THE HIGH COURT
COMMERCIAL

[2017 No. 282 J.R.]

IN THE MATTER OF COUNCIL DIRECTIVE 2004/18/EC
AND IN THE MATTER OF THE EUROPEAN COMMUNITIES (AWARD OF PUBLIC AUTHORITIES' CONTRACTS) REGULATIONS 2006 (S.I. 329 OF 2006)
AND IN THE MATTER OF COUNCIL DIRECTIVE 89/665/EEC (AS AMENDED)
AND IN THE MATTER OF THE EUROPEAN COMMUNITIES (PUBLIC AUTHORITIES' CONTRACTS) (REVIEW PROCEDURES) REGULATIONS 2010 (S.I. 130 OF 2010) (AS AMENDED BY S.I. 192 OF 2015)

BETWEEN

TRANSCORE, LP

APPLICANT

AND

THE NATIONAL ROADS AUTHORITY, OPERATING UNDER THE NAME OF TRANSPORT INFRASTRUCTURE IRELAND

RESPONDENT

AND

ABTRAN UNLIMITED, VINCI CONCESSIONS SAS AND VINCI HIGHWAYS SAS (TURAS)

NOTICE PARTY

JUDGMENT of Mr. Justice David Barniville delivered on the 17th day of October, 2018

INTRODUCTION

1. This case involves a challenge by the applicant, Transcore, LP, on public procurement grounds, to the decision made by the respondent, the National Roads Authority, now known as Transport Infrastructure Ireland (the "Authority"), in February 2017 to award to another bidder, Turas (a consortium consisting of a number of entities) ("Turas"), a new tolling operations contract for the M50 motorway and any other tolling points which the Authority might introduce or operate in future on the road network in Ireland.

2. It is not the only such case arising from that decision and from the procurement process run by the Authority. The incumbent, Emovis Operations Ireland Ltd. ("Emovis"), which was also unsuccessful in the procurement process, has itself commenced proceedings which are currently before the High Court. They are not as advanced as these proceedings and, as I understand it, are still at the discovery stage (*Emovis Operations Ireland Limited v. National Roads Authority & ors* [2018] IEHC 362 (Haughton J.)). As a result of an undertaking apparently given by Emovis in those proceedings, the automatic suspension on the award of the contract has continued. No application to lift it was made in these proceedings. The existing contract, having been extended, will expire in March 2019.

3. Many issues of fact and law were ventilated by the parties in the course of the exchange of affidavits and written submissions and in the oral submissions at the hearing. However, it is now common case that the essential question which I have to decide in these proceedings is a net issue of interpretation of the quality scoring matrix in respect of one of the criteria for evaluating one of three delivery plans required to be prepared and presented by each bidder as part of a quality submission required to be made with its tender submission.

4. The applicant has challenged the Authority's interpretation and application of that quality scoring matrix in respect of one of the marks given by the Authority to Turas in respect of one of the criteria by which the particular delivery plan was required to be evaluated. The Authority awarded Turas a mark of 9 out of 10 for that criterion (Criteria B) whereas the applicant claims that the Authority misapplied or misinterpreted the scoring matrix and should not have awarded Turas more than 8 marks in respect of that criterion.

5. As we shall see, the difference of one mark could have made the difference between winning and losing the competition for the applicant (and would have done unless it was necessary to revise other marks awarded as a result of a judgment in favour of the applicant in this case). The applicant claims that had the Authority awarded Turas 8 marks out of 10 rather than 9, the applicant would have achieved a higher overall score than Turas and would have been the successful bidder in the competition.

6. While ultimately refining itself to a net issue of interpretation (and consequent application) of the scoring matrix, the apparent simplicity of the issue of interpretation is somewhat illusory due in no small way to the exemplary quality of the advocacy, both written and oral, of the legal representatives of the three parties in the case which, while extremely impressive to hear, has made my task in determining the issue in the case more difficult than perhaps it ought to have been. I say this as, having reflected extensively on the issue of interpretation to be determined, I have come to the conclusion that the interpretation of the tender documentation put forward and relied upon and applied by the Authority is clearly correct and that, in those circumstances, I must refuse the applicant's application and dismiss its claim.

SCHEME OF JUDGMENT

7. I adopt the following scheme in this judgment. It is necessary at the outset to say something about the parties and then to outline in some detail the background to the procurement competition and the process for the award of contract at issue. I will then consider the correspondence which preceded the commencement of the proceedings before turning to consider the respective contentions of the parties in the proceedings. After that I will address the legal and factual issues which require to be determined in order to resolve the essential issue of interpretation. I will then summarise my conclusions.

THE PARTIES

(a) The Applicant

8. The applicant is a company which is incorporated in Delaware, USA, and has its registered office in Nashville, Tennessee, USA. It is a wholly-owned subsidiary of Roper Technologies, Inc., an NYSE-traded S&P 500 corporation with annualised revenues in excess of €3.54 billion in 2016. The applicant specializes in providing innovative toll system technology and operations to government agencies and private firms around the world. The applicant has transportation installations worldwide and develops and maintains almost half of all toll lanes in the United States. The evidence establishes that the applicant identified the tolling operations contract at issue in this case as representing a significant business opportunity giving it good potential to expand into the European market, with Ireland serving as the applicant's European base of operation and its headquarters.

(b) The Authority

9. The Authority is a statutory body which was established in 1993 and exercises powers pursuant to the Roads Acts 1993 to 2015. It has a general duty to secure the provision of a safe and efficient network of national roads in Ireland. It has overall responsibility for the planning and supervision of works for the construction and maintenance of national roads and other functions assigned to it under the legislation. In particular, the Authority has statutory power under s. 63 of the Roads Act 1993 (as amended) to enter into an agreement with another person for the operation and management by that person of roads for or with the Authority (including the provision, supervision and operation of a system of tolls and their collection in respect of the use of such roads).

10. The Roads Acts set out the provisions for the enforcement procedures and access to records required for the operation of a free-flow (or barrier-free) toll road such as the M50 in Dublin. The legislation also provides a statutory basis for the making of a draft toll scheme in respect of the M50 between Junctions 6 and 7 of that motorway.

11. The Authority merged with the Railway Procurement Agency pursuant to the Roads Act 2015 with effect from 1st August, 2015. The merged entity operates under the name Transport Infrastructure Ireland. The Authority (operating under that name) is the relevant awarding authority for the contract at issue in these proceedings.

(c) Turas
12. Turas is a notice party to the proceedings. It has fully participated in the proceedings by the delivery of a statement of opposition and affidavit evidence and by making written and oral submissions. It has supported the position of the Authority in resisting the applicant's claim.

13. Turas is a consortium formed between Abtran Ltd. ("Abtran"), VINCI Concessions SAS ("VINCI Concessions") and VINCI Highways SAS ("VINCI Highways"). Turas was formed in July 2015 by those entities for the purpose of preparing a joint submission in respect of a pre-qualification questionnaire issued by the Authority which is referred to below. At the time, Abtran (one of the consortium members) was providing certain services to the incumbent contractor (now known as Emovis) in respect of the barrier-free tolling system on the M50 motorway on a subcontract basis. VINCI Concessions operates on a worldwide basis designing, building, financing, operating and maintaining highway projects. Its affiliate, VINCI Highways, specialises in managing and operating highways and in delivering electronic tolling services both as a toll charger and as a toll service provider for light vehicles and haulier companies. Both VINCI entities have a significant presence internationally in the provision of tolling operations and concessions.

THE AWARD OF THE CONTRACT

Introduction
14. I set out in this section the background to the procurement process which has given rise to the proceedings. It is necessary to describe in some detail the process which led to the decision which is challenged by the applicant in these proceedings. These background facts are not now in dispute between the parties and are derived from the affidavits sworn on behalf of the applicant, the Authority and Turas. While there was a dispute between the parties concerning the date and circumstances in which the Authority's Evaluation Committee ultimately reached its decision to award Turas a score of 9 marks for the particular criterion at issue (Criteria B), that dispute was predicated on a misunderstanding by the applicant of certain documentation and based on a mistaken assumption by the applicant as to when a particular document (referred to as Document 7 below) was created. The Authority accepts that this misunderstanding was in part due to a misdescription of the particular document in the schedule of discovery documents. Insofar as it is necessary to do so, I will say something about that dispute later in the judgment. However, I believe that I am correct in recording that whatever factual dispute did exist between the applicant and the Authority on this issue, has dissipated and the ultimate issue for my decision is the so-called net issue of interpretation.

Background to Free-Flow/E-Flow Tolling on M50
15. In January 2006, the Authority announced that as part of planned upgrade works to the M50 motorway, the then existing toll arrangements (which consisted of a toll plaza) on the M50 at the West-Link toll bridge would be replaced by a free-flow or barrier-free tolling system in 2008. This type of tolling system allows for the collection of tolls by electronic means without having barriers or a toll plaza on the motorway and without, therefore, requiring motorists to stop or slow down in order to pay the toll charge. The M50 free-flow system was one of the first of its kind to be deployed on a European motorway.

16. In 2007, the Authority awarded a contract (known as the "first generation" free-flow contract) to construct and operate barrier-free tolling on the M50 motorway to a French consortium which went through a number of changes of structure, ownership and name over subsequent years and is now called Emovis. Emovis is the incumbent and, as noted earlier, has brought separate proceedings arising from the procurement process. I should note at this point that Emovis sought to intervene and make a submission on the morning of the third and last day of the hearing of this case. This attempted intervention by Emovis was resisted by the applicant. I refused to permit Emovis to intervene in circumstances where no application had previously been brought on its behalf and where the hearing of these proceedings was almost concluded. I felt that it was not appropriate that such an application should be made, and in those circumstances, I refused it.

17. The free-flow tolling arrangements on the M50 came into effect on 30th August, 2008. The toll plaza, booths and barriers were removed and replaced by overhead technology connected to a tolling operation centre. The new free-flow tolling arrangements eliminated the need for cash collection at the roadside and changed the nature of the operation to an e-commerce customer billing and collections operation. The evidence establishes that the M50 motorway is one of the most heavily trafficked and strategically important corridors on the national roads network with approximately on average 136,000 vehicles per day travelling over the tolled section of the M50 (between Junctions 6 and 7).

18. The existing contract was due to expire in March 2018 but the expiry date was extended to March 2019.

Process for Award of Contract
19. In anticipation of the launch of a procurement process for the new contract (the "next generation" contract), the Authority engaged in various initial planning measures and had the benefit of a range of external consultants assisting it, including tolling consultants, Ove Arup and Partners Ltd. ("Arup"), financial consultants, KPMG, and legal advisors, McCann Fitzgerald.

20. On 12th November, 2014, the Authority published a prior information notice to inform interested parties of a planned procurement competition to procure tolling operation services for the M50 tolling operation and for any future toll points which the Authority might introduce or operate on the road network in Ireland. It was anticipated that the procurement competition would commence in the second quarter of 2015. The notice stated that the Authority intended to schedule an industry briefing in the first quarter of 2015 to inform interested parties of the procurement process and of its objectives. The Authority held that industry briefing in Dublin on 23rd April, 2015.

21. The procurement competition commenced with the publication of a contract notice on 15th July, 2015. The contract notice contained information in relation to the proposed contract. It described the services required under the contract as being "Service Category no. 27: other services". The estimated value of the contract was given as a range of between €200 million and €400 million. It stated that the duration of the contract was 180 months from the award of the contract. The notice informed interested parties that the procedure to be adopted in the tender competition would be the competitive dialogue procedure. The notice further stated that the contract would be awarded to "*the most economically advantageous tender in terms of the criteria stated in the specifications, in the invitation to tender or to negotiate or in the descriptive document*".

22. The contract notice was accompanied by instructions to candidates and a pre-qualification questionnaire. The object of that stage of the process (namely, the pre-qualification process) was to pre-qualify a sufficient number of entities to invite to tender for the contract. The Authority received twelve submissions from interested candidates by the stipulated deadline of 13th September, 2015 and shortlisted the five highest-ranked candidates. The Authority then wrote to the successful and unsuccessful candidates on 18th December, 2015 to inform them of the outcome of the pre-qualification process.

23. The next stage of the procurement competition was the competitive dialogue process which consisted of two stages. The first involved detailed submissions and included dialogue meetings. The second stage involved a call for tenders. In this part of the process, the Authority intended to review the detailed submissions made by bidders which contained their plans and resourcing and the initial pricing for the contract and provide those bidders with an opportunity to enter into dialogue on the basis of their submissions.

24. The competitive dialogue process commenced with the issue of an invitation to participate in dialogue ("ITPD") to the five shortlisted candidates (which included the applicant and Turas). The competitive dialogue process also included the submission by bidders of their proposed detailed submissions and dialogue meetings and concluded with the formal closing of the dialogue stage.

25. The ITPD provided that detailed submissions would be reviewed in the context of the criteria set out in s. 6 of the ITPD. The call for tender stage would commence with the closing of the dialogue stage of the process and a call for tenders document being issued by the Authority. The ITPD provided that further details on this stage would be given in the call for tender documents to be circulated in accordance with the procurement timetable. Tender submissions made by the bidders would be reviewed and assessed by the Authority and its advisers against the evaluation criteria set out in the call for tenders document. It was further stated that the evaluation process was intended to result in the identification and appointment of the preferred bidder. The ITPD further noted that following the appointment of the preferred bidder the call for tender stage was anticipated to conclude with the award of the contract by the Authority, following finalisation of the contract documents.

26. The detailed submission stage of the competitive dialogue process required bidders to submit drafts of three delivery plans and afforded them an opportunity to submit mark ups on the draft contract to be considered by the Authority. The delivery plans to be included in the detailed submissions were:-

(a) the "mobilisation and transition plan";

(b) the "systems plan"; and

(c) the "operations plan".

The delivery plans would eventually form the basis for the bidder's quality submissions to be submitted as part of their tenders. The evaluation by the Authority of one of the criteria in the operations plan ultimately submitted by Turas at the call for tender stage of the process is at the heart of the applicant's case. The original deadline of the receipt of these detailed submissions was 28th April, 2016. That date was subsequently extended to 12th May, 2016.

27. Section 4 of the ITPD provided instructions to bidders concerning the completion and submission of their detailed submissions. Information concerning the detailed submissions stage was set out at section 4.3 of the ITPD. Section 6 of the ITPD contained a description of the evaluation process and was included in the ITPD to provide bidders with information about the approach which it was anticipated would be taken by the Authority when evaluating tenders submitted at the call for tender stage of the procurement process. The information set out in the ITPD in relation to the evaluation process is repeated in the call for tenders ("CFT") and I will set out the relevant provisions in greater detail when considering that stage of the process. It suffices to say for present purposes that, section 6.2 of the ITPD provided that the quality submissions to be made by bidders would be scored out of a maximum score of 650. The evaluation would involve assessment of the bidder's quality submission in relation to the delivery plans noted in Appendix 2 of the ITPD and that quality submissions would be evaluated against the sub-criteria in Appendix 2 and scored using the scoring guidance and evaluation methodology contained therein. The ITPD stated that the score awarded for each of the sub-criteria would be added together to obtain a total score out of 650 for the quality submission. Section 6.2 of the ITPD then set out information in relation to the evaluation of the pricing submission which would be scored out of a maximum of 350. Section 6.3 stated that the combined quality and price score would be calculated by adding the quality submission score and the price score. Section 6.4 stated that the tender receiving the highest combined quality and price score would be identified as the most economically advantageous tender and would be ranked number one in terms of the overall evaluation. The bidder submitting that tender would be identified as the preferred bidder. At section 6.5, the ITPD stated that the Authority anticipated that it would, following the outcome of the evaluation process, appoint a preferred bidder with whom it was proposed the Authority would enter into the contract. The form of contract was attached as an annex to the ITPD.

28. Important details in relation to the quality submission were set out in Appendix 2 to the ITPD. That Appendix contains two critically important tables, Table 2 setting out the tender evaluation criteria and Table 3 setting out the quality scoring matrix. These are repeated in the CFT and I consider them in detail in that context.

29. Following the provision of the ITPD to the bidders, the Authority held a number of information meetings with them. These information sessions were held on 17th February, 2016, 6th April, 2016, and 26th April, 2016 and dealt with a broad range of aspects of the procurement process, the objectives of the Authority and the contractual documents as well as the operation and enforcement of the tolling operations and staff matters. The Authority had also afforded bidders access to a web based virtual data room containing documents and information relating to the contract and documents relating to the procurement process.

30. Detailed submissions were furnished by the five bidders on 12th May, 2016. The detailed submissions were reviewed by the Authority. The Authority then engaged in individual dialogue meetings with bidders where any issues arising from the detailed submissions were identified and discussed. These meetings took place between 14th June and 22nd June, 2016. The bidders were given the opportunity of presenting their delivery plans to the Authority at these dialogue meetings and of raising any queries whether

technical, legal or commercial. The meetings also afforded the Authority the opportunity of raising queries and providing feedback arising from its review of the detailed submissions. Issues raised at the dialogue meetings were addressed by the Authority through feedback and clarifications. The Authority also provided written feedback on the detailed submissions to each bidder after the dialogue meetings.

