed. That is consistent with the focus on material difference in character and extension of scope of the contract in Reg 72 (8) (a) and (b).

167. Further, and as a related point made by Arrowsmith at paragraph 6-279:

> "It is possible that there is also a de minimis rule that means that some small price changes are acceptable even if they alter the balance of the contract slightly in favour of the contracting partner, at least where there is a good reason to make such a change."

168. Finally, on the question of burden of proof in this specific case, JW suggests that there is some support for the existence of an evidential burden on the Council because of what Andrews J said at paragraph 134 of her judgment in *Edenred HC*. This was in the context of where Edenred had alleged that ATOS's profit margin was greater under the modification in question, and yet there was a "basic error" in that allegation. Andrews J went on to say that "as the Defendants were able to demonstrate…" the profit margin was actually the same. But the use of the word "demonstrate" here was not to reflect some burden of proof on the defendants but simply that it was they who produced the relevant figures. None of this was about burden of proof. Otherwise, I have already rejected JW's burden of proof argument, above.

Analysis

169. Before dealing with the actual figures, JW makes the overarching point that I should infer that Veolia obtained a particularly favourable deal on the Modification which might suggest that it was not one which was value, or market value, for money, as far as the Council was concerned.

170. Here, JW relies first on the email from Mr Egan referred to in paragraph 93 above where he said " the financial benefit stays on contract". In evidence, Mr Searles accepted that this was a reference to Veolia, but obviously, there would be a benefit to it as it would get paid and it made sense for the IWHC to be the vehicle through which it got paid. Indeed, Mr Searles said that what the email was saying was that Veolia would receive a payment for the provision of the service.

171. In the wider context, and as Mr Egan said at paragraph 34 of his WS, the proposed modification offered an opportunity for Veolia to now handle at least some of the tonnage that had been lost as a result of the closure of MBT. While that might be an incentive to Veolia to agree to a modification, it does not mean that the terms of it would necessarily be unduly favourable to Veolia. I appreciate that by now, Veolia had complained about the work lost due to the closure of MBT but I do not accept that this meant that the Council was now offering an uncommercial sweetener, as it were. The evidence referred to in paragraphs 93 and 104 does not show this. It is also to be recalled that Mr Egan said that due to the closure of MBT, Veolia still earned less in the relevant period of the Modification than it had previously earned, by £313,000.

172. The second document relied upon by JW is an email sent to Veolia from Mr Price dated 10 March 2021 which referred to a "nice little earner" referred to in paragraph 99 above. It does not emanate from the Council and Mr Searles said that Mr Price was prone to using

language like this. In any event, it is not, in my view, evidence that the terms of the Modification were uncommercial, as it were.

173. I therefore turn to the figures.

174. I deal first with the gate fee of £**XX**. Here, JW contends that it was clearly excessive. It also points to the fact, which is correct, that in the event, there were no negotiations over this figure with Veolia nor did the Council push Veolia to disclose its margin over and above the cost of paying WAW to operate WTS6. I take the point about the lack of negotiations, although the matter was seen as urgent at the time. Mr Egan said in his WS that this urgency precluded or made it difficult to ask for a breakdown and in the circumstances it was not necessary. In cross-examination, Ms Martin accepted that while the need for a solution was urgent, it would not have precluded asking for a breakdown (which of course was in the original draft ACR) but she thought the speed at which Veolia would have provided it, given how long it took them to get the proposal to the Council in the first place, was probably why Mr Egan did not push that area of enquiry because he needed to get something on paper so that the council could consider what was its best option. In any event, the question at the end of the day is whether the rate was effectively uncommercial.

175. As to this, first, JW produced a calculation sheet drawn from confidential spreadsheets which showed that the total payable by way of the fixed amount for the operation of WTSs 1-5 was £1,549,762. The expected tonnage for 2021, excluding Southend, was 205,260. This yielded an implicit rate of £7.55 per tonne. JW contends that this shows that a gate fee of £**XX** cannot by any means be shown to be a commercial or market rate.

176. I follow the argument, but do not accept the conclusion. First, as Mr Searles said in evidence, how a bidder allocated costs in the tender response was up to it and the high inflationary pressure experienced by 2021 was unlikely to have been considered back in 2012 - 2013. There was no indexation applied to the fixed fee across the duration of the contract and by 2021, near the end of its fixed term, the actual cost was likely to have been under-represented by a fixed figure, compared with costs as at 2013, and the early years when it would probably have been over-represented.

177. I also accept that there was a difference between WTSs 1-5 and WTS 6 in that the latter was run by a commercial operator and it is reasonable to assume that its fee would be affected at least to some extent by the initial capital costs entailed in getting WTS 6 ready. In this context, it must be remembered that WTS 6 had always to be available to the Council (through BCPR delivering their waste to it) at the agreed times of day and regardless of the actual tonnage put through it.

178. Further, this was a temporary contract for 5 months with no guaranteed tonnages or fixed fees, and which could be terminated on one month's notice in contrast to the IWHC itself, as Mr Searles himself pointed out in cross-examination. Indeed, as Mr Searles also pointed out, the one month notice provision was not much protection for Veolia since the Council could simply reduce the tonnage to zero anyway for the last month, as it were. So I do not accept (as Mr Searles did not accept) that the implicit rate of £7.55 in 2021 for the purposes of the original IWHC means that the rate of £**XX** in the Modification was necessarily uncommercial.

179. I then turn to the rate which had been offered in 2019 when WTS 6 was mooted as a permanent addition. At that stage, there would have been about 2 ½ years of the IWHC to run, if not extended. The proposal then was £10.50 per tonne. In evidence, Mr Searles confirmed the permanent nature of the proposed new arrangement, which was on the basis that MBT would not re-open and there would have been guarantees of tonnage. And again, as Mr Searles said, there would have been upwards pressures on costs between 2019 and 2021 because of rising fuel and staff costs. Yet again, one points to the very short-term nature of the Modification with no guaranteed tonnage and an ability to be terminated on one month's notice. Mr Searles accepted that in relation to the 2019 proposal, Mr Egan had considered it necessary to do financial due diligence on the costs. But he pointed out that this was a contemplated permanent arrangement not a *pro tem* one like that undertaken in 2021. So I do not consider that the 2019 proposal means that the £**XX** gate fee was uncommercial.

180. Further, Ms Martin's evidence was that she had considered comparators and £**XX** was in or around the middle of them. She did not accept that the difference in prices she had looked at (which is where Veolia's quote came in the middle) was because the market was changing a great deal. There was a lot of variables but broadly, when looking across several different spreadsheets with gate fees, the rates tended to stay within about the same range. Mr Searles, equally, had said that from his knowledge, this was a commercial rate. I thought his evidence on the rate was clear and persuasive. See further paragraphs 109-112 above.

181. Further, JW has advanced no positive evidence that the rate of £**XX** was in fact outwith a commercial or reasonable band of rates for that time (i.e. 2021) and in respect of the actual terms of the Modification. It has contended that the Council's evidence through Mr Searles and Ms Martin that the rate of £**XX** was a reasonable market one was of little or no value. First it says that this is because it does not go to a shift in economic balance. I disagree, because if the additional services are rewarded by reasonable compensation (and in circumstances where, as here, the original rate of remuneration cannot be directly applied) then there is no shift in the economic balance favourable to the contractor. Second, JW says that even if the rate was a reasonable one, that is not the end of the matter if one does not know Veolia's margin. But again, that seems to me to be of little, if any, significance if the agreed rate is itself reasonable compensation. JW also says that the Council's evidence on rates was "exiguous" but it is some positive evidence and it was not suggested in cross-examination that the figures mentioned were unreliable or irrelevant. And again, JW put forward no positive evidence to rebut them.

182. I now turn to the guaranteed mileage point. The underlying rate was the rate in the original IWHC but here, the mileage was fixed at 38 miles even if the haulage was to a closer destination like Suez. JW points out that this was something sought by Veolia and indeed it was. But the question is whether in reasonable commercial terms it can be justified.

183. As distinct from the haulage mileages implicit in the IWHC across various sites with a duration of at least 8 years and 5 months, one can see why the large scope of haulage services to be provided meant that Veolia could accept a per tonne rate without more. The tonnage involved, on any view, was extremely large, even if not guaranteed.

184. On the other hand, again, this was a short-term contract and although there was no guaranteed tonnage (and the haulage rate was per tonne) Veolia had to be ready to transport

to Bellhouse whenever required within the time stipulated and it would need to have the relevant vehicle standing by, as it were. It does not seem unreasonable to me for Veolia to seek to build in an element to compensate it (or WAW) for this by a guarantee that effectively, all journeys would be treated as going to Bellhouse which was the object of the underlying exercise, even if the journeys did not always go there. Given the small scale of this operation, I can see the point of saying that a reduction of income from haulage (because of reduced haulage distances) would affect the overall costs and so some minimum level of income, effectively by guaranteeing the mileage, was reasonable.

185. Finally, I do think it important to look at the impact of the Modification on the contract as a whole. I have already noted the very small percentage of the revenue going to Veolia as a result of the Modification as compared with the overall estimated revenue of £300 million or the actual revenue of £96 million.

186. Further, and so far as the guaranteed mileage is concerned, Veolia's position seems to have been taken on the basis that Bellhouse would occasionally be unavailable. See, for example, Mr Egan's suggested redraft of the Veolia letter on 10th February 2021 which he says actually reflected what had been discussed. In the event, of course, it was more than an occasional change - the percentage of the total carried (which was 31,437.13 tonnes) which went to Suez instead of Bellhouse was 35.21% or 11,069 tonnes. That is to be compared with the total tonnage anticipated for the first 8 years, namely 3.5 million tonnes. This is drawn from Tables A2.1 and A2.3 of the WTS Requirements at A2 of Schedule 2 to the IWHC, plus the 200,000 tonnes per annum from the MBT. On that basis, the 11,069 tonnes that went to Suez represented about 3.1%. And in respect of that, the "excess" mileage cost i.e. in terms of waste taken to Suez but charged as if going to Bellhouse is only 12/38 or 31% of the amount claimed in respect of the Suez trips.

187. Overall, I fail to see how the Modification was such as to change the economic balance of the contract as a whole in favour of Veolia. I reach that conclusion regardless of the incidence of the burden of proof. And I have also reached it without it being necessary to consider the second element of Reg 72 (8) (c) which in any event was not argued before me.

Conclusions on Substantial Modification

188. Since I have concluded that the Modification did not constitute a substantial modification and the Council only needs to pass through one of the gateways in Reg 72 (1) the result is that the Modification did not constitute any breach of procurement law.

189. It is therefore strictly unnecessary to consider the Council's alternative reliance on Reg 72 (1) (a). However, since the matter was fully argued at trial, I shall deal with it briefly.

THE SCHEDULE 21 ISSUE

Schedule 21 itself

190. The relevant provisions for changes in the IWHC are set out in Schedule 21. It is here necessary to recite a number of the detailed provisions within it. Part 1 contains a number of general provisions applicable to all changes:

"**Change** means any change, variation, extension or reduction in any Site and/or any of the Services requested by the Contractor or the Authority…

2. LIMITS ON CHANGES
2.1. Neither Party may propose or implement an Authority Change or Contractor Change:
(a) which requires the Services to be performed or a Change to be implemented in a way that infringes any Legislation or Guidance or is inconsistent with Good Industry Practice;
(b) which would cause any Consent to be revoked (or would cause a new Consent or modification to an existing Consent to be required to implement the relevant Change to be unobtainable) in accordance with the principles set out in paragraph 3.1;
(c) which would materially and adversely affect the Contractor's ability to deliver the Services carried out (except for that part of the Service which has been specified as requiring to be amended in the Change Notice) in a manner not compensated pursuant to this Change Protocol;
(d) which would materially and adversely affect the health and safety of any person;
(e) which would require the Contractor to implement the Change in an unreasonable period of time;
(f) which would (if implemented) materially and adversely change the nature of the Project (including its risk profile); and/or
(g) whereby the Authority does not have the legal power or capacity to require the implementation of such Change.
2.2. The Contractor may, within ten (10) Business Days of receipt of an Authority Change Notice (or such longer period as reasonably set out by the Authority in the Authority Change Notice in consultation with the Contractor and taking into account the characteristics of the Authority Change and/or any modification to the Authority Change) state in writing whether it objects to the Authority Change Notice on any of the grounds set out in paragraph 2.1. The Authority shall, within ten (10) Business Days of receipt of such notice provide written confirmation that either:
(a) the Authority Change Notice is withdrawn; or
(b) the objection by the Contractor shall be referred for determination in accordance with the Dispute Resolution Procedure.

2.3. For the avoidance of doubt the Authority has an absolute discretion to accept or reject any Contractor Change except where such Contactor Change is required to comply with Legislation or Guidance or Good Industry Practice.

4. CHANGE PROCESS
4.1. Either Party may serve a Change Notice proposing a Change and such Change Notice shall be processed in accordance with the following sections of this Change Protocol:
(a) an Authority Change which is a Low Value Change shall be processed in accordance with Part 2 of this Change Protocol; or
(b) an Authority Change which is a High Value Change shall be processed in accordance with Part 3 of this Change Protocol; or
(c) a Contractor Change shall be processed in accordance with Part 4 of this Change Protocol."

191. Part 3 dealt with High Value Changes. These are only Changes which are likely to cost more than £5000 or 0.5% of the Annual Charge. The proposed Modification here was one such change. Relevant provisions within Part 3 provided as follows:

"1. NOTIFICATION AND SPECIFICATION
1.1. If a High Value Change is required by the Authority, the Authority shall serve an Authority Change Notice on the Contractor.
1.2. The Authority Change Notice shall, where applicable, include, but not be limited to, the following information:
(a) a statement that it is a High Value Change;
(b) a description of any works (or alteration to the relevant Site) required in sufficient detail to allow the pricing of the High Value Change by the Contractor;
(c) whether the Contractor is expected to provide maintenance and lifecycle services in respect of such Change;
(d) the location for the works or services required;
(e) the timing of the works or services required together with any adjustments required to any fixed dates in the Contract;