31. The dialogue meeting between the Authority and the applicant took place on the 14th June 2016. A presentation document (described as the "TII Dialogue Presentation") was provided by the Authority to the applicant (and to the other bidders). The applicant has drawn attention to a number of aspects of that presentation. The most relevant for present purposes is where, under the heading "*common observations/guidance which could impact on the quality scoring at call for tender stage*", the Authority stated in one of the bullet points as follows:-

> "● More consistent explanation of resourcing within the Delivery Plans in terms of numbers, team structures and organisation being matched to expected workloads and workflows and the related figures included in the OBM [Operator Business Model]."

32. The first stage of the competitive dialogue process then closed with the issue of the CFT to bidders on 22nd July, 2016. The CFT was reissued on 13th September, 2016 having undergone some minor revisions and updates. The contract which it was proposed the Authority would enter into with the successful bidder was attached at Annex A to the CFT. The CFT is of critical importance to the central issue which I have to decide and it is, therefore, necessary to spell out in some detail the relevant provisions of that document.

33. The CFT noted at the outset (in section 1.1) that having received and reviewed the detailed submissions from bidders and having completed the information sessions and the dialogue process, the Authority considered that it had identified solutions which met its needs and was, therefore, closing the competitive dialogue stage of the competition. The CFT invited bidders to submit their final tenders. It provided bidders with information regarding the required services and provided a description of the anticipated remaining steps in the procurement process.

34. At section 1.2 of the CFT it was stated that the CFT was expanding on the information provided in the earlier documents including the ITPD and to the extent that there was any conflict between the CFT and the ITPD, it was stated that the CFT would prevail. I am not aware of any such conflict having been identified by the parties. The CFT recorded (at section 1.3) that the Authority was being supported by a number of advisors in connection with the competition, namely KPMG, Arup, McCann Fitzgerald and Willis Risk Services Ireland Ltd.

35. Section 2 of the CFT provided detail in relation to the proposed contractual arrangements including the background and context to the new or "next generation" contract which the Authority wished to enter into and details in relation to the current contract which was due to expire in March 2018 but which had been agreed by the Authority to be extended for up to twelve months beyond that date. Section 2.3 of the CFT provided an overview of the services to be provided under the new contract and noted that the contract covered three envisaged phases over its term, namely:-

> (a) the mobilisation and transition services phase;
>
> (b) the operational services phase; and
>
> (c) the exit management services phase.

36. Section 3 of the CFT contained details of the procurement process itself and noted that:-

> *"[t]his competition is being conducted under the competitive dialogue procedure in accordance with the European Communities (Award of Public Authorities' Contracts) Regulations 2006"*

and that:-

> *"the Contract, if awarded, will be awarded to the bidder submitting the most economically advantageous tender."*

37. Table 1 in Section 3 of the CFT provided an indicative outline of the remaining stages and principal activities of the procurement process and was stated to be subject to change. However, the CFT noted that the Authority wished to enter into a binding contract with the preferred bidder "as soon as possible". The then timetable (at Table 1) envisaged the submission of tenders by 12:00 noon on 19th October, 2016, with the evaluation of tenders and the identification of the preferred bidder in January 2017 and the award of the contract in February.

38. The CFT noted (at section 3.2) that the call for tender stage would commence with the issue of the CFT and would include the submission by bidders of their tenders, the evaluation of tenders by the Authority and the identification of the preferred bidder and would conclude with the contract award. The principal activities within that stage were described (at section. 3.2) as including a one day information session, responses from the Authority to any queries raised by bidders in relation to the tenders, the submission by bidders of their tenders in accordance with the CFT, the evaluation of tenders and the identification of the preferred bidder in accordance with the evaluation criteria and scoring methodology set out in section 6, clarification from bidders (where requested by the Authority) on their tenders and the award and finalisation of the contract.

39. Section 4 of the CFT contained details on the completion and submission of tenders. Section 4.1 provided that tenders were required to be prepared and submitted in accordance with the requirements of the CFT. Section 4.2 provided general guidance. It stated that bidders had to demonstrate fully how their proposals would meet each of the Authority's requirements within their delivery plans. Guidelines were then given in respect of each of the three delivery plans, namely, the mobilisation and transition plan, the systems plan and the operations plan.

40. Section 4.3 then set out the information required to be submitted by bidders at the call for tender stage. Bidders were first required to submit a quality submission in relation to the solution which they were proposing to meet the Authority's requirements for the project. Bidders were also required to submit an operator business model ("OBM") which had to calculate (in accordance with a template set out in Appendix B) the forecasted costs and proposed charges for the services. Bidders also had to provide pricing information and the OBM included a tender pricing form. Bidders had to provide certain additional information and confirmations. The deadline for receipt of tenders was 12:00p.m. on 19th October, 2016 (which could be extended by the Authority).

41. For the purpose of the present case the most significant requirement on tenderers in respect of the information to be provided was the quality submission. Section 4.3 of the CFT stated that the quality submission was required to set out details of the bidder's approach to the requirements contained in each of the delivery plans detailed in Appendix 2 to the CFT. Section 4.3 continued:-

> *"Bidders are reminded of the following feedback points when preparing their Tender submissions:-*
>
> > • *Bidders should ensure that they provide a consistent explanation of resourcing within the Delivery Plans – in terms of numbers, team structures and organisation – and it should be clearly explained what these resources will be doing in terms of expected workloads and workflows, including an explanation of how the resources are expected to evolve during the Term in response to developments in the Services;*
> >
> > • *Bidders should ensure there is a clear and consistent link between the Operator Business Model and the Delivery Plans (Mobilisation and Transition, Systems and Operations)."*

42. Section 6 of the CFT dealt with the evaluation of tenders. This section, together with Appendix 2, contains the most critically important aspects of the tender documentation for the purpose of this case. At section 6.1 it was noted that the evaluation process section was included in the CFT to provide bidders with information about the approach that would be taken by the Authority when evaluating tenders submitted at that stage of the procurement process.

43. The evaluation process was then described in detail at section 6.2. It noted that the contract, if awarded, would be awarded to the bidder who submitted the most economically advantageous tender to the Authority assessed against the criteria set out in that section of the CFT and that the Authority would rank tenders based on the scores received. The steps of the anticipated evaluation process were then set out. They comprised a completeness and compliance review, a review and assessment of any change in information compared with that submitted as part of the pre-qualification submission, a quality submissions evaluation and a pricing evaluation.

44. With regard to the quality submissions evaluation, section 6.2 of the CFT stated:-

> *"The Quality Submissions will be scored out of a maximum score of 650. The evaluation will involve assessment of the Bidder's Quality Submission in relation to the Delivery Plans noted in Appendix 2. Quality Submissions will be evaluated against the sub-criteria in Appendix 2 and scored using the scoring guidance and evaluation methodology contained therein. The score awarded for each of the sub-criteria will be added together to obtain a total score out of 650 for the Quality Submission."*

45. With respect to pricing evaluation, section 6.2 of the CFT provided that the price submission would be scored out of a maximum score of 350 and that the evaluation price of each bidder's price submission would be assessed in accordance with the methodology set out in section 6.2. Section 6.3 of the CFT provided that the combined quality and price score would be calculated by adding the quality submissions score and the price score. At section 6.4 it was stated that the tender receiving the highest combined quality and price score would be identified as the most economically advantageous tender and would be ranked number 1 in terms of the overall evaluation. The bidder submitting that tender would be identified as the preferred bidder. At section 6.5 it was stated that having identified the preferred bidder, the Authority would notify each bidder of the outcome and would proceed to engage with the preferred bidder to conclude the contract as soon as possible. The form of contract proposed to be entered into between the Authority and the successful bidder was referred to at section 7 of the CFT and was attached at Annex A. The applicant places some reliance on a particular part of the contract (Schedule 2: Governance and Delivery Schedule) and I will refer to the relevant parts of that schedule below.

46. As pointed out above, section 6.2 of the CFT provided that the evaluation would involve the assessment of the bidder's quality submission in relation to the delivery plans noted in Appendix 2 and those quality submissions would be evaluated against the sub-criteria in Appendix 2 and scored using the scoring guidance and evaluation methodology set out there. It is to Appendix 2, therefore, that I now turn.

47. Appendix 2, headed "quality submission", stated that:-

> *"Bidders' Quality Submissions must be completed and submitted in accordance with the instructions set out in this Appendix 2 (and, for the avoidance of doubt, the remainder of this CFT)".*

48. Appendix 2 then stated:-

> *"The Quality Submission will be assessed as set out in section 6 of this CFT and this Appendix 2. Bidders are asked to read section 6 of this CFT and Governance and Delivery schedule [to the contract] carefully prior to preparing their Quality Submission."*

49. The form of quality submission required was then set out as follows:-

> *"The Bidder shall prepare and present its Quality Submission in the form of three separate documents as set out in the table below. These documents consist of three Delivery Plan (sic) as follows:-*
>
> > • *Mobilisation and Transition Plan;*
> >
> > • *Systems Plan; and*
> >
> > • *Operations Plan (incorporating Governance, Risk and Compliance)."*

It is with the third of these plans, the operations plan, with which this case is concerned.

50. Consistent with the requirement to separate out quality and price from the evaluation of the tenders, the Appendix went on to state:-

> *"Bidders are reminded that no reference to any payments, costs or price should be included within the Quality Submission. Price information should only be included within the Operator Business Model."*

Appendix 2 then stated that details of the requirements of these documents (i.e. the three delivery plans) were set out in the governance and delivery schedule of the contract to which I will turn shortly.

51. Table 1 in Appendix 2 set out the plans and scores in respect of each plan. The total score available for a bidder's quality submission was 650. Of that total, the score available for the operations plan was 350.

52. Appendix 2 then went on to note that the overall evaluation process for tenders was set out in section 6 of the CFT and that the criteria used for the evaluation of each of the required plans were as set out below. It then set out the criteria required in respect of the mobilisation and transition plan and the systems plan before turning to the operations plan with which we are concerned. With respect to that plan, Appendix 2 stated as follows:-

> *"The Tender must specifically address the requirements of the Operations Plan as set out in the Governance and Delivery Schedule. The Operations Plan must be consistent with the operational resources and costs identified in the Operator Business Model and the commercial rationales identified in the Financial Memorandum. The Authority will evaluate the Operations Plan against the evaluation criteria set out in Table 2 and in accordance with the scoring table set out in Table 3."*

53. Before turning to a consideration of the tender evaluation criteria and scoring matrix in Tables 2 and 3, I should make reference to the relevant provisions of the governance and delivery schedule to the contract which was annexed to the CFT (and an earlier version had been annexed to the ITPD). Part 2 of that schedule set out the requirements under the contract in respect of the three delivery plans to which I have already referred. Having set out the requirements in respect of the mobilisation and transition plan and the systems plan, section 4 of Part 2 of that schedule then addressed the requirements in respect of the operations plan. At section 4.2 it was noted that the primary objective of the operations plan was to set out the operator's plans to provide the services in an efficient and effective manner in accordance with the agreement. Table 4 in that section of the schedule then set out the required contents of the operations plan, setting out first the contents and then a description of the contents which was stated to be "a*s a minimum*". Table 4 then set out six items in respect of the required contents of the operations plan. One of those items (Item 4) is relevant for present purposes. Item 4 refers to "*resources - organisational structure and staffing*". The required contents of that aspect of the operations plan were then set out in the description column. Under Item 4, the operations plan had to contain a description of the operator's organisational structure for the management of the operation and delivery of the services under the contract which required the inclusion of certain information which was then set out in a series of five bullet points including the operator's organisational chart, the management structure, an overview of the various teams and departments involved, and (this is the important bullet point for present purposes):-

> "• *details of the resources required to provide the Services, how such resources relate to the volume of activity and how the activities and associated resources are expected to evolve during the Term; …"*

54. The applicant places particular reliance on this bullet point as requiring details as to how the resources required related to the volume of activity under the contract. The applicant drew attention to the fact that this minimum requirement for the contents of the operations plan was not contained in the version of the governance and delivery schedule in the form of contract attached to the ITPD.

55. Returning now to the tender evaluation criteria and markings in Appendix 2 of the CFT, Table 2 set out the tender evaluation criteria in respect of each of the three delivery plans. In respect of each plan the table contained two evaluation criteria (referred to as Criteria A and Criteria B), the available score for each of those two criteria in terms of the score available for the plan itself and the minimum score which had to be achieved in respect of each of those criteria. This case is concerned with the operations plan for which a score of 350 was available with a minimum score of 175 having to be achieved by the bidder. In respect of Criteria A, a score of 200 was available with a minimum score required of 100. Criteria A referred to the "*deliverability of the Plan having regard to the Bidder's credible proposals for how it will deliver all of the relevant requirements set out in the Contract ... in accordance with the requirements of the Contract*". For Criteria B, with which this case is concerned, a score of 150 was available with a minimum score of 75 being required. Criteria B concerns the "*sufficiency of the proposed resources to ensure consistent delivery of all aspects of the Plan*". The total quality submission score available for all three of the delivery plans was 650 with the minimum score of 325 being required.

56. The scoring methodology was then set out. For each of the three delivery plans it was stated that scores for the tender evaluation criteria set out in Table 2 would be allocated "*bearing in mind the scoring guidance set out in Table 3 below*". A score out of 10 marks would be allocated to the tender against the relevant criterion and that score out of 10 would then be converted to a score out of the maximum mark available for that criterion, as described in Table 3. Each bidder's total quality submission score would be calculated by aggregating the scores for all delivery plans in the section.

57. Table 3 set out the quality scoring matrix. In respect of each of Criteria A and Criteria B, Table 3 set out five boxes representing bands of scoring out of 10 marks, ranging from 0-2 to 9-10 by reference to "concerns" which the Authority had in relation to each of the two criteria for the relevant delivery plan. Since we are concerned with that part of the quality scoring matrix contained in Table 3 which related to Criteria B, I set out below in full the scoring matrix as it related to Criteria B:

Criteria B Sufficiency of the proposed resources to ensure consistent delivery of all aspects of the Plan	Score
The Authority has fundamental concerns with the Bidder's submission regarding the sufficiency of the proposed resources to ensure consistent delivery of all aspects of the Bidder's Plan	0-2
The Authority has major concerns with the Bidder's submission regarding the sufficiency of the proposed resources to ensure consistent delivery of all aspects of the Bidder's Plan	3-4
The Authority has significant concerns with the Bidder's submission regarding the sufficiency of the proposed resources to ensure consistent delivery of all aspects of the Bidder's Plan	5-6
The Authority has minor concerns with the Bidder's submission regarding the sufficiency of the proposed resources to ensure consistent delivery of all aspects of the Bidder's Plan	7-8

The Authority has no concerns with the Bidder's submission regarding the sufficiency of the proposed resources to ensure consistent delivery of all aspects of the Bidder's Plan	9-10

58. It can be seen, therefore, that the quality scoring matrix in Table 3 set out a range or band of scoring in respect of Criteria B ranging from 0-2 to 9-10 by reference to the "*concerns*" or otherwise which the Authority had with the bidder's submission with respect to that criterion starting with "*fundamental concerns*", for which the lowest band of marks was available and ranging to "*no concerns*", for which the highest band of marks (9-10) was available and including between them, "*major concerns*", "*significant concerns*" and "*minor concerns*". This case is primarily concerned with two of the bands of marks, namely, the band referring to "*minor concerns*" for which a range of 7- 8 marks was available and the band referring to "*no concerns*" for which a range of 9-10 marks was available. The applicant contends that the Authority incorrectly interpreted and applied the quality scoring matrix in Table 3 by awarding Turas a mark of 9 for Criteria B in respect of its delivery plan - operations plan, where, properly interpreted, it should not have awarded a mark of 9 or should have awarded no more than an 8.

59. Having set out the quality scoring matrix in Table 3, Appendix 2 then stated that the quality submissions score awarded to each bidder in respect of each delivery plan would be multiplied by the total score available for each plan to arrive at a score in accordance with a particular formula which was set out and that that procedure would be followed for each of the three delivery plans. The scores achieved by the bidders for all three plans would then be added together to arrive at an overall score for the quality submission with the maximum score that could be achieved being 650. An example was then set out (by reference to one of the three delivery plans) as follows:-

> *"The Authority assesses a Bidder's Mobilisation and Transition Plan as achieving 8 out of 10 for deliverability [ie Criteria A] and 9 out of 10 for sufficiency of proposed resourcing [ie Criteria B]*
>
> *The score for the Mobilisation and Transition Plan will be calculated as follows:-*
>
> *Deliverability: 8/10 X 100 = 80*
>
> *Resourcing: 9/10 X 50 = 45*
>
> *Total score awarded for Mobilisation and Transition = 80+45=125 out of a maximum of 150 available."*

The Authority attached some significance to the fact that the example demonstrates that the quality scoring matrix envisaged a score of 9 marks being achieved and that this supports the approach which the Authority took in interpreting the scoring matrix.