(f) in respect of additional or varied services, a description of such service or variation to a Service together with the anticipated date of implementation of the variation or commencement of the new service in sufficient detail to allow the pricing of the High
Value Change by the Contractor;
(g) whether any Consents (including variations to existing Consents) are required in order to implement the Change;
(h) either confirmation that the Authority will fund the High Value Change itself and its proposals for payment (whether in stages or otherwise) or a request that the Contractor raises finance for the Authority Change as required by paragraph 5.1 of Part 1; and
(i) the date by which the Contractor shall provide the Contractor Response to the Authority (which shall be appropriate to the complexity of the Change required) and shall not be less than ten (10) Business Days from the date of the Authority Change Notice or forty (40) Business Days if the Authority requests that the Contractor obtain funding of the Capital Expenditure under paragraph 5.1 of Part 1.
2. CONTRACTOR RESPONSE
2.1. Subject to paragraph 2 of Part 1, within the period specified in the Authority Change Notice the Contractor shall provide the Authority with a Contractor Response which shall include (where applicable) the following information:
(a) a detailed programme for the design, Authority review of the design, construction and/or installation of the High Value Change (including the procuring of any Consents);
(b) a detailed programme for commissioning and implementing any change in, or addition to the Services, including the provision and/or training of any staff;
(c) the proposed method of certification of any construction or operational aspects of the High Value Change if not covered by the procedures set out in this Contract;
(d) details of any impact of the High Value Change on the provision of the Services and in particular, details of any relief from compliance with any obligations of this Contract required during the implementation of the High Value Change;
(e) any Estimated Change in Costs that result from the High Value Change, taking into account any Capital Expenditure that is required or no longer required as a result of the High Value Change;
(f) where the Authority has specified in the Authority Change Notice that the Contractor shall raise finance for the Authority Change, the steps the Contractor has or will take to secure such finance;
(g) any Third Party Costs (approved in accordance with paragraph 2.3 of Part 3) and the details of the third party activity that will be incurred in providing the Contractor Response including together with a proposed process for approval of such costs by the Authority before they are incurred;
(h) indicate what savings, if any, will be generated by the High Value Change:
(i) whether a revision of the Charge is proposed (and, if so, give details of such proposed revision); or
(ii) whether such savings will be paid by a lump sum; and
(i) any amendment to this Contract or any Ancillary Document as a result of the High Value Change.
2.2. In calculating the Estimated Change in Costs and/or Capital Expenditure the Contractor shall ensure that any professional fees, contingencies, overheads and/or profit margins charged by any consultant, sub-contractor or supplier shall be calculated by reference to fair, reasonable and comparable market rates.
Agreement of Contractor Response
2.3 If the Authority requests to approve any Third Party Costs prior to that third party being appointed to prepare the Contractor's Response, the time period for the Contractor to submit its response in accordance with paragraph 2.1 of this Part 3 shall be suspended from the date on which such Third Party Costs are submitted for approval until approval is granted (or the
Parties have otherwise agreed or such Third Party Costs or they have been determined through the Dispute Resolution Procedure).
2.4 As soon as practicable and in any event no later than ten (10) Business Days after the Authority receives the Contractor Response, the Parties shall discuss and endeavour to agree the issues set out in the Contractor Response, and the Contractor shall:
(a) provide evidence that the Contractor has used reasonable endeavours including, where practicable, to oblige sub-contractors and suppliers to minimise any increase in costs and maximise any reduction in costs;
(b) demonstrate how any Capital Expenditure to be incurred or avoided is being measured in a cost effective manner, including showing when such expenditure is incurred; and
(c) demonstrate that any expenditure that has been avoided, which was anticipated to be incurred that has been affected by the Authority Change has been taken into account in the Estimated Change in Costs.

> 2.5 If the Contractor fails to provide the information required by or satisfy the provisions of paragraphs 2.4(a) – 2.4(c) (inclusive) of this Part 3 the Authority may reject the Contractor Response, in which event the Parties shall meet within ten (10) Business Days of the notice of rejection to discuss the reason for the Authority's rejection of the Contractor Response…"

192. It can be seen that Clause 2.1 sets out a number of restrictions. Sub-paragraph (f) prevents a Change which would "materially and adversely change the nature of the Project".

193. The general scheme of Schedule 21 is that where a Change is proposed by the Authority, the Contractor must respond, and then the parties must agree the necessary terms for the Change including, obviously, price. If they cannot agree, then either party can invoke the Dispute Resolution Procedure provided at Schedule 22.

194. Subject to that, a Contractor, in relation to an Authority Change Notice, can only object as a matter of principle, as it were, on the basis that one or more of the circumstances set out in paragraph 2.1 apply.

195. However, in respect of certain Changes, the Contractor's ability to object in this way is limited to the objections based on paragraph 2.1 (a) and (g) only. See paragraph 10.1. The particular Changes giving rise to this are set out in paragraph 10.2 and to that end, the Contractor acknowledges that these Changes are "within its contemplation" from the outset, as it were. I should add here that one of these Changes is:

> "(f) addition of any Authority recycling centres for household waste or waste transfer station;"

196. There was a limited debate before me as to whether this would encompass the addition of WTS 6, because if so, it might have an impact on the elements at Reg 72 (8) (a), (c) or (d). In the event, it was not necessary to call this provision in aid. However, in my view, it would not have helped because I consider that the word "Authority" clearly governs the words which follow including "waste transfer stations". WTS 6 was not an Authority WTS.

The Requirements of Reg 72 (1) (a)

197. The requirements of Reg 72 (1)(a) are these:

(1) There are clear, precise and unequivocal clauses which provide for the making of modification;

(2) They state the scope and nature of possible modifications as well as the conditions under which they may be used, and

(3) They do not provide for modifications that would alter the overall nature of the contract.

198. In addition, it seems to me to be implicit in Reg 72 (1) that the modification which has in fact been agreed was agreed pursuant to, or at least substantially pursuant to, the relevant clauses. Otherwise, it would be enough to say that (a) there are modifications, (b) they are provided for in the relevant clauses but (c) their creation has not employed those clauses. That consequence seems to me to make little sense. Indeed, there is not much point in requiring the clauses to state "the conditions under which they are to be used" if the modification can then be made without at least substantial adherence to those conditions.

199. I also agree that the need for at least substantial adherence also reflects the requirement to interpret this provision narrowly and the view expressed in *Succhi di Frutta* at paragraphs 118 and 126 that there need to be detailed rules and ones which set out "the precise arrangements for any substitution". Moreover, there is no good reason why any other interpretation is preferable. There should be no difficulty in complying with contractually prescribed rules for modifications.

Analysis

The Relevant Clauses

200. JW contends that Schedule 21 does not in fact state the scope of possible modifications and nor does it exclude modifications which would alter the overall nature of the contract. Both points are made by reference to the general provisions in Part 1 to Schedule 21. I take each point in turn.

201. The definition of Change is itself very wide because it encompasses all of the Sites but perhaps more importantly, all of the Services. There is no real demarcation of scope here. The Council points to the constraints of clause 8.3 dealing with certain Changes and costs. But that does not remedy the generality of scope entailed by the definition of Change.

202. One then turns to the negative requirements of paragraph 2.1. But they do not demarcate the kind of changes that can be made; they are concerned with other matters such as health and safety, lack of capacity and timing. It is correct that sub-paragraph (a) requires the Change to be implemented in accordance with Legislation and Guidelines. Thus it could be said that this provision excludes anything which would be in breach of the PCR. But that is not really a demarcation because the parties would not know in advance whether a proposed change would violate the PCR or not until a court ruled on the matter, save perhaps in an extremely clear case. I suspect sub-paragraph (a) is more aimed at Legislation and Guidance where there are clear particular rules (again, perhaps related to health and safety) where it is possible to say in advance if a proposed Change would be compliant or not. In any event, that is not demarcating scope.

203. One then turns to sub-paragraph (f). But again, this is a negative requirement and it would be difficult to draw from it a scope of permissible changes. In addition, subparagraph (f) would not satisfy the separate requirement that there must not be permitted modifications which materially alter the overall nature of the Project. That is because it adds a further word, namely "adverse".

204. The Council contends that this is not a case like *Gottlieb* where the changes permitted by the variation mechanism were very broad and almost entirely within the discretion of the authority. That is true, but it does not mean that Schedule 21 was not deficient for the reasons given above. In my view, it was.

205. In fact, whether I am right or wrong here does not actually matter because of my findings on the second issue which is whether the Modification was effected in at least substantial compliance with Schedule 21's procedural requirements. I turn now to that question.

Compliant Procedure

206. Here, JW contends that the Modification as effected did not comply with Schedule 21's conditions for the creation of Changes or even substantially so.