60. Having issued the CFT on 22nd July 2016, the Authority held an information session with all bidders on 7th September, 2016 in order to provide certain further information to them. The CFT was reissued with some amendments on 13th September, 2016. Bidders were also given the opportunity of seeking clarification and of raising queries in relation to aspects of the procurement process and the contract during the tender period. Tenders were received from each of the five shortlisted bidders by the deadline. The applicant, Turas and Emovis were among the entities which submitted tenders.

Evaluation of Tenders

61. In order to evaluate the tenders, the Authority formed an Evaluation Committee and an Evaluation Team. The Evaluation Committee comprised of Cathal Masterson, Rachel Cahill and Colm Lynch. Mr. Masterson who swore the affidavits in these proceedings on behalf of the Authority is its Head of Tolling. Ms. Cahill is a senior manager within the Authority. Mr. Lynch is an employee of Arup which has provided tolling consultancy services to the Authority since 2012. The evidence establishes to my satisfaction that the members of the Evaluation Committee were all extremely experienced people and had extensive expertise in the evaluation of tenders. The Evaluation Committee was supported and assisted by an Evaluation Team which included persons from Arup and KPMG. The Evaluation Team's responsibilities included reviewing the tender submissions, preparing feedback for the Evaluation Committee and attending at Evaluation Committee workshops, as necessary, to discuss with the Evaluation Committee feedback and observations provided and to contribute to discussions relating to the scoring of the tenders.

62. On opening the tenders, KPMG ensured that price information was excluded from the documents distributed to the Evaluation Committee and to the Evaluation Team as quality and pricing elements of the tender evaluation were required to be kept separate throughout the evaluation process. Therefore, pricing and payment information was not to be submitted to the Evaluation Committee until after the quality scores had been finalised. While there was some suggestion in the course of the exchange of affidavits that this requirement for separation may have been breached, that was not part of the pleaded case made by the applicant. There was, in any event, no evidence that the required separation between quality and price was breached.

63. Mr. Masterson's first affidavit (sworn on 8th May, 2017) contains a detailed account of the evaluation process undertaken by the Evaluation Committee on behalf of the Authority, assisted by the Evaluation Team. While some criticism was made on behalf of the applicant of the failure by Mr. Masterson to give a detailed account of the evolution in the thinking of the Evaluation Team during the course of the evaluation process, I am not satisfied that those criticisms have any basis whatsoever. On the contrary, I accept that in his first affidavit Mr. Masterson was responding to the case being made by the applicant which at that stage was as set out in the statement of grounds and in the first affidavit sworn by Tracy Marks (on 24th March, 2017), on its behalf. It is certainly the case that when challenged (in Mr Mark's third affidavit, sworn on 1st November, 2017) on the timing of certain discussions and decisions by members of the Evaluation Committee in the evaluation process, following the applicant's consideration of the documents discovered by the Authority, a further level of detail was provided by Mr. Masterson (in his fourth affidavit, sworn on 17th November, 2017) to explain the evolution in the thinking of the Evaluation Committee during the course of the process. This was done in order to refute allegations of impropriety or inappropriate conduct on the part of the Evaluation Committee in the evaluation of the tender submitted by Turas. In the event, those criticisms were largely based on an erroneous understanding on the part of the applicant as to the date and circumstances on which the Evaluation Committee ultimately decided to award a score of 9 marks to Turas in respect of Criteria B of the operations plan - delivery plan. I will address later in the judgment the evolution in the thinking of the Evaluation Committee in its assessment of this aspect of Turas's tender as recorded in the contemporaneous documents and as addressed in the affidavit evidence. Where necessary, I set out in that context my findings of fact based on my review of the documents and evidence. I stress that I have done so in circumstances where none of the deponents were subject to cross-examination.

64. Following receipt of the tenders on 19th October, 2016 the Evaluation Committee spent approximately seven weeks reading and reviewing the delivery plans submitted by the bidders and the OBMs and financial memoranda which had been redacted so as to

remove pricing information and which contained information relevant to the question of resources dealt with in the delivery plans. Over this period following receipt of the tenders, the Evaluation Committee organised a number of workshops to examine the resourcing set out within the delivery plans. There then followed three rounds of quality workshops held by the Evaluation Committee. The initial round of quality workshops took place over five days between 12th and 20th December, 2016. One full day was assigned to consider each tender submitted by the five bidders. Following this initial round of quality workshops, tender clarification requests were issued to the bidders and responses were received to those requests.

65. A second round of quality workshops was then held over three days between 17th and 19th January, 2017. At these quality workshops, the Evaluation Committee continued their discussions and deliberations on the delivery plans. After the second round of such workshops, the Evaluation Committee had provisionally agreed any potential concerns with the delivery plans but had not allocated quality scores to those plans.

66. The Evaluation Committee then organised a final round of quality workshops in order to decide on the quality scoring for each of the delivery plans in accordance with the evaluation methodology set out in the tender documentation. The final round of quality workshops was held over three days on 30th and 31st January, 2017 and on 8th February, 2017.

67. It was only in the course of the final round of quality workshops that the Evaluation Committee decided on and allocated scores to the delivery plans furnished by the bidders as part of these quality submissions.

68. In respect of the delivery plan - operations plan, the Evaluation Committee awarded the applicant and Turas a score of 8 out of 10 in respect of Criteria A. In respect of Criteria B, the Committee awarded the applicant score of 10. It awarded Turas a score of 9. The applicant maintains that the Authority ought not to have awarded a score of 9 and ought to have awarded no more than an 8 in respect of Turas's delivery plan – operations plan Criteria B. As we will see, the applicant claims that had Turas been awarded a mark of 8 instead of 9, its tender would not have been identified as the most economically advantageous tender but rather the applicant would have had the highest combined quality and price score and would have been identified as the most economically advantageous tender.

69. In his first affidavit on behalf of the Authority, Mr. Masterson stated that each Evaluation Committee member had to exercise his or her own judgement in evaluating the delivery plans and in considering the consequences and materiality of any potential concerns identified and had to do so independently and in a fair and consistent manner. He noted that members of the Evaluation Committee were fully engaged in "ground work" before they could commence actually scoring the delivery plans, for about twelve weeks, from the submission of the tenders to the final round of quality workshops. He stated (and I accept his evidence in its entirety) that members of the Evaluation Committee were continually developing their understanding of each of the delivery plans and were seeking to identify any potential concerns in respect of each delivery plan in accordance with the evaluation criteria. He further stated that when it came to scoring, the Evaluation Committee evaluated the delivery plans on the basis of the two criteria, Criteria A and Criteria B, in accordance with the requirements of the contract and that the scoring was based on "concerns" with the delivery plans as required by the evaluation criteria. The Evaluation Committee was seeking to identify any potential concerns with regard to the evaluation criteria and was not engaged in the exercise of seeking to identify which plan was best or better than another plan. This is an area of dispute between the parties. The applicant contended that when it came to deciding as between a score of 9 and a score of 10 in the top band of marks, it was open to the Evaluation Committee to judge one plan as being better than another or better suited to the requirements of the Authority. The Authority maintained that it was not entitled to adopt that approach and was confined, by virtue of the evaluation criteria, to marking on the basis of any concerns with regard to deliverability and resourcing. I draw attention to that dispute at this point and will set out the reasons why I am satisfied that the Authority's position is correct later in my judgment.

70. Mr. Masterson also stated in his first affidavit that by the time it came to the scoring of the delivery plans during the final round of quality workshops, which commenced at the end of January 2017, the members of the Evaluation Committee had developed a comprehensive view and understanding of each of the bidder's delivery plans and an agreement on any concerns with respect to each of those plans measured against the evaluation criteria but that the Committee had not finally determined or agreed on the level or scale of the identified concerns or the actual scores to be allocated. I will deal with the evolution in the thinking of the Evaluation Committee as it was recorded in contemporaneous documents later in my judgment.

The Outcome of the Procurement Competition

71. Once the tenders of each of the five bidders had been scored on quality and on price, the quality and price scores were then combined. Turas received a quality score of 555 and a price score of 247 giving a total of 802. The applicant received a quality score of 570 and a price score of 226 giving a total of 796. Turas was ranked in first place and the applicant in second place. The Evaluation Committee recommended to the Project Board of the Authority that the Authority should award the contract to Turas. The Project Board agreed and the Evaluation Committee made a recommendation to the Chief Executive of the Authority to award the contract to Turas. The Chief Executive decided that the contract should be awarded to Turas on 27th February, 2017. The Board of the Authority was informed of that decision for noting on 28th February, 2017. Following approval of the recommendation by the Chief Executive and noting by the Authority's Board, certain further actions were taken. Turas was informed in writing that it was the preferred bidder. At the same time, letters were sent to the unsuccessful bidders informing them of the outcome of the process and providing them with certain further information. Those letters were sent on 28th February, 2017. The standstill period of fourteen days then commenced. Unsuccessful bidders were also afforded the opportunity of meeting with the Authority for a debriefing session. It was anticipated that steps would be taken to finalise and conclude the contract with Turas. However, owing to the commencement of proceedings by Emovis and these proceedings, the contract has not been concluded.

CORRESPONDENCE SUBSEQUENT TO DECISION TO AWARD CONTRACT TO TURAS

72. The Authority wrote to the applicant on 28th February, 2017. This letter has been variously described by the parties as the "standstill letter" and the "rejection letter". I will refer to it as the "28th February letter". The terms and contents of that letter featured prominently in the case and considerable reliance was placed by the applicant on aspects of the letter in support of its claim. It is necessary, therefore, to refer to the 28th February letter and to the subsequent correspondence in some detail.

73. The letter informed the applicant that it had been unsuccessful in the tender competition and that the successful tenderer was Turas. It recorded that the applicant's submission had been assessed against the criteria listed in the CFT and set out the scores awarded both to Turas and to the applicant in tabular form. It noted that the applicant's score (796) resulted in its submission being ranked as the second placed tenderer in the competition (behind Turas which had scored 802). The letter referred to Appendix A which was attached and which provided details of the evaluation of the applicant's submission against each criterion in the tender evaluation criteria. The Appendix set out the applicant's score and a comparison to that of the winning submission. The letter then stated as followed:-

> *"As set out in the Call for Tender document, the score allocated to each delivery plan was based on the level of concern which the Authority had with regard to the relevant Plan, having regard to the criterion under assessment. Therefore, the feedback in the attached Appendix focuses on the concerns associated with your submission. However, mindful of the effort made in submitting your tender, the Authority has also included in the Appendix some general commentary on the strengths of the Delivery Plans."*

The letter further stated that the Authority was available to discuss the written feedback contained in the letter either in person or by telephone. It stated that the mandatory standstill period would begin on 1st March, 2017 and would end on 14th March, 2017 and that the Authority intended to sign a contract with Turas by 31st March, 2017. For reasons already explained, that did not occur.

74. Appendix A to the 28th February letter then set out with respect to each of the three delivery plans (the mobilisation and transition plan, the systems plan and the operations plan), and in respect of each of Turas and the applicant, the criteria in respect of each plan (Criteria A and Criteria B), the scores given in respect of each criteria for each plan and the reasons set out by the Evaluation Committee for the scores awarded. This case is concerned with the score awarded to Turas in respect of its delivery plan – operations plan, Criteria B (referred to by way of shorthand in this judgment where appropriate as "Criteria B"). It will be recalled that that criterion was described in the CFT (and in the ITPD) as "*sufficiency of the proposed resources to ensure consistent delivery of all aspects of the plan*" and that Turas received a score of 9 marks out of 10 for this criterion. The reason given in the letter for the award of 9 marks in respect of this criterion merits full quotation having regard to the significance which all parties have attached to the rationale given by the Evaluation Committee. The letter stated with respect to Criteria B of Turas's delivery plan-operations plan:-

> *"Bidder 3 [i.e. Turas] have proposed a number of headcount reductions at the start of the operations and during the term of the contract based on the roll-out of a number of process improvement and technology related initiatives. Specifically, the following resources are proposed:-*
>
> > *(1) From Operational Commencement Date an organisation with approximately 162 Full-Time Equivalents (FTEs) averaged over the first year of operation as against an overall level of resource for the current operation of 187 FTEs (from June 2016) is proposed;*
> >
> > *(2) From Year 1 (i.e. 2018) to Year 10 (i.e. 2028) an organisation with approximately 162 FTEs declines to 136 FTEs, with reductions largely in the Customer Service category; and*
> >
> > *(3) There is an increase of 109 FTEs for the multi-point tolling scenario.*
>
> *The Evaluation Committee considers that the reduction in head count is credible. However, while there was a significant level of detail on 'the assumptions underpinning any anticipated changes', there was less detail on 'how such resources relate to the volume of activity' (as per s. 4 contents of the Operations Plan). The Evaluation Committee awarded a score of 9 marks out of 10 for this criterion, as the Evaluation Committee did not consider the issues to be sufficiently serious to constitute a minor concern (i.e. such as to merit the score of 7 or 8 marks) or to be unequivocally of no concern whatsoever (i.e. such as to merit a score of 10 marks) and therefore awarded a score of 9 marks to appropriately reflect the degree of concern felt by the committee."*

75. By way of comparison, Turas received a score of 8 marks in respect of its delivery plan – operations plan, Criteria A on the basis that the Committee considered that there were "*a number of minor weaknesses in the Plan stemming from a lack of detail for certain aspects of the services …*" which it regarded as giving rise to "*minor concerns*". By way of further comparison, the applicant received a score of 10 in respect of Criteria B as the Committee had "*no concerns regarding the sufficiency of the proposed resources to ensure consistent delivery of all aspects of this System plan (sic) and awarded a score of 10 marks out of 10*".

76. The applicant responded to the 28th February letter in a letter dated 3rd March, 2017 (the "3rd March letter") which was signed by Whitt Hall, its Senior Vice President. Understandably, the letter expressed the applicant's great disappointment that it had not been successful in the procurement competition. Despite this, the applicant expressed its "*sincere appreciation*" for the transparency which the Authority had provided throughout the entire tender process including in the 28th February letter. I would add that this is one of a number of occasions on which the applicant complimented the transparency of the tender process operated by the Authority. Both the Authority and Turas sought to rely on the fact that the applicant was complimentary of the transparency of the process as in some way undermining the applicant's entitlement to challenge the Authority's decision. However, that point was not advanced with any great enthusiasm and, in any event, it has no substance. The fact that the applicant may have complimented the process can in no way disentitle the applicant from challenging the result on legal grounds.

77. Returning to the 3rd March letter, the applicant asserted in that letter that it had a "significant concern" as to how Turas obtained its score (of 9 marks) in respect of Criteria B of the delivery plan – operations plan. Having referred to the quality scoring matrix and to the score of 9 marks achieved by Turas in respect of Criteria B, the letter observed that in the reasons given in the Appendix to the 28th February letter explaining the rationale for that score:-

> *" … some concerns surrounding the significant aspect of 'how resources related to the volume of activity' based on the level of detail Turas provided in its Plan are discussed at length, with the Evaluation Committee even concluding that it did feel a degree of concern".*

78. The 3rd March letter continued:-

> *"First, the Evaluation Committee states that Turas's Operations Plan, which reflects a significant and continuing decline in resources over a period of time while the volume of traffic and activity is continually increasing, provided 'less detail on how such resources relate to the volume of activity (as per section 4 contents of the Operations Plan)'. The concern arises to a significant enough level for the Evaluation Committee to discuss it further and described the concern as an 'issue' in the next sentence. Continuing its words, the Evaluation Committee concludes the discussion surrounding the concerning aspect by stating it 'awarded a score of 9 marks to appropriately reflect the degree of concern felt by the Committee'".*

79. The 3rd March letter asserted that these statements by the Evaluation Committee clearly reflected that it had determined that a "*degree of concern*" existed with an aspect of resource sufficiency in the Turas operations plan. The 3rd March letter expanded on this complaint and asserted that the Evaluation Committee had directly concluded that it felt a "*degree of concern*" rather than "*no*

concern" based on those points. The 3rd March letter went on to assert that the Evaluation Committee's stated "*degree of concern*" inherently exceeded the "*no concern*" standard required to achieve either 9 or 10 marks in respect of Criteria B and that, therefore, Turas should have been ineligible to receive either a score of 9 or a score of 10 in respect of this criterion. The applicant requested the Authority to re-evaluate whether the mark given to Turas was correctly given in light of the requirements to achieve a score of 8 or 9 in respect of Criteria B in the quality scoring matrix. The applicant requested the respondent to extend the mandatory standstill period.

80. The Authority responded by letter dated 8th March, 2017 (the "8th March letter"). In that letter, the Authority referred back to the 28th February letter and to the explanation given (in Appendix A to that letter) for awarding a mark of 9 in respect of Criteria B to Turas. Having done so, the letter then stated that "*given the choice between 9 or 10 marks set out in the applicable scoring guidance, the Evaluation Committee considered the appropriate score to reflect the degree of concern was 9 marks*".

81. The 8th March letter continued:-

> *"We do not accept that only a submission with no concern whatsoever could fall into the 9-10 scoring band. If that were the case, there would be no point in having a choice between 9 or 10 marks. We consider it was clear from the scoring guidance that the Evaluation Committee could differentiate between a mark of 9 or a mark of 10 in this band, having regard to the degree of concern identified. If bidders had a question about how the Authority would differentiate between a mark of 9 or 10 in this band, this could have been raised with the Authority at any point following the issue of the Invitation to Participate in dialogue".*

82. The 8th March letter then stated:-

> *"… the Authority has already clearly stated in its letter of 28th February, and does not dispute, that the Evaluation Committee felt some degree of concern in respect of this criterion on this Plan. As above, this was not considered to be sufficiently serious to constitute a minor concern with a score of 7 or 8 marks. …"*

The Authority rejected the request to re-evaluate the marks and refused to extend the mandatory standstill period.

83. The applicant's solicitors responded by letter dated 10th March, 2017 (the "10th March letter") repeating the applicant's criticism of the Authority's decision and asserting that in awarding Turas a score of 9, the Authority had acted in breach of the criteria set out in Appendix 2, Table 3 of the ITPD (and CFT). The 10th March letter asserted that in order for a score of 9 marks to be awarded in respect of Criteria B the Authority had to have "*no concerns*" with the bidder's submission regarding the sufficiency of the proposed resources to ensure consistent delivery of all aspects of the bidder's plan whether or not the Authority felt that a submission exceeded the maximum threshold advised to bidders for receiving a score of 7 or 8. The letter further asserted that if the Authority had wanted lawfully to award a score of 9 marks where there was some degree of concern, even if it was a lower degree of concern than a "*minor concern*", the Authority was required to state this expressly in the ITPD (and CFT) but did not do so. The letter further asserted that the reference to "*no concerns*" in Criteria B was "*clear and unambiguous*" and could not be interpreted to allow for a score of 9 marks where there was some concern or indeed any level of concern.

84. The applicant contended that no bidder could have considered the scoring matrix to be "*in any way unclear or ambiguous or meriting of any clarification in the process*" and that a score of 8 marks was available where any minor concerns existed even where they were "*very minor*" and that a score of 9 marks was available only where the threshold of there being "*no concerns whatsoever*" was reached. The applicant alleged that the Authority was in breach of its obligations of transparency and equal treatment in the manner in which it awarded the score of 9 to Turas in respect of Criteria B. It concluded that in awarding a score of 9 marks in the circumstances, the Authority had made an undisclosed and unlawful amendment to the relevant award criterion and evaluation methodology and a manifest error in the allocation of marks for that criterion. The applicant submitted that the Authority was required to adjust the score given to Turas in respect of the relevant criterion so as to award it a maximum of 8 marks rather than 9 marks and that that in turn would result in the applicant having the highest scoring tender. In those circumstances, it was contended that the Authority was required to appoint the applicant as the successful bidder. The applicant threatened proceedings under the European Communities (Public Authorities' Contracts) (Review Procedures) Regulations 2010 (S.I. No. 130 of 2010) (as amended by S.I. No. 192 of 2015) (the "Remedies Regulations") and sought an extension of the standstill period and confirmation that the Authority would not conclude the contract with Turas.

85. The Authority replied to that letter on the same day, stating that it did not intend to extend the standstill period which was to expire on 14th March, 2017 and would be concluding the contract with Turas by the end of March. The Authority rejected the allegations made by the applicant in relation to the conduct of the evaluation of tender and noted that a more detailed response would follow.

86. That detailed response came by way of a further letter dated 15th March, 2017 (the "15th March letter"). In that letter, the Authority reiterated what it had said in the 8th March letter, in the following terms:-

> *"… we do not accept that only a submission with no concerns whatsoever could fall into the 9-10 scoring band, such that, as you allege, '… a score of 9 was available where a threshold was reached of there being no concerns whatsoever'. As set out in our letter of 8th March, if that were the case, there would be no point in having a choice between 9 or 10 marks. We consider it was clear from the scoring guidance that the Evaluation Committee could differentiate between a mark of 9 or a mark of 10 in this band, having regard to the degree of concern identified. We do not agree with your assertions to the contrary."*

87. The 15th March letter rejected the contention that the scores were awarded on an undisclosed basis or that there had been any breach of the general principles of transparency and equal treatment, any amendment to the award criteria and evaluation methodology set out in the tender documents or any error in the allocation of marks, let alone a manifest or serious error.

DEBRIEFING SESSION

88. Representatives of the applicant participated in a debriefing session with the Authority by way of a conference call on 16th March, 2017. Reliance was placed by the Authority at the hearing on the fact that Mr. Marks, one of the participants in the call on behalf of the applicant, commented that the transparency throughout the competition was "*second to none*" and that it was nothing like the applicant had experienced in similar competitions in the US. Mr. Marks is also recorded (in a note of the call taken by the Authority, the accuracy of which is not disputed) as having stated that the applicant's issue with the outcome of the competition was "*purely a technical point relating to scoring*".

89. As I observed earlier, the fact that the applicant may have been complimentary, or indeed very complimentary, of the manner in which the competition was run by the Authority and in relation to the transparency of the procedures followed in the course of the competition does not in any way disentitle the applicant of making whatever valid legal points may be made in relation to the process. Equally, the fact that the applicant may have described the issue which he has with the process as being purely a technical point is irrelevant. If the point is a good one then the applicant is entitled to succeed, whether the point is a technical one or otherwise. Equally, if the point is a bad one then the applicant will fail.

THE PROCEEDINGS

General

90. Proceedings were ultimately issued by the applicant on 28th March, 2017 following further correspondence between legal representatives of the applicant and the Authority. The commencement of the proceedings gave rise to an automatic suspension on the conclusion of the contract pursuant to Regulation 8(2) of the Remedies Regulations (as amended). From the correspondence provided to me, it appears that the Authority considered applying to the High Court to lift the automatic suspension to enable it to conclude the contract. However, it ultimately did not make such an application, apparently as a result of certain undertakings as to damages given by Emovis in the context of the other proceedings brought by it in respect of the procurement competition.

91. The applicant's application was made on foot of an originating notice of motion, a statement of grounds and a grounding affidavit of Tracy Marks sworn on 24th March, 2017 together with the exhibits to that affidavit. The procedures governing the form of the proceedings are contained in O. 84A of the RSC. Mr. Marks swore further affidavits (in response to the affidavits sworn on behalf of the Authority and Turas) on 25th May, 2017 and 1st November, 2017. The Authority's statement of opposition was filed on 8th May, 2017 and was supported by an affidavit sworn by Cathal Masterson on the same date. Further affidavits were sworn by Mr. Masterson (in response to affidavits sworn by Mr. Marks on behalf of the applicant) on 20th June, 2017, 3rd July, 2017 and 17th November, 2017. Affidavits of discovery were sworn by Mr. Masterson on behalf of the Authority on 14th September, 2017 and 12th October, 2017. A statement of opposition was served on behalf of Turas on 15th May, 2017 which supported the position of the Authority. That statement of opposition was verified by an affidavit sworn by Andrew Smith on 15th May, 2017. Mr. Smith swore a further affidavit in support of the position being adopted by Turas on 26th June, 2017.

The Applicant's claims and contentions

92. The applicant sought various reliefs including orders pursuant to Regulation 9(1)(a) of the Remedies Regulations setting aside the Authority's decision to appoint Turas as the successful tenderer for the contract and varying the Authority's decision to appoint Turas and directing the Authority to appoint the applicant as the successful tenderer for the contract. The applicant further sought declaratory relief and other orders to the effect that the decision by the Authority to appoint Turas as the successful tenderer failed to comply with the requirements of public procurement law and, in particular, the requirements of the European Parliament and Council Directive 2004/18/EC of 31 March, 2004 on the Coordination of Procedures for the Award of Public Supply and Service Contracts (as amended) (the "Public Contracts Directive"), the European Communities (Award of Public Authorities' Contracts) Regulations 2006 (S.I. No. 329 of 2006) (as amended) (the "Public Contracts Regulations"), the Council Directive 39/665/EEC of 21 December, 1989 (as amended) (the "Remedies Directive"), the Remedies Regulations and certain general principles of EU law including the principles of equal treatment, non-discrimination, transparency, competition, proportionality and objectivity (the "general principles"). The applicant sought a declaration that the Authority's decision to award Turas a score of 9 marks and/or more than 8 marks in respect of its delivery plan – operations plan, Criteria B as set out in the ITPD and the CFT breached those requirements and the general principles and/or breached a collateral contract between the applicant and the Authority under which the Authority was to apply the rules of the procurement process in a fair and equal manner, in accordance with its terms and with law and, specifically, with the requirements of procurement law, the ITPD, the CFT and the general principles. Various other reliefs were sought including an order pursuant to Regulation 9(1)(a) and/or 9(5) of the Remedies Regulations setting aside and/or permanently suspending the Authority's decision to appoint Turas as the successful tenderer.

93. While damages were originally sought by the applicant, it was confirmed at the commencement of the hearing that having regard to the fact that the Authority has not proceeded to award the contract to Turas, the question of damages did not arise. It was further indicated at the hearing that while the applicant had sought an order directing the Authority to appoint it as the successful tenderer, I could leave over the question of the appropriate remedies to be granted until after I made my findings and set out my conclusions in respect of the grounds of challenge advanced by the applicant. Depending on those conclusions, the question of the appropriate remedies could then be addressed by the parties.

94. The applicant alleged that the Authority failed to comply with the Public Contracts Directive, the Public Contracts Regulations, the general principles and the alleged collateral contract in a number of respects. First, it was alleged that the Authority failed to comply with the general principles, in particular, the principles of non-discrimination, transparency, equal treatment and proportionality by awarding Turas a score of 9 marks and/or more than 8 marks in respect of Criteria B in circumstances where it was alleged that the Evaluation Committee had some concerns regarding the sufficiency of the proposed resources to ensure consistent delivery of all aspects of Turas's plan. Second, it was alleged that the Authority misdirected itself in law and made a manifest error in the manner in which it evaluated tenders by awarding Turas a score of 9 marks and/or more than 8 marks in respect of Criteria B, in circumstances where it had some concerns with Turas's submission regarding sufficiency of the proposed resources to ensure consistent delivery of all aspects of its plan. It contended that the Authority ought, therefore, to have ruled out the possibility of awarding Turas 9 or 10 marks and/or any more than 8 marks in respect of Criteria B. Third, it was contended that in awarding Turas a score of 9 marks and/or more than 8 marks in respect of Criteria B, the Authority failed to adhere to, departed from and amended the terms of the ITPD and/or CFT. Finally, it was argued that in awarding Turas a score of 9 marks and/or more than 8 marks in respect of Criteria B, the Authority applied an undisclosed criterion or an undisclosed scoring matrix to the evaluation of Turas's submission. As noted above, the applicant also alleged that the Authority acted in breach of the alleged collateral contract under which it is alleged the Authority was to apply the rules of the procurement process in a fair and equal manner, in accordance with its terms and in accordance with law and with the requirements of procurement law, in particular, by awarding Turas a score of 9 marks and/or more than 8 marks in respect of Criteria B.

95. The applicant did not challenge the evaluation methodology set out in the ITPD and the CFT and, in particular, in Table 3 of Appendix 2. Had the applicant sought to do so, I would have agreed with the submission made on behalf of the Authority and on behalf of Turas that such a challenge would be time barred as being outside the 30 day time limit under O. 84A Rule 4 RSC and Regulation 7 of the Remedies Regulations. However, the applicant did not seek to challenge the evaluation criteria but rather relied on the rationale given by the Evaluation Committee in the Appendix to the 28th February letter for its decision to award Turas a score of 9 marks in respect of Criteria B. The applicant's case was predicated on the basis that the Evaluation Criteria contained in the ITPD and the CFT were clear in their terms but it says they were not properly interpreted and applied by the Authority. The applicant argued that having regard to the rationale stated in the Appendix to the 28th February letter and, in particular, to the conclusion of the Evaluation Committee that the issues identified by the Committee were not "*sufficiently serious to constitute a minor concern*" or

to be "*unequivocally of no concern whatsoever*", the Evaluation Committee and, in turn, the Authority could not lawfully have awarded Turas a score of 9 marks in respect of Criteria B. In order for the Authority to have awarded a score of 9 to Turas in respect of Criteria B, the applicant submitted that the Authority must have had "*no concerns*".

96. The applicant further submitted that in light of the rationale given by the Evaluation Committee for the score which it gave to Turas in respect of Criteria B, the Authority (a) did not, as a matter of fact, and (b) could not lawfully have had "*no concerns*" in respect of the sufficiency of the proposed resources to ensure consistent delivery in all aspect of the plan (i.e. Criteria B). The applicant advanced this submission in light of what it contended was the proper interpretation to be given to the evaluation criteria contained in Appendix 2 to the ITPD and the CFT. In contending that the Authority did not in fact have "*no concerns*" in respect of the sufficiency of the proposed resources to be allocated by Turas for the purpose of Criteria B, the applicant sought to challenge both the pleas contained in the Authority's statement of opposition and the evidence adduced by the Authority in relation to its conclusions on the application of the evaluation criteria in respect of Criteria B of Turas's submission. The applicant maintained that not only did the Authority not plead in its statement of opposition that it had "no concerns" for the purpose of Criteria B but it did not in fact have "*no concerns*" with respect to those criteria. In this regard, the applicant relied on what was said by the Authority in the 28th February letter and in the subsequent 10th March letter. The applicant maintained that the evidence adduced on behalf of the Authority in the form of the affidavit sworn by Mr. Masterson did not go so far as to say that the Authority had "*no concerns*" with respect to Criteria B in Turas's submission.

97. The applicant contended, therefore, that the Authority could not lawfully have awarded a mark of 9 to Turas in respect of Criteria B and could only lawfully have awarded a mark of 8 or lower. It submitted that the affidavits sworn on behalf of the Authority in defence of the claim sought, in effect, to "retro-fit" the terms of the rationale set out in the Appendix to the letter of 28th February so as to downgrade or downplay the concerns felt by the Evaluation Committee in respect of Criteria B of Turas's submissions. Strenuous objection was taken on behalf of the Authority to this suggestion on the grounds that not only was it not pleaded by the applicant and, therefore, outside the scope of the case properly before the court but it was also contradicted by the affidavit evidence of Mr. Masterson in respect of which no cross examination had occurred. In its affidavit evidence and in written and oral submissions on its behalf, the applicant maintained that in order for a score of 9 or 10 marks to be awarded in respect of Criteria B under the evaluation methodology set out in Table 3 in Appendix 2 to the CFT (and ITPD), properly interpreted in accordance with the correct legal test, the Authority had to have "*no concerns*" with respect to those criteria. It submitted that in light of the rationale for the mark given by the Evaluation Committee in respect of Criteria B, the Authority could not lawfully have given a mark of 9. A key document for the applicant is, therefore, the 28th February letter and the rationale given by the Evaluation Committee for awarding a score of 9 marks in respect of Criteria B.

98. In response to the Authority's contention that as a matter of law the evaluation methodology would have allowed the Authority, once it was satisfied that it did not have "*minor concerns*" in relation to Criteria B which would have merited a score of 7 or 8 marks, to have awarded a score of 9 or 10 marks (depending on the gradation or degree of issue or concern (falling short of a "*minor concern*") with respect to Criteria B), the applicant contended that it was only where "*no concerns*" existed in respect of those criteria that a score of 9 or 10 marks could be awarded.

99. In response to another point raised by the Authority as to how it could decide as between a mark of 9 or 10 in a situation where the Authority had "*no concerns*" in respect of Criteria B, the applicant contended as follows. It accepted that it was open to the Authority to give a mark of 9 within this band as opposed to 10 in respect of a submission about which the Authority had "*no concerns*" where the Authority regarded that bid as being superior or better than or better suited to the job than another bid about which it also had "*no concerns*". The applicant argued that it was only on this basis that 9 marks could be awarded to one bid in respect of which the Authority had "no concerns" in respect of Criteria B and 10 marks could be awarded to the other. In response to this, the Authority contended that such an approach would involve the application of criteria which had not been notified in advance to the bidders, would be inconsistent with the evaluation methodology communicated to them in the tender documentation and would be a breach of the rules of the competition and, therefore, a breach (*inter alia*) of the general principle of transparency. The Authority submitted that the only way to distinguish between two bids in the top band of marks (i.e. where it had "*no concerns*" in respect of Criteria B) was on the basis of the degree or gradation of concerns or issues which it had in relation to Criteria B where such issue or concern did not amount to a "*minor concern*". This approach was caustically described by the applicant as a "*legerdemain*" or sleight of hand. As I explain later in this judgment, I prefer the Authority's position on this issue.