207. Clause 1.2 requires the ACN to contain certain information. Clauses 2.1 and 2.2 then provide for a Contractor Response with a number of details to be given. Clause 2.3 provides a procedure for the parties to reach agreement on the issues raised in the Contractor Response and by paragraph 2.4, the Contractor had certain further obligations in this regard.

208. Clause 2.5 gave the Authority the right to reject the Contractor's Response if the further requirements of the Contractor in paragraph 2.4 were not met. This right of rejection would then be the subject of further negotiation and in the event of disagreement, the matter could be referred to the Dispute Resolution Procedure.

209. If there was no Contractor's Response at all, then the Authority could implement the High Value Change without further recourse to the Contractor i.e. it could impose it on the Contractor.

210. It can be seen from this summary that there is a detailed and elaborate procedure to be followed.

211. Ms Martin's original draft of the ACR was produced on 10 February and 21. No point is taken on the adequacy of the information provided by the Council in this draft or the final ACR. In the first draft, the Contractor's Response was sought by a section which required Veolia to produce a brief report within 7 days to include (at least) 6 matters, including the margin to be applied by Veolia.

212. However, the final version, as submitted to Veolia, omitted the request for a Contractor Response entirely. Mr Egan's email to Ms Martin on 29 March explained that he had changed the ACR as he said at the time, so that "it is more in keeping with confirmation than a proposal". The difficulty is that this is not what Part 3 of Schedule 21 required. And it then meant that there could not be the discussion process required by paragraph 2.4.

213. The Council accepts that the procedure laid down by Part 3 of Schedule 21 was not followed. However, it says that this did not matter and the gateway in Reg 72 (1) (a) was nonetheless fulfilled. It contends first that a Contractor Response (which was not sought) was not needed because it was "not applicable". I disagree. What was to be provided "if applicable" was the particular information relevant to the proposed Change and it was for the Contractor to provide it. The words "if applicable" did not entitle the Council (or Veolia) to remove the need for a Contractor Response at all.

214. Second, the Council says that the Clause 2.4 procedure was not required. This is because Clause 2.5 states that the Authority could reject the Contractor Response as noted above if there was a breach of Clause 2.4. But again, that is not a power to dispense with the Contractor Response altogether. And as JW has pointed out, if in truth the Council could simply reject key aspects of the procedure, then much of Schedule 21 might as well not be

there. If so, it could not be said that Schedule 21 really did state the conditions under which the Modification could be used.

215. The point is surely that, of course, the parties to the IWHC, as with any other contract, could agree any variations they wanted. But the fact that they do so does not without more mean that it is a variation covered by and made pursuant to Schedule 21 for the purposes of the Reg 72 (1) (a) gateway.

216. That is why it is not to the point that Veolia and the Council did indeed agree a variation; obviously they did and it is contained in the ACR as ultimately signed. Equally, it is clear that there was a process of discussion which led to that variation. But that does not mean that the relevant parts of Schedule 21 were complied with, substantially or otherwise. They were not.

217. This conclusion is not a case of form over substance. The point is that if an Authority can establish that a modification falls within Reg 72 (1) (a) it then avoids the need to rely upon the other gateways which involve, as we have seen, a considerable amount of evidence argument and analysis. But making use of Schedule 21 involves a strong element of overt transparency which, in my view, is the price to be paid for being able to invoke it, quite apart from the substantive constraints set out in Reg 72 (1) (a).

Conclusion

218. For all those reasons, had it been necessary for the Council to rely upon Reg 72 (1) (a) I would have found that it was unable to do so.

ISSUE 3

Introduction

219. Issue 3 concerns Reg 33 (set out below). JW contends that there was an improper use of Lot 1, because that Lot was reserved for waste that came from the MBT. The waste did not do so here, since the MBT was not by then in operation. That improper use constituted unlawfulness on the Council's part because it was outside the limits of the FWA. JW further contends that had the Council not made an award to Enovert under Lot 1, it would have continued its Lot 4 arrangement with JW in respect of the BCPR waste, again until October 2021 when BCPR's own procurement exercise finished. Issue 3 turns essentially on an interpretation of Schedule 1 to the FWA.

Relevant Facts

220. As to the FWA itself I have already made some reference to this, and its Schedule 1, in paragraphs 18-20 above. The key point to make here is that the FWA was with a variety of providers, 8 in total, including Enovert and JW. It would continue in effect until terminated. The Council was not obliged to supply any particular volume of work to any of them under the FWA itself, and the work they did obtain would be governed by the results of the mini-competitions, the Lot Service Orders and then any call-off of work thereunder. As already seen, the only Lot which had a guaranteed tonnage was Lot 1.

221. Clause 4.3 of the FWA provides as follows:

> "**Evaluation of responses**
> 4.3.1 The Customer shall evaluate all compliant Supplemental Tenders in accordance with the Award Criteria and shall identify the Framework Provider or Framework Providers who have submitted the most economically advantageous Supplemental Tender(s).
> 4.3.2 Subject to clauses 4.3.3 to 4.3.5 (inclusive), following the evaluation of all Supplemental Tenders, the Customer shall notify in writing:
> (a) the Framework Provider(s) who has been selected following a Mini-Competition; and
> (b) all other Framework Providers who submitted a Supplemental Tender but were unsuccessful.
> 4.3.3 Notwithstanding the fact that a Customer has followed the procedure set out in clause 4 for any Mini-Competition, the Customer may cancel, postpone, delay or end the Mini-Competition procedure without placing a Services Order or placing a Contract with no liability arising to any Customer."

222. I set out the relevant parts of Schedule 1 in context, under paragraph 235 below.

223. Schedule 5 to the FWA Part 1 set out the mini-competition requirements. Part 2 set out the mini-competition award criteria. This case does not concern the scoring of any award following a mini-competition or otherwise challenge its criteria. However, Part 2 states expressly that relevant Service Orders would be awarded to providers who had submitted the most economically advantageous tender. It states that this will be determined by applying the award criteria applicable to such Service Order and by use of an "Award Model" which would calculate which combination of providers delivers the most economically advantageous solution to the Customer. In other words, the Council would look at the services offered, and the terms on which they were offered, across all of the Lots. An example of the Award Evaluation Model which is in the form of an Excel spreadsheet was provided via a link. I have seen parts of that Model described as C0412 V1.

224. There are some later documents in relation to the FWA which I will deal with, in context, below.

225. In paragraphs 25 and 26 above, I referred to the fact and outcome of the mini-competition which launched on 5 October 2020. It is now necessary to say something more about it.

226. As Mr Searles explained in his first WS, when the Council awarded contracts or issued Service Orders under the FWA, it would seek to identify the most cost-effective solution. As already noted, this entails the use of the Award Evaluation Model. This involved looking at "whole system costs" to be compared across all 5 Lots. Use was also made of a Financial Optimiser spreadsheet to ensure that the tonnages were allocated in accordance with the Award Evaluation Model. For any particular mini-competition, it would take all of the tonnages of waste that needed to be disposed of and where they were coming from, the least and most tonnages which individual bidding providers said they could accept, and the whole-system costs would include haulage as well as gate fees. The spreadsheet would then indicate the most financially optimal way to allocate tonnages under the various Lots, following the mini-competition. If a provider chose not to accept an offer made under a particular Lot following a mini-competition, the Financial Optimiser could be rerun to explore other options.

227. For this mini-competition, one aspect of the Financial Optimiser concerned the "base-optimal" (i.e. the most cost-effective" solution) so far as disposal of BCPR's waste was concerned. Mr Egan explained this in paragraph 22 of his WS and it is not in itself disputed. The base-optimal solution, called Option 1, was to have BCPR's waste hauled to and

disposed of at Enovert's facility at Bellhouse at a projected cost of £10.36 million over an 18 month period. Option 2 involved taking the waste to the nearest "hardstanding" site (which was not Bellhouse) and that would cost £11.472 million. The final Option 3, would involve continuing to use JW for the BCPR waste which would be the most expensive option at £12.030 million.