100. The applicant further sought to call in aid in support of its claims in the proceedings, the fact that the procurement process operated by the Authority was a "*solemn exercise*" which had to be operated in a manner which ensured that full effect was given to the requirements of procurement law and to the general principles such as transparency and equal treatment. The applicant did not expressly seek any relief on the grounds of an alleged failure to comply with the required solemnity of the process (and again I accept the submission advanced by the Authority and by Turas that no such case was pleaded in the statement of grounds as would undoubtedly have been necessary were such a ground to have been advanced in support of the relief sought). However, the applicant sought to rely on the solemnity of the exercise in order to engage in a detailed analysis of the documentation produced by the Evaluation Committee in the course of the evolution of its thinking as to the marking to be given in respect of Criteria B of Turas's submission with a view to criticising the procedure followed by the Authority. While it is important to understand fully how the Evaluation Committee's thinking evolved in the course of the process leading up to the score which it ultimately awarded to Turas in respect of Criteria B and the reasons for its conclusions in that regard, not least because of the critically important principle of transparency, I think it is fair to say that much of the force of the applicant's contentions on this point was ultimately diminished when it became clear that the applicant had proceeded on a mistaken belief as to the date on which a particular document (Document 7) was produced. That said, while ultimately not being relied on by the applicant in support of any ground for relief, it is necessary for me to examine and consider how the process was conducted by the Authority in order fully to examine and understand the conclusions reached by the Evaluation Committee and, ultimately, the Authority in relation to the contested mark.

The Authority's response (supported by Turas)

101. I have mentioned in the previous part of the judgment some of the responses put forward by the Authority in response to the applicant's various contentions. The Authority's fundamental position was that it had properly interpreted the evaluation methodology, in accordance with the correct legal test and that the correct application of that methodology (as properly interpreted) allowed and indeed compelled the Evaluation Committee to award a mark in the top band of 9-10 in respect of Criteria B for Turas's submission.

102. The Authority's case was that it was clear to all bidders in advance of and throughout the process that submissions would be scored by reference to "*concerns*", the submissions were so scored, the Evaluation Committee did not have "*minor concerns*" with respect to Criteria B of Turas's submissions, the Evaluation Committee had "*no concerns*" with respect to Criteria B but did have issues or concerns in respect of the level of detail provided in Turas's submission with regard to how Turas's resources related to the volume of activity to be carried out by it under the contract.

103. The Authority submitted that it had pleaded in the statement of opposition and explained in the affidavit evidence that it did not have "*minor concerns*" and that it had "no concerns" with respect to Criteria B of Turas's submission and that its evidence had not been contradicted or contested by cross-examination. The Authority went further by submitting that even if it had "*concerns*" which fell short of "*minor concerns*" (which it said that it did not), it could still lawfully have awarded a mark of 9 and could not lawfully have awarded a mark of 8 or less. While not necessary for the primary case which it made, the Authority did submit that in a situation where it was satisfied where it did not have "*minor concerns*" with respect to the relevant criteria, it was open to it to decide as between a 9 and 10 on the basis of the degree of concern or issue about an aspect of the relevant criteria, such as a level of detail. It submitted that it was not entitled to decide as between two bids in respect of which it had "no concerns" with respect to Criteria B by considering which bid it felt was better than the other or better suited to the requirements of the contract or superior in some way to the other. It contended that such would be a breach of the evaluation criteria as bidders would not have been aware that this was the approach which would be taken by the Authority in such circumstances.

104. The Authority's fundamental position, in which it was supported by Turas, was that the interpretation which it had given to the evaluation criteria was correct and in compliance with the required legal test in that it was what the reasonably well informed and normally diligent tenderer would have understood by the evaluation criteria set out in the quality scoring matrix in Table 3, in Appendix 2 of the CFT (and ITPD). It further contended that it properly applied that interpretation in scoring Turas and operations plan (and other plans).

THE ESSENTIAL ISSUE AND HOW TO APPROACH IT

105. This brief summary of the respective positions of the parties shows that what is really between the parties is a dispute as to the correct interpretation of the quality scoring matrix in Table 3 of Appendix 2 to the CFT (with identical wording being used in the ITPD). While it might be said that the issue is a net one of interpretation, that somewhat understates the complexity of the point. In approaching that issue of interpretation, it is necessary to consider what the Authority and, in particular, the Evaluation Committee did in reaching its decision to award a mark of 9 in respect of Criteria B in Turas's submission. It is then necessary to consider whether in approaching the scoring in the manner that it did, the Evaluation Committee acted in accordance with the evaluation methodology contained in Table 3. This in turn depends on the correct interpretation to be given to the quality scoring matrix.

106. There is no dispute between the parties that if the Evaluation Committee did not correctly interpret the evaluation methodology and did not apply that methodology as correctly interpreted, the Authority would have breached one or more of the general principles, including, the principles of transparency, equal treatment and non-discrimination. It is, therefore, necessary to examine in a little detail the process followed by the Evaluation Committee in reaching its conclusion as to the mark to be awarded to Turas in respect of Criteria B and then to consider whether, in accordance with the proper legal test, the Evaluation Committee correctly interpreted the evaluation methodology contained in Table 3. As part of this consideration, it will be necessary to address the contention advanced by the applicant that in making the case that the Authority had "*no concerns*" as to the sufficiency of the proposed resources to be applied by Turas to ensure consistent delivery of all aspects of the relevant delivery plan, the Authority was seeking to make a case which it had not pleaded, was not stated on its behalf in the evidence and was inconsistent with the reasons given in the 28th February letter and in subsequent correspondence prior to the commencement of the proceedings.

107. Having briefly stated what the case is about and what will be necessary for me to consider further, it is important also to note what the case is not about. First, the applicant does not maintain that the Authority erred in its evaluation of Turas's tender in respect of Criteria B such that on its merits the Authority ought to have awarded Turas 8 marks rather than 9 in respect of Criteria B. Rather it is contended that had the Authority correctly interpreted the quality scoring matrix in Table 3, it would not have awarded a mark of 9 and would have awarded no more than an 8.

108. Second, it is not contended by the applicant that the Authority acted unreasonably or irrationally (in the *O'Keeffe v. An Bord Pleanála* [1993] 1 IR 39 sense) or that the Authority committed a manifest error as such in the assessment of Turas's submission (although this was pleaded and although the applicant has clearly made the case that the Authority erred in its construction and application of the quality scoring matrix in Table 3).

109. Third, the applicant does not challenge the evaluation criteria contained in Table 3. On the contrary, it contends that those criteria were very clear but were misinterpreted and misapplied by the Authority.

110. Fourth, the applicant does not challenge the adequacy of the reasons given by the Authority for its decision to award a 9 in respect of Criteria B in Turas's submission. Rather, it accepts that the reasons were adequate but did not support the awarding of a score of 9. This is not, therefore, a reasons case.

111. Fifth, although pleaded by the Authority and by Turas, it is no longer disputed that the applicant is an "*eligible person*" to maintain its challenge to the Authority's decision within the meaning of Regulation 4 of the Remedies Regulations. I have no doubt that the applicant is an "*eligible person*" within the correct meaning of that term. It had an interest in obtaining the contract and alleged that it had been harmed by an alleged infringement of European public procurement law.

112. Sixth, although relevant to a consideration and assessment of the process actually followed by the Evaluation Committee, no relief is sought and no grounds are advanced for impugning the process as failing to maintain or apply the required degree of solemnity of process discussed in some of the authorities.

ANALYSIS OF THE ISSUES

General

113. I now turn to consider the question of the interpretation of the quality scoring matrix in Table 3 and the various aspects that must be considered in that context. The essential issue here is whether by concluding that the issues which it had with regard to the level of detail provided by Turas in respect of how its resources related to the volume of activity, which it did not consider to be "*sufficiently serious to constitute a minor concern*" or to be "*unequivocally of no concern whatsoever*", the Evaluation Committee was entitled to award a score of 9 marks "*to appropriately reflect the degree of concern*" felt by it. Was the Evaluation Committee precluded from awarding a mark in the top band where it was required to have "*no concerns with the bidder's submission regarding the sufficiency of the proposed resources to ensure consistent delivery of all aspects of the bidder's plan*" in circumstances where it had an issue or issues or concern with regard to the level of detail on an aspect of the plan which did not amount to a "*minor concern*", and was not "*unequivocally of no concern whatsoever*" and where the score was given to reflect appropriately the "*degree of concern*" felt by the Evaluation Committee?

114. The Authority has maintained that it had "*no concerns*" regarding the "*sufficiency of the proposed resources to ensure consistent delivery of all aspects of the [Turas] plan*" and that it did not have "*minor concerns*" with that aspect of Turas's

submission. However, since it was suggested by the applicant that the position adopted by the Authority at the hearing was not consistent with what actually occurred during the process and was not the case made by the Authority in its correspondence, in its pleadings and in its affidavit evidence, it is necessary to look first in a little detail at what was actually done by the Evaluation Committee in evaluating this aspect of Turas's submission. It is possible to discern what actually occurred before the Evaluation Committee from the affidavit evidence adduced by the Authority in the proceedings and from the documents discovered by the Authority.

Solemnity of the Process

115. In considering the affidavit evidence and discovered documents, I am, of course, conscious of the fact that the evaluation process conducted by public authorities such as the Authority is a solemn one in which it is critically important for proper documentary records to be kept. I endorse the observations of McCloskey J. of the High Court of Northern Ireland in *Resource (NI) v. Northern Ireland Courts and Tribunals Service* [2011] NIQB 121 where he stated:-

> *"… under the current statutory and jurisprudential regime, meetings of contract procurement evaluation panels are something considerably greater than merely formal events. They are solemn exercises of critical importance to economic operators and the public and must be designed, constructed and transacted in such a manner to ensure that full effect is given to the overarching procurement rules and principles. Where, in any given case, a disappointed bidder's legal challenge focuses on the activities and deliberations of an evaluation panel, the evidence bearing thereon will, inevitably, be carefully and objectively scrutinised by the court. Any failure by the court to scrutinise with particular care the contents of relevant individual and collective marking frames would be in dereliction of the judicial duty."*

116. The description of the evaluation exercise as being a "*solemn*" one has been endorsed in a number of decisions by the High Court of England and Wales such as *EnergySolutions EU Ltd. v. Nuclear Decommissioning Authority* [2016] EWHC 1988 (Fraser J.) and *Bristol Missing Link Ltd. v. Bristol City Council* [2015] EWHC 876 (Coulson J.) and by Baker J. in the High Court in *Somague Engenharia SA & Wills Bros. Ltd. v. Transport Infrastructure Ireland* [2016] IEHC 435 (at paras. 33-34) ("*Somague*").

117. While not seeking any relief in the proceedings in relation to any alleged failure to respect and maintain the solemnity of the evaluation process and while conceding that this an issue which may be more directly relevant in proceedings asserting a manifest error in the evaluation of tenders, the applicant did submit that the solemnity of the evaluation process was a "*factor*" which must "*come into play*" in considering what the Evaluation Committee did in this case.

118. I agree that when considering the evidence adduced on behalf of the Authority as to the evaluation process conducted by the Evaluation Committee, I must bear in mind the overarching requirement of solemnity in the process. However, I would not be prepared to impugn the decision of the Authority on the basis of an alleged failure to respect the required solemnity in circumstances where this was not a ground advanced by the applicant in its statement of grounds. In any event, I am satisfied that the affidavit evidence adduced by the Authority and the documentary evidence put before the court in respect of the evaluation process followed by the Evaluation Committee clearly establish that there was no failure by the Authority to respect the necessary solemnity of the process. In so far as any suggestion to the contrary was maintained by the applicant at the hearing, I do not accept that suggestion. Were such a contention properly put in issue in the case, I would unhesitatingly have rejected it.

Absence of Cross-Examination

119. In considering what the Evaluation Committee did in evaluating the tenders and, in particular, in evaluating Turas's submission with particular reference to the evaluation of Criteria B, I must first consider what the Authority said in evidence was done by the Evaluation Committee in carrying out the evaluation exercise and consider the documentary record put before the court by the Authority. While the applicant did seek in the course of its submissions to question the averments made by Mr. Masterson, a member of the Evaluation Committee, in the affidavits which he swore on behalf of the Authority, the applicant ultimately pulled back from actually questioning the credibility of those averments.

120. In my view, the applicant was not entitled to criticize or question the credibility of Mr. Masterson's evidence in circumstances where it was open to the applicant to seek to cross-examine Mr. Masterson on his evidence but it did not seek to do so. I cannot put it better than Hardiman J. did in his judgment in the Supreme Court in *Boliden Tara Mines Ltd. v. Frank Cosgrove and others* [2010] IESC 62 where he said (at pp. 17-18):-

> *"It cannot be too strongly emphasised that, where evidence is presented on affidavit, a party who wishes to contradict such evidence must serve a Notice of Intention to Cross-examine. In a case tried on affidavit, it is not otherwise possible to choose between two conflicting versions of facts which may have been deposed to. In a case where there is no contradictory evidence an attack on the evidence which is before the court must include cross-examination unless the contradicting party is prepared to rely wholly on a submission that the plaintiff has not made out its case, even taking the evidence it has produced at its height."*

121. To similar effect are the observations of Laffoy J. in the Supreme Court in *McNamee v. the Revenue Commissioners* [2016] IESC 33 (at paras. 41-43).

122. If the applicant wished to challenge the credibility of the averments made by Mr. Masterson as to what the Evaluation Committee did in the course of the evaluation process and as to the conclusions it reached, it should have sought to cross-examine Mr. Masterson. Having failed to do so, it is not open to the applicant to invite me to doubt or to reject aspects of Mr. Masterson's evidence. It is, of course, open to the applicant to make the case that even taking what Mr. Masterson has said at its height, the Authority was not entitled to award the mark which it did in respect of the relevant aspect of Turas's submission.

Consideration of the pleadings and affidavits

123. In order to understand the explanation given on affidavit by Mr. Masterson as to what the Evaluation Committee did in carrying out the evaluation process, and to understand its ultimate conclusions in relation to the disputed mark, it is necessary first to identify the relevant parts of the statement of opposition in which the Authority set out in summary form what its response to the applicant's case was. On the particular issue as to whether the Authority was entitled to award a mark of 9 in the "*no concerns*" band in respect of Criteria B of Turas's submission, the most significant plea in the statement of grounds was that contained at paragraph 13.16.

124. Having set out the reasons given by the Evaluation Committee for why a score of 9 was awarded in respect of Criteria B, the applicant pleaded (at para. 13.16) of the statement of grounds:-

> *"It is clear from the foregoing that the Respondent's Evaluation Committee had some concerns regarding the sufficiency of the proposed resources to ensure consistent delivery of all aspects of Turas's Plan. This is described in the Evaluation*

Committee's own words, specifically noting that there was a 'degree of concern' in their scoring decision for Turas. In the circumstances, and by reference to the express terms of the Quality Scoring Matrix, it was not open to the Respondent to award Turas a mark of 9 and/or more than eight marks in respect of Delivery Plan - Operations Plan, Criteria B, as a mark of 9 and/or more than 8 marks could only be awarded in circumstances where the Authority had 'no concerns' with the Bidder's submission regarding the sufficiency of the proposed resources to ensure consistent delivery of all aspects of the Bidder's plan."

125. In response to this plea which concerned the alleged failure by the Authority to comply with the general principles of EU law and, in particular, the principles of transparency, equal treatment, non-discrimination and proportionality, the Authority's statement of opposition contained a number of relevant pleas. At para. 6, the Authority pleaded that it did not have "*minor concerns*" about the sufficiency of resources in Turas's operations plan. Therefore, it contended, the only applicable band of marks in the quality scoring matrix in Table 3 was the 9-10 band. The Authority further pleaded in that paragraph that nothing in the 28th February letter (whether the use of the phase "*degree of concern*" in the letter or otherwise) was inconsistent with that position.

126. Later, at paras. 77 to 81 of the statement of opposition, the Authority's position was further expanded upon. Those paragraphs also indicated that the Authority would be relying in support of the pleas contained in them on the averments contained in Mr. Masterson's first affidavit. In those paragraphs, the Authority:-

(a) denied that the Evaluation Committee had "*some concerns*" regarding the sufficiency of the proposed resources to ensure consistent delivery of all aspects of Turas's operations plan;

(b) denied that it was clear from Appendix A to the letter of 28th February or otherwise that the Evaluation Committee had some concerns regarding the sufficiency of the proposed resources to ensure consistent delivery of all aspects of Turas's operations plan;

(c) denied that it was not open to the Authority in the circumstances and by reference to the express terms of the quality scoring matrix, to award Turas a mark of 9 or more than 8 marks in respect of Criteria B for the relevant plan;

(d) denied that the Authority had "*some concern*" about Turas's operations plan;

(e) denied that the Authority has "*some concerns*" or "*some concern*" regarding the sufficiency of the resources proposed by Turas to ensure consistent delivery of all aspects of its operations plan.

127. As the statement of opposition indicated that the Authority would be referring to Mr. Masterson's first affidavit in respect of the grounds on which it was defending the proceedings, it is necessary to turn to that affidavit and to the affidavits subsequently sworn by Mr. Masterson on behalf of the Authority.

128. In his first affidavit (sworn on 8th May, 2017), having explained the approach which the Evaluation Committee took in the evaluation process leading up to and during the final round of quality workshops on 30th and 31st January and 8th February, 2017 (to which I have referred earlier), having made the point that it was not until the final round of the quality workshops that the Evaluation Committee members began exercising their judgement in proposing, discussing, challenging and ultimately agreeing, on a consensus basis, on the award of a particular score for the relevant criteria, for each bidder and having referred to the ultimate conclusions reached by the Evaluation Committee in respect of Criteria B for Turas's submission, Mr. Masterson went on to state (at paras. 166 to 172 of his affidavit) that:-

(a) the members of the Evaluation Committee did not have "*even a minor concern*" in relation to the sufficiency of the resources proposed in Turas's operations plan in that they were "*confident that Turas did actually have sufficient resources to provide the required services set out in the Contract and in accordance with its Operations Plan*";

(b) the Evaluation Committee's confidence in relation to the sufficiency of resources in Turas's operations plan was grounded on a number of matters including that the Plan was "coherent and logical and the resources were clearly and consistently set out and committed to and supported by meaningful and credible assumptions in relation to a gradual evolution of the resources over reasonable periods of time";

(c) the Evaluation Committee was "*confident in the sufficiency of the resourcing proposed by Turas in its Operations Plan and, when agreeing the scores in the final Quality Workshop, there was no question that there was even a 'minor concern' with the Turas Operations Plan*" so that it would have been inappropriate and unlawful to have awarded a score in the 7-8 band and the only band of scoring available to the Committee was the 9-10 band;

(d) the only decision therefore for the Evaluation Committee was whether to award a score of 9 or 10 and the Committee ultimately decided that a score of 9 marks rather than 10 marks was fair for the reason explained by Mr. Masterson at paras. 169 to 172 of his first affidavit as follows:-

> *"This was because, in "joining the dots" in its Operations Plan as to why Turas had proposed the level of resources it had, Turas had not fully addressed in detail one "dot" – the Resources to Volume. As was noted in the [28th February letter], while 'there was a significant level of detail on 1the assumptions underpinning any anticipated changes' there was less detail on 'how such resources relate to the volume of activity'" (para. 169);*

(e) Turas's submission in respect of resourcing would have been "*completely cohesive*" if that "*dot*" had been "*fully addressed in detail*" but as Mr. Masterson explained, "*due to the lack in detail (which was considered almost immaterial in the context of the overall Turas's Operation Plan), 9 was felt to be the right mark*" (para. 170);

(f) the evaluation of Turas's operations plan involved assessing many different aspects including "*Resources to Volume*" (para. 171);

(g) in order to provide a clear explanation to Turas as to why it had received a score of 9 and not a 10 in accordance with the scoring methodology in the CFT, the letter of 28th February referred to the "*degree of concern felt about the issue*" as the reason for distinguishing between a score of 9 and 10 marks (para. 172);

(h) the explanation in the 28th February letter reflected the fact that scoring was conducted by reference to the "level

of concern" felt about a submission (para. 172).

129. Further relevant averments were contained in paras. 220 and 221 of Mr. Masterson's first affidavit. There, he reiterated that the Evaluation Committee was confident as to the sufficiency of the resources proposed by Turas, that it did not have "*minor concerns*" in relation to those proposed resources and that, therefore, the only appropriate band for scoring was the 9-10 band. He further reiterated that while the Evaluation Committee had considered awarding a mark of 10, it had a "*degree of concern*" as Turas had not fully addressed one "*dot*" in its submission on the operations plan in respect of Resources to Volume and, therefore, the Committee awarded a mark of 9. He stated that it would have been unlawful to award a score of no more than 8 as the Evaluation Committee had clearly stated that it did not have any "*minor concerns*" in relation to Criteria B. Mr. Masterson continued that having regard to the total marking range of 0-10 and having regard to the range of aspects identified in the Governance and Delivery Schedule to the contract (referred to earlier), it was "*entirely obvious that a degree of concern could arise in respect of one aspect of all of the requirements, in this case Resources to Volume, without that necessarily translating into "minor concerns" with the response as a whole*" (para. 221).

130. I can also dispose at this point of further criticism levied by the applicant in respect of the evidence adduced by the Authority. It was said on a number of occasions on behalf of the applicant in submissions that Mr. Masterson was only one of three members of the Evaluation Committee and only he had sworn affidavits in the proceedings. The point was made that no affidavits were sworn by the other two members of the Evaluation Committee. There is no substance to that submission. It was perfectly in order for Mr. Masterson to swear affidavits on behalf of the Authority and to set out in the course of those affidavits what the Evaluation Committee did in the course of the evaluation process. There was no requirement for affidavits to be sworn by the other two members of the Evaluation Committee, Ms. Cahill and Mr. Lynch, in circumstances where it was not suggested on behalf of the applicant that those other members would have said anything different to Mr. Masterson. It is also notable that the point was first made in oral submissions at the hearing and had not been mentioned in the affidavits or written submissions of the applicant or otherwise pre-figured in advance of the hearing. In any event, I do not regard the point as having any merit. I conclude that Mr. Masterson was entitled to swear the affidavits on behalf of the Authority in his capacity as a member of the Evaluation Committee and in doing so, he was entitled to give evidence as to the actions, deliberations and conclusions of the Evaluation Committee. It was not necessary for the Authority to provide affidavits from the other two members of the Evaluation Committee. Finally, in this context, I would observe that each of three members of the Evaluation Committee signed and approved the final Evaluation Committee template setting out the score given to Turas in respect of Criteria B and the reasons for that score on 27th February, 2017 (those reasons were subsequently reproduced in the Appendix A to the 28th February letter).

131. In his second affidavit (sworn on 20th June, 2017), Mr. Masterson further elaborated on the Evaluation Committee's approach and rationale for awarding a 9 in respect of Criteria B for Turas's plan. At para. 22 Mr. Masterson stated that the Evaluation Committee "*did not have 'a concern' with sufficiency of resources*". At para. 35, Mr. Masterson stated that the Authority was "*not concerned*" about Turas's "*resource levels*". At para. 37, he reiterated what was said in the Appendix to the 28th February letter, namely that the Evaluation Committee had "*no concerns with the level of resources being proposed by Turas*".

132. In his fourth affidavit (which Mr. Masterson swore on 17th November, 2017), having corrected the misunderstanding as to the sequence of events in relation to the preparation of one of the Evaluation Committee templates (Document 7) and having traced the evolution in the Evaluation Committee's process of evaluating Turas's operations plan in respect of Criteria B, Mr. Masterson made a number of averments confirming and clarifying the reasons the Evaluation Committee had for awarding a mark of 9 in respect of Criteria B.

133. At para. 69 of his fourth affidavit, Mr. Masterson stated that, having identified an issue of potential concern in respect of Criteria B, the Evaluation Committee agreed that that issue was not in fact a "*minor concern*" since the Committee "*had no concerns regarding the sufficiency of the Turas resources*" but it felt that "*more detail could have been provided on how the resources related to the volume of activity*".

134. At para. 86 of that affidavit Mr. Masterson stated that there were a number of areas of "*potential concern*" in respect of all tenders where some uncertainty remained coming into the final quality workshop. One of those was a potential concern identified with respect to Turas's delivery plan - operations plan, Criteria B. He stated that during the final quality workshop on 8th February, 2017, the Evaluation Committee discussed the point and following that discussion it was agreed that they had "*no concerns with the Bidder's submission regarding the sufficiency of the proposed resources to ensure consistent delivery of all aspects of the Bidder's Plan*". They then discussed and agreed that as between a mark of 9 and a mark of 10, a mark of 9 was a correct and fair score for Turas in respect of this aspect of the relevant plan. This is a clear and uncontroverted averment by Mr. Masterson on behalf of the Authority that the Evaluation Committee had "*no concerns*" in respect of Criteria B with regard to the relevant Turas plan. As noted earlier, Mr Masterson was not cross-examined on this averment.

Consideration of the Evaluation Committee Documents

135. Before summarising my findings of fact in relation to the conclusions reached by the Evaluation Committee, and having regard to the fact that some time was spent in the course of the hearing addressing the documents discovered by the Authority which evidenced the evolution in the evaluation process conducted by the Evaluation Committee in respect of the disputed aspect of Turas's submission, it is appropriate that I make some observations in relation to these documentats.

136. The documentation consists of the Evaluation Committee templates prepared by the Evaluation Committee prior to, during and subsequent to the final quality scoring workshop on 30th and 31st January and 8th February, 2017 in respect of the Committee's evaluation of Turas's delivery plan - operations plan, Criteria B . While 17 Evaluation Committee templates were referred to and exhibited by Mr. Masterson, not all are relevant and there is some repetition in them. I will deal only with the most relevant documents.

137. The first such document (Document 2) was dated 26th January, 2017. At that stage before they reached their ultimate conclusions in relation to the mark to be awarded to Turas in respect of Criteria B, the Committee highlighted "*two potential concerning areas*" in relation to the sufficiency of the resources proposed by Turas. Those two potential areas were then set out. Document 2 then stated that the Evaluation Committee considered that those issues represented a "*[no/minor] concern in terms of the sufficiency of resources set out in the Operations Plan …"* and that the plan was "*in all other aspects … considered by the Evaluation Committee to be sufficiently well resourced*".

138. The next document (Document 3) was dated 30th January, 2017. With respect to Criteria B and Turas's operations plan, the document noted that there were "*two/[three] potential concerning areas*" in relation to Turas's sufficiency of resources. Those three areas were then set out. The document then noted that the Evaluation Committee considered that those issues represented "*a [minor] concern*". Again the document stated that the plan was in "*all other aspects considered by the Evaluation Committee to be*

sufficiently well resourced".

139. The next relevant document (Document 6) was dated 7th February, 2017. Having specified the resources being proposed by Turas, the Committee recorded that "*we have a minor concern regarding the sufficiency of resources at operational commencement*" and that "*[w]hile the reduction in headcount is not unrealistic, it needs to be substantiated by relating it to the volume of activity in the various areas of the service …*".

140. Document 7 (dated 8th February, 2017) is next in sequence. This is the document which was thought by the applicant to have been prepared after the final quality workshop meeting on 8th February, 2017 and to contain the reasons for the score decided upon by the Evaluation Committee at that meeting. However, as noted earlier, it was confirmed by the Authority, and it is accepted by the applicant, that this document was prepared before the final quality workshop meeting took place on 8th February, 2017. It represented the input to the meeting and not the outcome of the discussions at it. Document 7, having set out the resources proposed by Turas and the proposed reduction in those resources, then stated as follows:-

> *"While the Evaluation Committee considers that the reduction in headcount is reasonably credible and not unrealistic, it has not been fully supported by sufficient detail on 'the assumptions underpinning any anticipated changes' and 'how such resources relate to the volume of activity' (as per section 4 contents of the Operations Plan), therefore the Evaluation Committee considers that there is a risk in this area which results in a minor concern regarding the sufficiency of resources particularly at operational commencement."*

Document 7 then stated:-

> *"The Evaluation Committee therefore awarded a score of eight marks out of ten for this Operations Plan."*

141. Document 7 is the first document in which it was indicated that the Evaluation Committee was considering awarding a score of 8 marks to reflect a "*minor concern*" which it had in relation to the sufficiency of resources proposed by Turas, particularly at operational commencement. However, as explained by Mr. Masterson in his fourth affidavit (at para.21), the mark for Turas in respect of Criteria B changed from 8 to 9 during the course of 8th February, 2017, the date of the final quality workshop. The score of 8 was included only once in the Evaluation Committee templates, namely, in

Document 7, which was prepared and circulated in advance of the final quality workshop on 8th February, 2017. Mr. Masterson explained (at para. 37 of his fourth affidavit) that Document 7 was circulated to assist an informed discussion with a view to enabling the Evaluation Committee to agree on and finalise the significance or materiality of the issues contained in the document and the related scores. Document 7 was described as a "*work in progress*" draft entering into the final day of the final quality workshop on 8th February, 2017. I have no hesitation in accepting that explanation which is entirely consistent with the sequence of events as it appears from the Evaluation Committee template documents.

142. Mr. Masterson explained in his first affidavit and again in his fourth affidavit that the Evaluation Committee's views not only in relation to Criteria B of Turas's plan but in relation to each criterion across all the delivery plans for all of the bidders continued to evolve during the evaluation period up to the point at which the quality scores were finalised and before the pricing scores became known to the Evaluation Committee (see, for example, para. 71 of Mr. Masterson's fourth affidavit). Mr. Masterson also explained (and I accept his evidence) that the members of the Evaluation Committee continued to challenge, moderate and calibrate the scores and documented their emerging and developing views using the Evaluation Committee templates during this period. He explained that the templates produced were not designed to provide "*a perfectly traceable document trail*" (para. 72 of Mr. Masterson's fourth affidavit) but rather to set out their evolving thoughts as they progressed through the evaluation process and to ensure that they were "*fully satisfied with the overall consistency and fairness of the scoring and fully satisfied that each quality score resulted from a thorough and objective analysis, and was consistent with the Evaluation Methodology*" (see para. 161 of Mr. Masterson's first affidavit and para. 72 of his fourth affidavit).

143. The evolution in the Evaluation Committee's views can be seen in the changes made in Document 8 (representing the output from the meeting on 8th February, 2017) which was prepared on 9th February, 2017 compared with Document 7. Document 8 stated with regard to Criteria B of Turas's plan, having referred to the headcount reductions proposed and the resources which were proposed, as follows:-

> *"The Evaluation Committee considers that the reduction in headcount is reasonably credible, however while there is a significant level of detail on 'the assumptions underpinning any anticipated changes' there is less detail on 'how such resources related to the volume of activity' (as per section 4 contents of the Operations Plan), therefore the Evaluation Committee awarded a score of nine marks out of ten for this Operations Plan, in terms of criteria B".*

144. A score of 9 marks was therefore awarded following the Evaluation Committee's discussions and deliberations on 8th February, 2017. That the Evaluation Committee had decided to award a mark of 9 rather than 8 in respect of Criteria B is also confirmed by the scoring table template prepared on 8th February, 2017 which was also provided in discovery by the Authority (albeit that that document was potentially confusing in that it referred at the top to the date as being 30th/31st January, 2017 and although attached to an email sent to Mr. Masterson by a staff member at 16:05 on 8th February, 2017, the email itself was not discovered as it was not apparently covered by the agreed discovery categories). In any event, it is clear from a comparison between Documents 7 and 8 and from the explanation contained in Mr. Masterson's fourth affidavit how the Evaluation Committee's views changed and evolved during the course of the final quality workshop on 8th February, 2017 culminating in the Committee's decision to award 9 marks out of 10 to Turas in respect of Criteria B for the relevant plan.

145. The score did not change in the subsequent documents. Some detail in the reasons for the score given as set out in the Evaluation Committee templates did change (see for example Document 12 dated 16th February, 2017). Some further changes can be seen in Document 16 (dated 24th February, 2017) and in the final Evaluation Committee template (Document 17) dated 27th February, 2017 which was the version approved and signed by the three members of the Evaluation Committee. While some detail in relation to the reasons given for the award of 9 marks did change between Document 8 and Document 17, the score awarded to Turas in respect of Criteria B did not change. It remained at 9 marks. The reasons contained in Appendix A to the February 28th letter were as set out in the final version of the Evaluation Committee template signed and approved by the members of the Evaluation Committee on 27th February, 2017.

146. The applicant sought to criticize the process adopted by the Evaluation Committee in carrying out its evaluation and spent some time going through the documents during the course of the hearing in order to criticize the Authority for not referring to or addressing the documents and the evolution in the views of the Evaluation Committee in Mr. Masterson's first affidavit. The applicant also sought

to suggest that in some way the Authority did not comply with or respect the necessary solemnity which should exist in a process such as this. I reject those criticisms for a number of reasons.

147. First, Mr. Masterson's first affidavit was sworn in response to the case then being made by the applicant which did not raise issues in relation to the evolution of the Evaluation Committee's views in the course of the process. The applicant sought to criticize the process in Mr. Marks's third affidavit on the basis of a misunderstanding in relation to the date of creation of Document 7. That issue having been clarified, it seems to me that no criticism could properly be made against the Authority in respect of the process adopted. Second, the applicant's statement of grounds did not include any plea criticising the process or in the alleged lack of solemnity in the process. Third, Mr. Masterson's affidavits and, in particular, his fourth affidavit, contained a detailed explanation for the evolution in the Evaluation Committee's views in the course of the process and an explanation as to why the Evaluation Committee decided that a mark of 8 would not be appropriate and that a mark of 9 was the appropriate score. Finally, a court should be reluctant to engage in a detailed analysis of how marks changed during the course of an evaluation process.