228. The reason why Lot 1 was awarded to Enovert (as opposed to some other provider) is because this was the result of the Financial Optimiser using the prices offered by Enovert and the other bidders. From an internal point of view, the Council could not have continued to use JW to process the BCPR waste because it was the least cost-effective solution.

The Law

229. Reg 33 provides as follows:

> "…(6) Contracts based on a framework agreement may under no circumstances entail substantial modifications to the terms laid down in that framework agreement, in particular in the case referred to in paragraph (7).
> **Awarding contracts based on a framework agreement**
> (7) Where a framework agreement is concluded with a single economic operator—
> (a) contracts based on that agreement shall be awarded within the limits laid down in the framework agreement; and
> (b) for the award of those contracts, contracting authorities may consult the economic operator which is party to the framework agreement in writing, requesting it to supplement its tender as necessary.
> (8) Where a framework agreement is concluded with more than one economic operator, that framework agreement shall be performed in one of the following ways:—
> (a) following the terms and conditions of the framework agreement, without reopening competition, where it sets out—
> (i) all the terms governing the provision of the works, services and supplies concerned, and
> (ii) the objective conditions for determining which of the economic operators that are party to the framework agreement shall perform them, which conditions shall be indicated in the procurement documents for the framework agreement;
> (b) where the framework agreement sets out all the terms governing the provision of the works, services and supplies concerned—
> (i) partly without reopening competition in accordance with sub-paragraph (a), and
> (ii) partly through reopening competition amongst the economic operators which are party to the framework agreement, where this possibility has been stipulated by the contracting authorities in the procurement documents for the framework agreement;
> (c) where not all the terms governing the provision of the works, services and supplies concerned are laid down in the framework agreement, through reopening competition amongst the economic operators which are party to the framework agreement.
> (9) For the purposes of paragraph (8)(b)—
> (a) the choice of whether specific works, supplies or services shall be acquired following a reopening of competition or directly on the terms set out in the framework agreement shall be made pursuant to objective criteria, which shall be set out in the procurement documents for the framework agreement;
> (b) those procurement documents shall also specify which terms may be subject to reopening of competition.
> (10) The possibilities provided for in paragraph (8)(b) shall also apply to any lot of a framework agreement for which all the terms governing the provision of the works, services and supplies concerned are set out in the framework agreement, regardless of whether all the terms governing the provision of the works, services and supplies concerned under other lots have been set out.
> (11) The competitions referred to in paragraph (8)(b) and (c) shall be based on the same terms as applied for the award of the framework agreement and, where necessary, more precisely formulated terms and, where appropriate, other terms referred to in the procurement documents for the framework agreement, in accordance with the following procedure:—

(a) for every contract to be awarded, contracting authorities shall consult in writing the economic operators capable of performing the contract;
(b) contracting authorities shall fix a time limit which is sufficiently long to allow tenders for each specific contract to be submitted, taking into account factors such as the complexity of the subject-matter of the contract and the time needed to send in tenders;
(c) tenders shall be submitted in writing, and their content shall not be opened until the stipulated time limit for reply has expired;

(d) contracting authorities shall award each contract to the tenderer that has submitted the best tender on the basis of the award criteria set out in the procurement documents for the framework agreement."

The scope of the dispute on Issue 3

230. Paragraph 32 (iv) of the APoC alleges that contrary to PCR regs 33 (6), 33 (7) and 33 (11), the Enovert Service Order constituted a contract which was "outside the limits laid down in the Framework Agreement and not based on the same terms as applied for its award". I confess that I am unable to see the relevance of Reg 33 (7) since that applies to the case where the framework agreement was concluded with a single economic operator. But the FWA was made with 8 different operators, as already explained. Therefore, insofar as JW invokes sub-paragraph (7)(a), which stipulates that contracts based on a framework agreement should be within the limits laid down in that agreement, it does not seem to me to be relevant.

231. The provision which would be relevant is Reg 33 (8) since that deals with framework agreements made with more than one operator. Here, sub-paragraphs (b) and (c) contemplate the holding of mini-competitions. Reg 33 (11) then stipulates that the competitions should be on the same terms as applied for the award of the framework agreement and with more precise terms if necessary. It is in that regard that JW alleges that the award of Lot 1 to Enovert was not based on the same terms as applied for the award of the FWA.

232. JW's case as to breach of Reg 33 seems to me to be somewhat unclear but it does not matter. That is because the Council pleaded back to these allegations without taking a point as to which particular part of Reg 33 could be invoked and instead dealt with the substantive point. That is, whether, consistently with the FWA, the Council could award a Lot 1 Service Order to Enovert in circumstances where the MBT was not operating. JW contends that Lot 1 could only be applied where the MBT <u>was</u> operating. If it was not, other Lots had to be used.

233. In answer to this, the Council makes two core points:

(1) First, and principally, as a matter of interpretation, the definition of Lot 1 (and the other Lots) does not preclude the award of a Service Order under Lot 1 in circumstances where the MBT facility is not producing any relevant waste;

(2) Second, if the first contention is not correct, then an award under Lot 1 was permissible if it contemplated at least the possibility of some delivery of waste from MBT going forwards, even if not immediately. As to that, the Council contends that there was a realistic possibility that this might happen.

234. Obviously, if the Council is correct in its first contention, the second becomes unnecessary.

Analysis

235. I turn first to Schedule 1 to the FWA. Paragraph 3 needs to be set out in detail which I do below, omitting simply that text which it is unnecessary to set out for present purposes. I will need to consider the wording in both the left hand and right hand columns.

Lot 1 – **Disposal Only of RDF and/or MSW**	Accept and dispose, on behalf of the Authority…a combination of RDF and untreated mixed residual Municipal Solid Waste. The Authority… unable to guarantee which waste stream will be provided on any specific day and the Contractor shall provide a solution capable of receiving either material. Material will be delivered to the Contractor by way of bulk haulage vehicles. Disposal solution shall be provided by the Contractor by way of a Disposal Facility(ies) with the appropriate Environmental Permit and in compliance with all relevant Legislation, and are not technology-limited, e.g. may include IED compliant incineration processes, or further treatment prior to disposal. The Authority… estimates that Lot 1 will consist of circa 200,000 tonnes per annum based on current arisings. Services Orders will be distributed amongst those Framework Providers offering the most economically advantageous bids in quantities between 25,000 and 200,000 tonnes.
Lot 2 – **Disposal Only of MSW (Contingency)**	Accept and dispose, on behalf of the Authority… untreated mixed residual Municipal Solid Waste… Lot 2 is a contingency arrangement. Estimated tonnages and the applicability of a Guaranteed Minimum Tonnage will be indicated at the time of a relevant mini-competition.
Lot 3 – **Disposal Only of bulky waste (Contingency)**	Accept and dispose, on behalf of the Authority…of bulky Municipal Solid Waste arising at Recycling Centres for Household Waste (or Household Waste and Recycling Centres in Southend) and source-segregated bulky waste from kerbside collections…. Lot 3 is a contingency arrangement. Estimated tonnages and the applicability of a Guaranteed Minimum Tonnage will be indicated at the time of a relevant mini-competition.
Lot 4 – **Transfer and Disposal of direct-delivered waste (Contingency)**	Accept, transfer, transport and dispose of Municipal Solid Waste delivered to the Contractor's waste transfer facility by local authority waste collection vehicles on behalf of the Authority… where the Contractor is responsible for handling, bulk storage, transport and final disposal (at a disposal location agreed by the Authority… (the Contractor being responsible for the cost of final disposal). The Contractor may not sort or recycle this waste, nor mix it with waste from sources other than the Customer. Lot 5 is a contingency arrangement. Estimated tonnages and the applicability of a Guaranteed Minimum Tonnage will be indicated at the time of a relevant mini-competition.
Lot 5 – **Transfer and Haulage of direct-delivered waste (Contingency)**	Accept, transfer and transport Municipal Solid Waste delivered to the Contractor's waste transfer facility by local authority waste collection vehicles… Lot 5 is a contingency arrangement. Estimated tonnages and the applicability of a Guaranteed Minimum Tonnage will be indicated at the time of a relevant mini-competition.