148. That very point was made recently by Hogan J. in the Court of Appeal in *Word Perfect Translation Services Ltd. v. the Minister for Public Expenditure and Reform (No. 3)* [2018] IECA 156 ("*Word Perfect*"). The judgment was given in that case after I reserved judgment in the present case, it was brought to my attention by agreement of the parties. In dismissing one of the grounds of appeal advanced by the appellant in that case concerning the manner in which marks for the two bidders involved altered during the course of the evaluation process, Hogan J. stated:-

> *"34. …, evaluators should have the freedom to explore, consider and reflect on the strengths and weaknesses of the various tenders. As I already have had occasion to remark elsewhere in this judgment, the task of the evaluators is already difficult enough. If they were required to explain possible changes in thinking between evaluation meetings prior to the final decision it would add new layers of complexity – not least in terms of discovery and oral evidence – to an already complex system of public procurement litigation.*
>
> *35. Such a requirement would, moreover, stifle the necessary freedom which evaluators must have to reflect on the respective merits of the bids. The evaluators must be prepared to stand or fall by a review of the final published evaluation for manifest error. But short of that they cannot be expected to have to defend what are, at best, tentative or provisional views expressed during the course of evaluation process. ..."*

I completely agree with and endorse those sentiments.

149. While the parties did address submissions in relation to the alteration in the mark given to Turas in respect of Criteria B and in relation to the manner in which that mark changed during the course of the evaluation process, the comments of Hogan J. in the Court of Appeal in *Word Perfect* clearly demonstrate that a court should be extremely cautious in embarking upon such a consideration and should be reluctant to do so. Having done so, however, in the present case, I am not persuaded that there was anything wrong at all with the process followed by the Evaluation Committee or any lacking in solemnity in the manner in which the process was conducted.

Findings and conclusions of fact on disputed evidence

150. My conclusions in relation to the relevant issues of fact concerning the views of the Evaluation Committee are as follows. First, the Evaluation Committee/Authority did not have any "*minor concern*" with Turas's submission regarding the sufficiency of the proposed resources to ensure consistent delivery of all aspects of its plan (i.e. Criteria B). Second, the Evaluation Committee/Authority had "*no concerns*" with Turas's submission regarding the sufficiency of those proposed resources (again for the purpose of Criteria B). Third, the Evaluation Committee/Authority did have an issue with regard to the level of detail provided by Turas on "*how [its] proposed resources relate to the volume of activity*" (as set out in s. 4 of the operations plan contained in the governance and delivery schedule to the contract (attached to the CFT)). Fourth, the Evaluation Committee/Authority did not consider that issue to be sufficiently serious to constitute a "*minor concern*" such as to merit a score of 7 or 8 marks. Fifth, the Evaluation Committee/Authority did not consider the issue to be "*unequivocally of no concern whatsoever*" such as to merit a score of 10 marks. Sixth, the Evaluation Committee/Authority awarded a score of 9 marks to "*appropriately reflect the degree of concern felt by the Committee*". Seventh, the Authority pleaded in its statement of opposition and adduced evidence on affidavit that it did not have any "*minor concern*", had "*no concerns*" and did not have "*a concern*" in relation to the sufficiency of the resources proposed by Turas to ensure consistent delivery of all aspects of the relevant plan (i.e. Criteria B). Eighth, there is nothing in the 28th February letter or in the letters of 8th March and 15th March which contradict the case made by the Authority that it had "*no concerns*" and no "*minor concern*" for the purposes of Criteria B. As I explain later in the judgment, the authorities make clear that the letters are not to be interpreted as if they were a contract or a piece of legislation. The reasons given for the mark awarded to Turas in respect of Criteria B for the relevant plan are clearly ascertainable from the underlying Evaluation Committee templates and from Appendix A to the 28th February letter. The subsequent letters of 8th March and 15th March must be read in that context. Even if those two letters are in any way inconsistent with the templates and with the Appendix to the 28th February letter, (by rejecting the contention that only a submission with no concerns whatsoever could fall into the 9-10 band), and I do not believe that, properly read in context, that they are, that does not detract from the fact that the case actually made by the Authority both in its pleadings and on affidavit is that it had "no concerns" regarding the sufficiency of the resources proposed by Turas for the purpose of Criteria B. That case is entirely consistent with the underlying template documents and with Appendix A to the 28th February letter.

151. Having addressed those factual issues, it is now necessary to consider the correct interpretation to be given to the relevant part of the CFT. The applicant is of course correct in stating that the evidence is not decisive and that it is ultimately a matter for the court to decide whether, based on the facts as found, the evaluation criteria correctly interpreted, entitled the Evaluation Committee to award a score of 9 marks or whether it was none the less obliged to award a mark of no more than 8 in respect of Criteria B of the relevant Turas Plan.

Interpretation

152. I turn to the issue of interpretation. I first consider the approach which a court is required to take in interpreting tender documents. Then, since they are highly relevant to the proper interpretation of tender documents, I address the relevance of the general principles of EU law and how they apply in the present case where the contract the subject of the procurement process is a contract falling under Annex IIB (of the Public Contracts Directive) or under Part B of Schedule 2 (of the Public Contracts Regulations). In light of the relevant legal principles and the submissions of the parties, I will then have to set out my conclusions on the correct interpretation of the tender documentation at issue in this case, in particular the quality scoring matrix in Table 3 of Appendix 2 to the CFT and my conclusions as to whether the decision of the Authority to award a score of 9 marks in respect of Criteria B of the relevant part of the Turas operations plan was in compliance with the correct interpretation of the tender documents.

Principles of interpretation
153. The principles applicable to the interpretation of tender documents are well settled in Irish and European law. In Ireland, they were comprehensively considered and applied by Finlay Geoghegan J. in the High Court in *Gaswise Ltd. v. Dublin City Council* [2014] IEHC 56; [2014] 3 I.R. 1 ("*Gaswise*"). Those principles were recently endorsed by the Court of Appeal in *Word Perfect* and were considered very recently by the High Court (McDonald J.) in *Sanofi Aventis Ireland Limited t/a Sanofi Pasteur v. Health Service Executive* (Unreported, High Court, Mc Donald J., 12th October 2018) ("*Sanofi*").

154. In Gaswise, Finlay Geoghegan J. drew together and neatly summarised the applicable principles of interpretation. In the case before her, Finlay Geoghegan J. was required to interpret an invitation to tender ("ITT") published by the contracting authority. She stated as follows:-

> *"16. The interpretation of the ITT is a matter for the court. That interpretation must be carried out in a manner which gives effect to the core principles of equal treatment and transparency in the legislative framework as amplified by the judgments, in particular of the CJEU. Article 2 of Directive 2004/18/EC of the European Parliament and Council of the 31st March, 2004, on the coordination of procedures for the award of public works, contracts, public supply contracts (O.J. L 134, 30.4.2004, p. 114) ("the Public Contracts Directive") provides:-*
>
> > *"Contracting authorities shall treat economic operators equally and non-discriminatorily and shall act in a transparent way."*
>
> *17. This has been transposed in this jurisdiction by reg. 17 of the [Public Contracts Regulations].*
>
> *18. The principle of equal treatment has been referred to as being "at the very heart of the public procurement directives" (Fabricom SA v. Belgium (Case C-21/03) [2005] E.C.R. I-1559, at para. 26). In Universale-Bau (Case C-470/99) [2002] E.C.R. I-11617, at p. 11690, the CJEU said of the relationship between the principle of equal treatment and the principle of transparency:-*
>
> > *'[91] The principle of equal treatment, which underlies the directives on procedures for the award of public contracts, implies an obligation of transparency in order to enable verification that it has been complied with …*
> >
> > *[93] It follows … that the procedure for awarding a public contract must comply, at every stage, particularly that of selecting the candidates in a restricted procedure, both with the principle of the equal treatment of the potential tenderers and the principle of transparency so as to afford all equality of opportunity in formulating the terms of their applications to take part and their tenders …'*
>
> *19. The application of the principles of equal treatment and transparency to the formulation of award criteria was specifically considered in SIAC Construction Ltd. v. Mayo County Council (Case C-19/00) [2001] E.C.R. I-7725, where, at pp. 7754 to 7755, the CJEU stated:-*
>
> > *'[41] Next, the principle of equal treatment implies an obligation of transparency in order to enable compliance with it to be verified …*
> >
> > *[42] More specifically, this means that the award criteria must be formulated, in the contract documents or the contract notice, in such a way as to allow all reasonably well-informed and normally diligent tenderers to interpret them in the same way.*
> >
> > *[43] This obligation of transparency also means that the adjudicating authority must interpret the award criteria in the same way throughout the entire procedure …'*
>
> *20. The requirement that award criteria be formulated in such a way "as to allow all reasonably well-informed and normally diligent tenderers to interpret them in the same way" continues to be the test applied by the CJEU. In Commission v. Netherlands (Case C-368/10) [2013] All E.R. (E.C.) 804, the CJEU repeated this requirement in similar terms and, in relation to an alleged infringement of article 2 of the Public Contracts Directive, at p. 854, stated:-*
>
> > *'[109] The principle of transparency implies that all the conditions and detailed rules of the award procedure must be drawn up in a clear, precise and unequivocal manner in the notice or contract documents so that, first, all reasonably informed tenderers exercising ordinary care can understand their exact significance and interpret them in the same way and, secondly, the contracting authority is able to ascertain whether the tenders submitted satisfy the criteria applying to the relevant contract …"*
>
> *21. Applying those principles to the interpretation of the ITT in these proceedings, the question for the court is whether the ITT should be interpreted as including, in a clear, precise and unequivocal manner, the requirement that all tenderers submit with their tender an RPS such that it enabled all reasonably well informed and normally diligent tenderers to interpret the ITT as including such a requirement."*

155. Finlay Geoghegan J. then quoted with approval a passage from the judgment of McCloskey J. in the High Court of Northern Ireland in *Clinton v. Department of Employment and Learning* [2012] NIQB 2 ("*Clinton*"), where he stated:-

> *"38. The SIAC test … exhorts the court to attempt, so far as reasonably practicable, to occupy the shoes of the hypothetical tenderer. The test provides some insight into the characteristics and attributes of such a tenderer: well, but not necessarily fully, informed and usually careful and attentive, but not invariably a paragon of diligence. The incorporation of the adjectives 'reasonably' and 'normally' in the test, convey the notion of a tenderer who may be vulnerable to a certain (though not excessive) degree of error, inattention and other human weakness. In other words, the SIAC hypothetical tenderer is a terrestrial, rather than celestial, being, hailing from earth and not heaven. In its determination of this issue, I consider that the court should approach the matter not as an exercise in statutory construction or as one involving the interpretation of a deed or contract or other legal instrument. To adopt such an*

approach would not, in my view, be consonant with the SIAC test. Rather, the court's attention must focus very much on the 'industry' concerned, in which the professionals and practitioners are not lawyers."

156. Finlay Geoghegan J. in Gaswise agreed with McCloskey J. that, in answering the question concerning the proper interpretation of the relevant tender document, the court, "*should attempt to put itself in the shoes of a reasonably well informed and normally diligent tenderer who would be responding to this particular ITT … and should not do so as a lawyer*" (at para. 23 of her judgment).

157. The Court of Appeal adopted this approach as the approach to be followed in interpreting the relevant tender document (a supplementary request for a tender ("SRFT")) in *Word Perfect*. In that case, the court had to interpret the requirement for a "*narrative*". In delivering the judgment of the Court of Appeal, Hogan J. noted that the word "*narrative*" was a "*fairly ordinary English word which the reasonably diligent and well-informed tenderer would well understand as one requiring a written statement*" (at para. 23). That interpretation was confirmed in the context of the language of the tender document itself. The court referred to other relevant provisions of the SRFT in coming to its conclusion as to what the document required by seeking a "*narrative*" summary (which had not been provided by the successful tenderer in that case).

158. Both *Word Perfect* and *Gaswise* make it clear that in interpreting a particular provision in a tender document, context is very important. This point was also forcefully made by McCloskey J. in *Clinton*. He stated (at para. 37) as follows:-

"The meaning of Selection Criterion No. 1 is a question of law for the court. The test devised in SIAC is essentially an objective one. Self-evidently, the evidential matrix to which this test is to be applied will be acutely case sensitive. In applying this test in the present case, there was no dispute between the parties that the exercise to be performed by the court can permissibly take into account certain evidence of a subjective nature. […] Indisputably, the context is a matter of critical importance. Thus the court must consider this criterion as a whole and do so within its wider setting. Furthermore, I accept [Counsel's] submission that the overall context is a commercial one, imbued with ingredients of common sense and commercial purpose."

159. Further support for the requirement to interpret the particular provision of the tender documentation in context (a proposition not disputed by the applicant) can be found in the judgment of O'Donnell J. in the Supreme Court in *The Law Society of Ireland v. MIBI* [2017] IESC 31 ("*Law Society*"). While not a procurement case and while the Court was interpreting a contract (in relation to which different principles of interpretation apply as is clear from the authorities discussed earlier), the observations of O'Donnell J. (set out below) are nonetheless helpful in the context of interpreting the relevant provisions of tender documents and sit comfortably with the other factors which must be taken into account when a court is interpreting such documents. In the context of contractual interpretation, O'Donnell J. stated:

"[The] meaning [of an agreement] is, however, to be determined from a consideration of the Agreement as a whole. What the court must seek therefore is not an interpretation in which some aspects win out over others. Rather it is a case of providing an interpretation of the Agreement as whole, which not only relies on those features supportive of the interpretation, but also most plausibly interprets the entire Agreement and in particular those provisions which appear to point to a contrary conclusion. Even if the majority of factors appeared to tend broadly to one side of the argument, that interpretation cannot be accepted if it wholly and fundamentally irreconcilable with some essential features … It is important therefore to test any interpretation of a clause against the understanding of the Agreement to be gleamed from what is said, and sometimes not said, elsewhere in the Agreement." (para. 6)

160. Later in his judgment, O'Donnell J. observed:

"It is necessary to understand the entirety of an agreement and then to consider what that means for the specific issue now raised. It is necessary therefore to see the agreement and the background context, as the parties saw them at the time the agreement was made, rather than to approach it through the lens of the dispute which has arisen sometimes much later." (at para. 14).

161. Before moving from the legal principles governing the interpretation of tender documents, I must also touch on a related issue which concerns the approach to be taken by a court to the interpretation of correspondence emanating from a public authority in the course of a procurement process. As I noted earlier, the applicant argued that the letters from the Authority following the evaluation process including the letters of 28th February, 8th March and 15th March were inconsistent with the case which the Authority sought to make at the hearing namely, that the Evaluation Committee/Authority had "*no concerns*" with the Turas submission regarding the sufficiency of the proposed resources to ensure consistent delivery of all aspects of its plan. I have already set out my conclusion that those letters are not inconsistent with that case and in any event, the position of the Authority was clearly and fairly set out in its statement of opposition and in the affidavits sworn on its behalf by Mr. Masterson and I made the point that he was not cross-examined in relation to his averments as to the conclusions reached by the Evaluation Committee in the course of the evaluation process in relation to that aspect of Turas's submission. In that context, I draw attention to two important Irish cases which, I believe, confirm the approach which I have taken to the interpretation of the Authority's correspondence. Before doing so, I should make clear that I agree with the submission advanced by the applicant, based on the decision of the High Court (Humphreys J.) in *RPS Consulting Engineers Limited v. Kildare County Council* [2016] IEHC 113 ("*RPS*") that the reasons given by a public authority for its decision in a procurement process must be those which existed at the time the decision was taken and cannot be retrospectively created. That must be correct.

162. *RPS* was essentially a reasons case which this case is not. However, I have no hesitation in accepting as correct the fact that the reasons for a decision on a procurement process must be those which existed at the time the decision was taken and cannot be created retrospectively. There was no issue between the parties on that point.

163. The two cases to which I now wish to refer to in the context of the approach a court should take in interpreting correspondence in a procurement competition are *Somague and Baxter Healthcare Limited v. Health Service Executive* [2013] IEHC 413 ("*Baxter*"). In *Somague*, one of the complaints by the applicant who challenged the decision of the contracting authority to award a contract for extension of the Luas railway line was that the standstill letter described the relevant aspect of the successful tenderer's submission as "*good*" or "*very good*" but not "*excellent*" (which the scoring criteria required that it should be in order to obtain full marks). Baker J. in the High Court rejected that complaint and stated:-

"The language of the debrief letter is not to be interpreted as requiring the degree of exactitude and care as might be required in a contract or a piece of legislation. The evaluation score sheet showed that the assessors regarded the SSJV submission as excellent, with no reservations. No error in ascribing full marks can therefore be said to exist." (para. 56)

164. Baker J. repeated those sentiments (at para. 93) stating that "*the language* [of the standstill letter] *is not to be construed as if it were legislation or formal contractual documentation*".