236. As for the left hand columns, which are in bold, only Lot 1 refers to RDF (refuse-derived fuel). It is common ground that this is, or would have been, produced only by the MBT facility. MSW, by contrast, can have many sources and is the waste covered by the other Lots, as well as Lot 1. Looking at the left-hand column alone, I think the words "and/or" should be viewed in the usual way. The contractor providing the service under Lot 1 may have to dispose of one or other or both products. It is not required to process an amalgam or collection, as it were, of both at the same time. Nor do I think the expression here is qualified by the words used in the right-hand column, especially "combination" to which I now turn.

237. As for the words in the right-hand column, JW focuses on "a combination of RDF and untreated mixed residual MSW". JW does not contend that this requires a physical mixture of the two products to be processed at any one time. In fact, as Mr Searles said in evidence, the MBT was designed to operate in one mode or the other not both at the same time. But he also said that whoever was the operator on Lot 1 had to be able to process a mixture of the product at the same time even if delivered to it separately if that is what was required. That is a technical requirement. That would explain the use of the word "combination".

238. JW contends for something different; it says that the word "combination" indicates that within a short span of time, Enovert would be processing a combination of both products. Put another way, it was intended that over a period of time it would be processing both products, rather than MSW and not RDF. I do not agree with this interpretation. I do not see why it means anything more than a requirement to be able to process both types of product, unlike Lots 2-5 which are confined to MSW.

239. JW then points to the fact that only Lot 1 has a guaranteed tonnage of 200,000 per annum and Lots 2-5 are all described as "Contingency". Since 200,000 tonnes was the estimated output of the MBT facility as at 2017 and since it was expected that it would operate, JW contends that the contingency would come into play if and as soon as the MBT ceased to operate generally.

240. However, the Council says that "Contingency" should be seen in a context where Lot 1 is in any event the principal or the "default" processing option, whether in processing MBT waste or MSW from some other source. In other words, Lot 1 was always intended as the main "receptacle" for waste wherever it came from. Lots 2-5 were genuine fall-back provisions. And "contingency" reflected where there might be some unplanned and temporary situation rather than the norm as it were. Mr Searles gave the example of where an existing Lot 1 provider had some operational difficulty so that it could not at a particular point provide the service. He accepted in evidence that the 200,000 tonnes figure originally stated would have represented the estimated tonnage that would come from the MBT once it operated. But he added that the position had changed anyway by 2020. More importantly, I do not accept that this reference to 200,000 metric tonnes means that Lot 1 was to be concerned, and only concerned with the MBT output as a matter of construction. Overall, I think that the Council's interpretation of "contingency" is the more realistic one. Lot 1 was in any event dealing with the non-contingency situation (be it the MBT or some replacement scheme).

241. It then needs to be added that the FWA itself (along with its Schedule 1) does not make any reference to the MBT facility. Nor, in fact, does the pre-contractual Bidder Guidance document dated 3 August 2017. Instead, it substantially reproduces the language of Schedule 1.

242. It is correct that in the (post-contractual) document headed "Contract Operations Manual" Version 2, dated March 2019, described as a tool to assist the Authority and Contractor in the day-to-day running of the FWA, it is provided as follows at paragraph 2.3:

> "**Purpose and Overview of the Contract**
> The purpose of the Framework Agreements is to provide 1 key service and 4 contingency services which assist the Authority in meeting its responsibilities as a Waste Disposal Authority (WDA) under the Environmental Protection Act 1990.

> The key services provided by this contract are broken into the following lots;
>
> - Lot 1 – Disposal only of RDF and/or MSW
> - Lot 2 – Disposal only of MSW (contingency)
> - Lot 3 – Disposal only of bulky waste (contingency)
> - Lot 4 – Transfer and disposal of direct-delivered MSW (contingency)
> - Lot 5 – Transfer and haulage only of direct deliveries MSW (contingency)
>
> Lot 1 is linked to the Mechanical Biological Treatment (MBT) PFI as it is the product from the facility. Lot 2 – 5 form business continuity by providing sites and services that can handle the contract waste in the event the PFI facility is unable to."

243. Paragraph 2.3 then recites the descriptions of the Lots, much as in Schedule 1 to the FWA. The last paragraph in the quoted section obviously reflected the perception at the time, especially in relation to RDF and at a point when the MBT was operating, albeit in the commissioning stage.

244. But the Contract Operations Manual can be contrasted with the (equally post-contractual) document containing "General Instructions and Guidance" dated around 5 October 2020, issued in respect of the invitation to participate in the actual mini-competition in issue. Here, Lot 1 was described in paragraph 22 as follows:

> "22 The Authority will deliver waste under lot 1 (Disposal Only of RDF and/or MSW). RDF will only be provided in the event that the MBT Facility is accepting and processing waste. At the time of issuing this document, the MBT Facility is not accepting or processing waste. Therefore, the waste provided by the Authority is likely to be residual waste rather than RDF, however, this may change at any time."

245. However, it is perhaps material to note that JW did not take the view at that stage that there was a somehow improper use of Lot 1. And in cross-examination, Mr Barthaud accepted that he understood that this paragraph meant that Lot 1 would be used for the disposal of residual waste in circumstances where the MBT would not be operating. That is perhaps some evidence of how the reasonably well-informed and normally diligent (RWIND) tenderer would see Lot 1. But I do not see this as a determinative factor.

246. I should add that both Mr Searles and Ms Martin gave evidence in their WSs and were asked in cross-examination about the operation of the Financial Optimiser in connection with the Enovert Service Order. In fact, as it seems to me, its actual operation is of limited assistance on Issue 3. That is because, if on a true interpretation of Schedule 1, it was not open to the Council to award the Enovert Service Order, I do not see how the fact that this was internally mandated (and expressed to bidders) on the basis of cost and in accordance with the Financial Optimiser could make any difference. Conversely, if Schedule 1 did permit the Enovert Service Order the fact that it was mandated as overall the cheapest option, while explaining the Council's actions, is unnecessary in terms of its case on interpretation.

247. In this regard, both Mr Searles and Ms Martin were taken to the terms of the Enovert Service Order itself and in particular paragraph 3. The point there was made that the "whole cost" analysis was said to apply only across Lots 2-5. Both denied that it was so limited and obviously they were considering in particular how the position was to be costed in relation to the BCPR waste. But in any event, I do not see how this assists on the question of interpretation.

248. For all of the above reasons, I conclude that the scope of Lot 1 was wider than simply the reception of waste from the MBT facility. I therefore agree with the Council's first contention, set out at paragraph 233(1) above.

249. So far as the Council's second contention is concerned, this is academic. But I should record that in my view, the Council was entitled to and did take into account the possibility that the MBT might come back onstream. That was so, notwithstanding the findings by Pepperall J in *Essex v UBB*. Mr Searles said that he had been informed through the administrators that the lending banks still wanted to try and find a solution to enable the MBT facility to operate and that the administrators still saw the contract as live. Further, the underlying PFI contract was for 25 years and had not actually been terminated. There was therefore a risk, though a small one, that the Council might in the future be called on to remove waste from the MBT facility. Lot 1 was the only Lot under which that could be done. In the event, this point does not now matter and it is not necessary for me to deal with the Council's second and alternative contention.

250. The award of the Enovert Service Order was not an illegitimate use of Lot 1. There was therefore no unlawfulness involved in this award.

ISSUE 4

251. Issue 4 concerns Reg 18 (set out below). The allegation is that even if it was lawful to use Lot 1, at the very least, the way in which the FWA was operated here was not transparent. In the course of oral closing argument, the role of Issue 4 became somewhat attenuated. If the Court was to find that Lot 1 could operate independently of whether there was waste coming from the MBT, Mr Giffin KC accepted that the argument under Issue 4 would not assist JW. However, if the Court concluded that Lot 1 did require that there had to be at least the possibility that the MBT waste could still come through, but that this possibility was there (because the MBT contract might be revived) then Issue 4 would have a role, as noted in the discussion at Day 5/49.

252. Reg 18 provides as follows:

> "18.—(1) Contracting authorities shall treat economic operators equally and without discrimination and shall act in a transparent and proportionate manner.
> (2) The design of the procurement shall not be made with the intention of excluding it from the scope of this Part or of artificially narrowing competition.
> (3) For that purpose, competition shall be considered to be artificially narrowed where the design of the procurement is made with the intention of unduly favouring or disadvantaging certain economic operators."

253. On the basis of the foregoing, Issue 4 does not now arise (see paragraph 251 above). Further, it is not now suggested that there was some equal treatment principle in play in respect of the Council's decision to award work under one Lot as opposed to another. Had that suggestion been maintained, I fail to see why a principle of equal treatment should govern an authority's decision to award a Service Order under a particular Lot to one bidder, but not another, where the process of the mini-competition was not itself challenged and where the award complied with the underlying framework agreement.

254. Yet further, there can be no question of a lack of transparency. The Lots were clearly described and it seems that JW, to take an example, had no difficulty in understanding

them. Further the basis on which Lots would be awarded was by reference to the Award Model - see paragraphs 221-223 above.

255. Moreover, even if there was some lack of transparency, it is impossible to see where this could go in terms of causation, given that JW never bid for Lot 1 in the mini-competition despite understanding (through Mr Barthaud) what Lot 1 entailed.

ISSUE 5 - SUFFICIENTLY SERIOUS BREACH

256. Given my conclusions above, this issue does not now arise. Further, although the point has been argued, I do not consider it possible for me sensibly to reach a finding on this issue, on the alternative hypothesis that I was wrong and there had been a breach in relation to the Modification and/or Lot 1. The question of a sufficiently serious breach is a nuanced one in my view and its resolution would depend on precisely what my findings were as to breach and the circumstances surrounding it, which in the event I did not make.

257. I therefore do not deal with this point.

ISSUE 6 - CAUSATION

258. Despite how Issue 6 is framed, both sides agree that there was not to be a final determination of causation (had I found a breach) at this trial. Rather the question is whether there was a real possibility of JW suffering loss. That is to be distinguished from merely a fanciful one.

259. It seems to me that this is something on which I can express a meaningful view on the alternative hypothesis that there had been a procurement breach.

260. For the purposes of causation, the agreed hypothesis to be considered is not that a procurement exercise was run because the Modification required it, but rather that the Modification did not proceed at all, and the breach was in that way averted. On that footing, JW contends that its existing Lot 4 contract would have been extended for some or all of the period beyond 7 June to 31 October.

261. As to that, the Council contends that it had two options, neither of which involved continuing with JW. The first was to use the negotiated procedure without publication permitted by Reg 32 and here, on the basis that it was strictly necessary for reasons of extreme urgency due to unforeseeable circumstances. In fact, Mr Searles in evidence accepted that there were no unforeseeable circumstances. But in any event, there was still the option of using JW under Lot 4 and there is at the very least a real question as to whether extreme urgency could be made out.

262. Secondly, the Council says that it could have run a further Lot 5 mini-competition to facilitate transporting the BCPR waste to Bellhouse. As to that, JW points out that in the previous mini-competition, neither of the authorised Lot 5 providers (being JW itself and Hadleigh Salvage and Recycling Ltd) in fact bid. However, the Council says it does not follow that there would have been no bids this time round. JW responds that if the terms of the mini-competition had been such as to attract bidders, they might have included JW

itself, and that at the least a mini-competition would have taken some time to run and in the meantime the waste would still have had to be transported under Lot 4.

263. In all the circumstances, I do not consider that there is a "knockout" point which can be advanced by the Council so as to say that there was no real possibility of loss in the event there was the Modification Breach.

264. As for the Lot 1 Breach, had this occurred (but not the Modification Breach) the Council contends that it would have either procured a new FWA or new Service Orders under a further mini-competition. But these procedures would still take time. By way of example, the FWA timeline in 2017 to which I was referred (see Supplemental Bundle page 2972) ran over a period of 2 months. That is not a negligible period for the purposes of any opportunity for JW to have continued providing services under Lot 4, albeit it would not be for the whole 5 months.

265. Again, therefore, I would conclude there was a real possibility of JW suffering at least some loss here.

266. The only further point (which I already made in paragraph 251 above) is that if the only breach relating to Lot 1 was that under Issue 4 and the remaining Reg 18 breach relied on, namely non-transparency, that would not have given rise to a real possibility of loss. In the end, I did not understand JW to be suggesting that it did.

ISSUE 7 - CIVIL PENALTIES

267. In order to make sense of this issue, I need to set out a number of provisions of the PCR:

> "89.—(1) This regulation applies to the obligation on a contracting authority to comply with—
> (a) the provisions of Parts 2 and 3];…
>
> **Contract-making suspended by challenge to award decision**
> 95.—(1) Where—
> (a) a claim form has been issued in respect of a contracting authority's decision to award the contract,
> (b) the contracting authority has become aware that the claim form has been issued and that it relates to that decision, and
> (c) the contract has not been entered into,
> the contracting authority is required to refrain from entering into the contract.
>
> **Remedies where the contract has been entered into**
> 98.—(1) Paragraph (2) applies if—
> (a) the Court is satisfied that a decision or action taken by a contracting authority was in breach of the duty owed in accordance with regulation 89 or 90; and
> (b) the contract has already been entered into.
> (2) In those circumstances, the Court—
> (a) must, if it is satisfied that any of the grounds for ineffectiveness applies, make a declaration of ineffectiveness in respect of the contract unless regulation 100 requires the Court not to do so;
> (b) must, where required by regulation 102, impose penalties in accordance with that regulation;…
>
> **Grounds for ineffectiveness**
> 99.—(1) There are three grounds for ineffectiveness.
> *The first ground*
> (2) Subject to paragraph (3), the first ground applies where the contract has been awarded without prior publication of a contract notice in any case in which Part 2 required the prior publication of a a contract notice…

The second ground
(5) The second ground applies where all the following apply—
(a) the contract has been entered into in breach of any requirement imposed by—
(i) regulation 87 (the standstill period),
(ii) regulation 95 (contract-making suspended by challenge to award), or
(iii) regulation 96(1)(b) (interim order restoring or modifying a suspension originally imposed by regulation 95);
(b) there has also been a breach of the duty owed to the economic operator in accordance with regulation 89 or 90 in respect of obligations other than those imposed by regulation 87 (the standstill period) and this Chapter;
(c) the breach mentioned in sub-paragraph (a) has deprived the economic operator of the possibility of starting proceedings in respect of the breach mentioned in sub-paragraph (b),or pursuing them to a proper conclusion, before the contract was entered into; and
(d) the breach mentioned in sub-paragraph (b) has affected the chances of the economic operator obtaining the contract...

The consequences of ineffectiveness
101.—(1) Where a declaration of ineffectiveness is made, the contract is to be considered to be prospectively, but not retrospectively, ineffective as from the time when the declaration is made…

Penalties in addition to, or instead of, ineffectiveness
102.—(1) Where the Court makes a declaration of ineffectiveness, it must also order that the contracting authority pay a civil financial penalty of the amount specified in the order.
(2) Paragraph (3) applies where—
(a) in proceedings for a declaration of ineffectiveness, the Court is satisfied that any of the grounds for ineffectiveness applies but does not make a declaration of ineffectiveness because regulation 100 requires it not to do so; or
(b) in any proceedings, the Court is satisfied that the contract has been entered into in breach of any requirement imposed by regulation 87, 95 or 96(1)(b), and does not make a declaration of ineffectiveness (whether because none was sought or because the Court is not satisfied that any of the grounds for ineffectiveness applies).
(3) In those circumstances, the Court must order at least one, and may order both, of the following penalties:—
(a) that the duration of the contract be shortened to the extent specified in the order;
(b) that the contracting authority pay a civil financial penalty of the amount specified in the order.
(4) When the Court is considering what order to make under paragraph (1) or (3), the overriding consideration is that the penalties must be effective, proportionate and dissuasive.
(5) In determining the appropriate order, the Court must take account of all the relevant factors, including—
(a) the seriousness of the relevant breach of the duty owed in accordance with regulation 89 or 90;
(b) the behaviour of the contracting authority;
(c) where the order is to be made under paragraph (3), the extent to which the contract remains in force…"

268. JW contends that I must award a civil financial penalty against the Council because (a) the Modification was in breach of Reg 72 (9) ("the Modification Breach") and (b) because it was entered into only on 25 June 2021 which was after the claim had been issued on 17 June and after the Council had become aware of it, so that it was in breach of Reg 95 (1) ("the Contract Entry Breach").

269. In essence, JW argues as follows:

(1) By reason of Reg 98 (2), because there were those breaches and the contract had been entered into, the Court must impose penalties in accordance with Reg 102;

(2) In respect of the Modification Breach, the first ground for ineffectiveness, under Reg 99 (2) applied. That is because there should have been a procurement process which would have necessitated prior publication of the notice;

(3) In respect of the Contract Entry Breach, the second ground for ineffectiveness applied under Reg 99 (5);

(4) By reason of Reg 102 (2) (b) and (3) the Court must order a civil penalty. The only other option would be to shorten the length of the contract but that could not be done since the IWHC had already terminated;

(5) While JW made a claim for a Declaration of Ineffectiveness, it accepts that the Court cannot make one here, since the IWHC terminated in March 2022; nonetheless, that does not affect the Court's duty to impose a civil penalty.

270. The Council disagrees with this analysis for a number of reasons.

271. In my view, there is no duty to award a civil penalty here.

272. First, since I have not found that there was the Modification Breach, the first ground of ineffectiveness does not arise. That is because there cannot be any requirement for a notice. That being so, it is not necessary for me to deal with a further point made by the Council to the effect that the original OJEU notice sufficed in any event.

273. That leaves the second ground for ineffectiveness. But this only applies if all of sub-paragraphs (a) to (d) of Reg 99 (5) are satisfied. JW only focused on the first, being the Contract Entry Breach. But since none of the subsequent sub-paragraphs apply, this ground for ineffectiveness is not available.

274. I then turn to Reg 102 (2) (b). Read by itself, and out of context, this provision appears to apply. There is (let it be assumed for these purposes) the Contract Entry Breach. It is also the case that a declaration of ineffectiveness is not made and there are no qualifying grounds for ineffectiveness.

275. However, the underlying reason why the Court cannot here make a declaration of ineffectiveness, even if there were grounds is because there is now no contract left to be rendered ineffective. Thus it cannot be said that the Court does not make a declaration of ineffectiveness because there were no grounds. It could not have made one anyway. On that basis, I do not consider that Reg 102 (2) (b) in fact applies. (Ironically, JW's submission was that there were grounds for ineffectiveness but if so, the actual words of Reg 102 (2) (b) would not cover the situation anyway).

276. Further, it is clear that the premise underlying the whole of Reg 102 is that at the time when the Court has to consider these matters, there is still a "live" contract. Sub-paragraph (1) obviously assumes this, because it operates where the Court does make a declaration of ineffectiveness.

277. As for sub-paragraph (2), read in context, it surely refers to a situation where a declaration could be made (because there is a live contract) but where the listed matters mean that it cannot or should not be, for example, because the general interest requires the contract to be maintained nonetheless. This also explains the remedy at Reg 102 (3) (a) which could not be available if there was no contract to shorten. I note that the factors to be taken into

account when deciding the appropriate order (which is to have at least a contract shortening or a civil financial penalty) include the extent to which the contract remains in force. I think that is a clear reference to how long the contract has to run or at least that is the paradigm example. But again, to my mind, that still assumes a live contract.

278. Indeed, it could equally be said that Reg 98 itself only operates if there is still a live contract since it directs the court to make a declaration of ineffectiveness and impose a penalty under Reg 102.

279. For all those reasons, I consider that Reg 102 has no operation here and there is no obligation to impose a civil penalty. That being so, it is not necessary for me to consider the Council's further point that the automatic suspension created by Reg 95 does not apply anyway in a "modification" case like this.

280. This means that the issue as to whether the Modification to the IWHC was made on 25 June, and in any event after 18 June when the Claim Form was issued is academic. However, as this is a discrete issue and was argued and there was some evidence about it I shall set out briefly my views on it.

281. It seems to me that the Modification was indeed made on 25 June 2021 and not before. The Council clearly considered it important that it be signed and indeed it had had pressed Veolia for a signature – see paragraph 105 above. It is perfectly true that Veolia started to perform its services on 7 June. But that does not necessarily entail that a contract came into existence then or shortly after, through acceptance by conduct. Indeed, as at 7 June the contract duration of 5 months had not been fixed in the ACR, although a period of up to 5 months was mooted in Mr Searles' internal report of 1 June.

282. Had Veolia refused to sign on or around 25 June, I cannot see that the Council would have permitted it to continue providing services. But that does not mean that for the period up to that point, there had to have been a contract in place. Veolia would on the face of it have had a clear claim to be remunerated on a *quantum meruit* basis.

283. I note the Council's reliance on the cases (in particular *RTS v Molkerie* [2010] UKSC 14) and propositions set out at paragraph 73 (a) to (f) of its Written Closing. But they do not impel the conclusion that there must have been a contract in place prior to 25 June on the facts of this case by reason of Veolia's performance from 7 June. This is particularly so in the context of a debate whether question is not whether a contract ever came into existence but simply on what date.

284. In the event, for the reasons already given, the debate as to when the Modification was made is academic.

CONCLUSION

285. I summarise my conclusions on the Issues which were determinative, as follows:

(1) On Issue 1, Substantial Modification, the answer is "No";

(2) On Issue 3 (a), the Lot 1 Issue, the answer is "No"; Issue 3 (b) did not arise;

(3) On Issue 4, the Regulation 18 Issue,

(a) the Council owed general duties to JW under Regulation 18, but there was no duty of equal treatment between bidders where there was a lawful mini-competition process which was compliant with the FWA;

(b) there was no breach of any Reg 18 duty with regard to the award of the Enovert Service Order;

(4) On issue 7, the Ineffective Issue, the answer is "No".

286. I am extremely grateful to both Counsel for their very helpful oral and written submissions.