165. In *Baxter*, the High Court (Peart J.) rejected an argument that the use of certain words in a score sheet which accompanied the standstill letter amounted to the application of new undisclosed award criteria by the contracting authority. He held that that contention was "*to read far too much into the brief comment on the score sheet in an effort to contrive a challenge to the tender result…*" and that the applicant was being "*overly pedantic*" in relation to the interpretation which it was urging in respect of the words used in the score sheet. (para. 123).

166. I have borne in mind these observations when considering the language used by the Authority in the letters of 28th February, 8th March and 15th March. As I have already concluded, those letters do not contradict and are not inconsistent with the position adopted by the Authority at the hearing, namely, that it had "*no concerns*" with regard to the sufficiency of the resources proposed by Turas to ensure consistent delivery of all aspects of its plan (i.e. for the purpose of Criteria B). I am satisfied on the evidence that the Authority had "no concerns" for the purposes of those criteria and the question now is whether the Authority, through its Evaluation Committee, was lawfully entitled to reach that conclusion in light of the proper interpretation to be given to the tender documents.

Application of General Principles

167. As Finlay Geoghegan J. made clear in *Gaswise* (as approved by the Court of Appeal in *Word Perfect*), the interpretation of the tender documents must be carried out in a manner which gives effect to the general principles of EU law such as equal treatment and transparency, the so-called general principles. Those general principles were central to the test adopted by the CJEU in *SIAC Construction Ltd. v. County Council of Mayo* (Case C-19/00) [2001] ECR I-07725 ("*SIAC*") which required the award criteria in the tender documentation to be formulated in such a way as to allow all "*reasonably well-informed and normally diligent tenderers*" to interpret those criteria in the same way and required the contracting authority to interpret those criteria in the same way throughout the entire procurement procedure.

168. In the present case the applicant alleged a breach of the general principles and, particularly, the principles of transparency and equal treatment. It alleged such a breach on the ground that the Authority misinterpreted and misapplied the award criteria contained in the CFT and, in particular, in Table 3 of Appendix 2. Since that is the essential case made by the applicant and since the general principles led the CJEU to adopt the interpretative test laid down in *SIAC* and applied in this jurisdiction in several cases including *Gaswise* and *Word Perfect*, it is necessary to say a little more about the general principles and their application in the present case. If the principles do apply, they must inform the interpretation which the court gives to the award criteria in the CFT.

169. While there is agreement between the parties that the general principles apply, there is a dispute between them as to the source of the application of those principles. The applicant contended they apply by reason of the provisions of the Public Contracts Directive and the Public Contracts Regulations which the applicant pointed out were stated to apply to the competition in the ITPD (section 3.1) and in the CFT (section 3.1, p. 9) and admitted to apply in the Authority's statement of opposition. The Authority and Turas, while accepting that the general principles do apply, contended that the source of their application is not the Public Contracts Directive or the Public Contracts Regulations. Rather, they say the principles applying in this case arise as general principles of EU law arising from the Treaty as developed by the CJEU.

170. This is something of an academic dispute since all parties accept that the general principles do apply. Specifically, it is accepted by the Authority and by Turas that the principles of transparency and equal treatment arise (although they argue that there has been no breach of those principles). In light of the acceptance by all parties that the general principles apply, I do not believe that it is necessary for me to rehearse the arguments made by the opposing sides on this point as to the source of the application of those principles in the present case. It should suffice that I briefly set out my conclusion and the reason for that conclusion.

171. I have concluded that the Authority and Turas are correct in their arguments as to the source of the application of the general principles in this case. I have reached that conclusion for a number of reasons.

172. First, it is agreed that the contract at issue was one for services falling within Service Category No. 27, "*other services*" (as stated in the contract notice). Services in Category No. 27, namely, "*other services*" are listed in Annex IIB of the Public Contracts Directive. Under Article 21 of that Directive, contracts which have as their object services listed in Annex IIB "*shall be subject solely to Article 23 and Article 35(4)*" of the Directive. Such contracts are not stated to be subject to any other article of the Directive such as Article 2 which makes specific reference to the obligation on contracting authorities to "*treat economic operators equally and non-discriminatorily and [to] act in a transparent way*". There is no allegation of a breach of Article 23 or Article 35(4) of the Directive. An identical problem arises under the Public Contracts Regulations. Contracts for services falling within Category No. 27, namely, "*other services*" fall under Part B of Schedule 2 to the Regulations. Under Regulation 21, a public contract to supply a service listed in Part B of Schedule 2 is subject only to Regulations 23 and 41. The equivalent to Article 2 of the Public Contracts Directive is Regulation 17 of the Public Contracts Regulations. Regulation 21 does not state that Regulation 17 is to apply. Further, there is no allegation of a breach of Regulations 23 and 41 of the Regulations in the present case. Therefore, a reading of the relevant provisions of the Public Contracts Directive and of the Public Contracts Regulations supports the conclusion that the general principles referred to in Article 2 of the Direction and Regulation 17 of the Regulations do not apply in the case of a procurement process for a contract to provide services in Annex IIB of the Public Contracts Directive or Part B of Schedule 2 of the Public Contracts Regulations which is the type of contract at issue here.

173. Second, this conclusion is supported by the decisions of the High Court (Peart J.) in *Baxter* and in *Fresenius Medical Care (Ireland) Ltd. v. Health Service Executive* [2013] IEHC 414 ("*Fresenius*"). I agree with the conclusions reached by Peart J. at paras. 34 and 35 and at paras. 42 to 44 of *Baxter* and at paras. 33 to 38 of *Fresenius*. In summary, there is a distinction between Annex IIA contracts to which the provisions of the Public Contracts Directive apply in full and Annex IIB contracts to which only a small number of stated provisions of the Directive apply. While that distinction is no longer relevant, having regard to more recent amendments to the Directive, the distinction was relevant at the time this competition was initiated and it is agreed that the relevant amendments do not apply to this case. I agree with the conclusion reached by Peart J. in *Baxter* and *Fresenius* that the provisions in the Directive applicable only to Annex IIA contracts are not applicable, whether by implication or otherwise, to Annex IIB contracts.

174. Third, while the ITPD and the CFT did state that the competition was being conducted under the competitive dialogue procedure in accordance with the Public Contracts Regulations, I do not believe that those references in the ITPD and in the CFT can be read as applying all of the provisions of the Regulations to the competition at issue here. That would be in the teeth of the express provisions of the Regulations themselves and, in particular, of Regulation 21 to which I have just referred. The ITPD and the CFT did state that the competition would be conducted in accordance with the competitive dialogue procedure in accordance with the Public Contracts Regulations but I do not believe that can be read as applying all of the provisions of the Regulations (or indeed the Public Contracts

Directive) which would not otherwise be applicable to Annex IIB or Schedule 2 Part B contracts.

175. Fourth, the Authority did not accept in its statement of opposition that the Public Contracts Regulations (or indeed the Public Contracts Directive) applied in their entirety to the competition for the contract at issue. In fact, at para. 8 of the Authority's statement of opposition it was pleaded that the contract had as its object services listed in Part B of Schedule 2 to the Public Contracts Regulations and that, in the premises, the contract was subject only to Regulations 23 and 41 of those Regulations. A similar plea was contained in para. 9 of the statement of opposition in relation to the Public Contracts Directive where it was pleaded that the contract was subject only to Articles 23 and 35(4) of the Directive. At para. 10 it was pleaded that no allegation was made by the applicant of a breach of any of those specified provisions of the Regulations or the Directive. It is true that later on in the statement of opposition (at para. 36) it was admitted by the Authority that the award of the contract was regulated by the Public Contracts Regulations. However, in my view, that plea has to be read with and subject to the earlier pleas in the statement of opposition which made it clear what provisions of the Regulations the Authority was admitting applied. I should add for completeness that pleas to similar effect were contained in the statement of opposition delivered by Turas (see, for example, para. 2 of its statement of opposition). Counsel on its behalf took the lead in advancing submissions on this point at the hearing. I accept those submissions for the reasons just set out.

Scope and Extent of General Principles

176. In light of the parties' agreement that the general principles and, in particular, the principles of transparency and equal treatment apply, and before considering the respective interpretations put forward by the parties of the evaluation criteria contained in the CFT which must be judged from the point of view of the reasonably well informed and normally diligent tenderer and in light of the general principles, I should briefly refer to the status and scope of those principles.

177. I accept the submission advanced by the applicant (and not disputed by the Authority or by Turas) that the general principles lie at the heart of the European public procurement regime and inform not only the interpretation of the EU procurement Directives and Regulations but also have been invoked on many occasions by the CJEU to imply additional obligations which go beyond the express requirements of the relevant Directives (and have also been applied in cases where the relevant provisions of the Directives do not expressly apply). The general principles have been considered and discussed by the CJEU in a series of important public procurement cases including *Telaustria Verlags GmbH v. Telekom Austria AG (Case C-324/28)* [2000] ECR I-10745, *Universale-Bau v. Entsorgungsbetriebe Simmering GmbH (Case C-470/99)* [2002] ECR I-11617, *ATI EAC v. ACTV Venezia (Case C-331/04)* [2005] ECR I-10109, *SIAC Construction Ltd. v. County Council of Mayo (Case C-19/00)* [2001] ECR I-07725 and *Commission v. CAS Succhi di Frutta SpA (Case C-496/99 P)* [2004] ECR I-03801.

178. The status and scope of the general principles have also been discussed and considered in several Irish cases including *Baxter, Fresenius, Somague, Gaswise* and *Word Perfect*. The observations of Finlay Geoghegann J. in *Gaswise* (as approved by the Court of Appeal in *Word Perfect*) have been referred to earlier. I will refer to some of the observations of the Irish courts which concisely describe the significance of the general principles in EU procurement law. In the High Court in *Baxter* Peart J stated (at para. 34):-

> *"General principles of equal treatment, transparency and non-discrimination emanating from the EU Treaty lie at the heart of the public procurement Directives, and Regulations made thereunder, in order to provide fair conditions of competition for economic operators. The Directives and Regulations provide for certain specific procedures and measures to be taken in respect of contracts to which the Directives apply, which reflect the general principles of transparency and equal treatment, and ensure that they are observed at all stages of such a tender process. This ensures for such contracts an appropriate level of fairness in terms of transparency, equal treatment and non-discrimination, and assists the task of verification in that regard."*

It will be recalled that notwithstanding Peart J's conclusion that the specific procedures provided for in the Public Contracts Directive applicable to Annex IIA contracts did not apply to Annex IIB contracts, nonetheless it was accepted and held in that case (and in the present case) that the general principles are nonetheless applicable to the procurement process. As Peart J. stated (at para. 43), the fact that Annex IIA contract procedures are not applicable to Annex IIB contracts, "*does not mean that the general principles under EU primary law can be ignored, or that they do not provide a canopy under which the process must be conducted and by which it must be guided*" although the contracting authority can decide on the tender process which observes those principles.

179. In *Somague*, Baker J. in the High Court stated:

> *"The principles of equality, non-discrimination and transparency are central to the philosophy of the Directives of encouraging open competition between citizens of, or companies registered in, Member States. The requirement of transparency is to ensure that persons engaging in a tender process know the evaluation criteria in advance of submitting a tender for a public works or utilities contract, and know how these criteria were applied by an evaluation team to an individual tender" (para. 16).*

180. I have no hesitation in concluding (and the parties accept) that the general principles of transparency and equal treatment were applicable to this procurement process.

181. The parties were agreed that a useful summary of the scope and content of the relevant general principles is to be found in the opinion of Lord Hodge in the Outer House, Court of Session of Scotland in *Healthcare at Home Ltd. v. The Commons Services Agency* [2012] CSOH 75 ("*Healthcare at Home*"). I found the opinion of Lord Hodge in this case very helpful not only for its discussion of the general principles themselves but also for how Lord Hodge links those principles to the required rule of interpretation of tender documents in from *SIAC*. I note that the observations of Lord Hodge were also cited with approval by McDonald J. in *Sanofi*.

182. At para. 10 of his opinion in Healthcare at Home, Lord Hodge helpfully summarised the principle features of the case law of the CJEU on the application and effect of the general principles. I enthusiastically adopt that summary. Lord Hodge stated:-

> *"11. First, the principle of equal treatment, which lies at the heart of the public procurement directives, requires that the tenderers must be in a position of equality both when they formulate their tenders and also when the contracting authority assesses those tenders (SIAC […]).*
>
> *12. Secondly, the contracting authority must apply the principle of non-discrimination, which is one of the fundamental principles of EU law, when it chooses the criteria on which it proposes to base the award of a contract […] This principle also obliges the contracting authority to apply the award criteria objectively and uniformly to all tenderers (SIAC (above) at para 44).*

13. Thirdly, the principle of equal treatment implies an obligation of transparency so as to afford equality of opportunity to potential tenderers (Universale-Bau […]; SIAC (above) at para 41).

14. It follows from the obligation of transparency that, fourthly, the contracting authority must formulate the award criteria in the contract documents in such a way that potential tenderers are in a position to be aware, when preparing their tenders, of the existence and scope (or relative importance) of the elements which the contracting authority will take into account in identifying the most economically advantageous offer […]. The ECJ has also stated this consideration in a different manner, namely that the award criteria must be formulated in such a way as to allow all reasonably well-informed and normally diligent tenderers to interpret them in the same way (SIAC (above) at para 42). In Evropaïki Dynamiki v. European Maritime Safety Agency [2010] EUECJ T- 70/05, at para 130, the ECJ stated that the aim of the provisions was to allow such tenderers to achieve that uniformity in interpretation.

15. Fifthly, this obligation to disclose the elements which the contracting authority will take into account means (a) that in its consideration of the tenders the contracting authority cannot alter the criteria for the award which it has disclosed, (b) that its award decision cannot include elements which, if they had been known at the time the tenders were prepared, could have affected that preparation, and (c) that it must not adopt a method of assessment on the basis of matters which are likely to give rise to discrimination against one of the tenderers […].

16. Sixthly, and consistently with the preceding proposition, the obligation of transparency also means that the contracting authority must interpret the award criteria in the same way throughout the procedure (SIAC (above) at para 43)."

Both the applicant and the Authority (supported by Turas) were agreed that of the propositions set out by Lord Hodge, the fourth and fifth were most relevant in the present case. I agree that this is so.

183. Lord Hodge went on to make a point which has been made in a number of Irish cases that "*because the principles of equality, transparency and non-discrimination are foundational in this European regulatory regime, the contacting authority has no margin of appreciation as to the extent to which it will or will not, comply with this obligations*" (at para. 19). He did, however, accept that it has a margin of appreciation "*in relation to matters of judgment or assessment*" where the court will intervene only where it has "*clearly committed an error*" (at para. 20).

184. A similar point as to the absence of any margin of appreciation in the event of a breach of general principles was made by Fennelly J. in the Supreme Court in *SIAC Construction Limited v. Mayo County Council* [2002] 3 I.R. 148 where he stated (at para. 176):-

"Where a failure to respect the principles of equality, transparency or objectivity is clearly made out, there is, of course, no question of permitting a margin of discretion."

185. Peart J. in the High Court in Fresenius stated to similar effect (at para. 39):-

"In that regard, the rules must be clear so that any review of compliance can also be effective. These matters ensure that appropriate levels of transparency and equality of treatment are built into the tender process. Naturally, as stated by Fennelly J. in his judgment in the Supreme Court in SIAC, the obligation to render effective the public procurement principles means that where there has been an established failure to respect the principles of equality, transparency or objectivity, there can be no question of permitting the discretion or margin of appreciation to overlook it. In such clearly established circumstances the Court must act and quash the decision."

186. Baker J. in the High Court in Somague also concluded (at para. 37):-

"That the contracting authority has no margin of appreciation where the principles of equality/transparency have not been respected emerges from the decisions of Fennelly J. in SIAC and of Peart J. in Fresenius …".

187. The parties were agreed that where a breach of the general principles of transparency and equal treatment is established, no margin of appreciation can apply. That is undoubtedly correct. However, they differ on whether and to what extent a margin of appreciation exists in the assessment by the Evaluation Committee as to the particular band of marks into which a submission should fall in terms of the criteria being assessed. The applicant accepted that a margin of appreciation did exist where the Authority had a concern in relation to the sufficiency of resources for the purposes of Criteria B in terms of whether that concern was "*minor*" or otherwise. However, it disputed the existence of any margin of appreciation or flexibility in relation to the top band of marks (where a mark of 9 or 10 was available) because of the requirement that to obtain a score in this band the Authority had to have "*no concerns*" in relation to the sufficiency of proposed resources. In other words, the Authority had no flexibility or margin of appreciation when scoring a submission in this top band. The Authority submitted that a margin of appreciation is relevant in determining whether a submission can be marked in the top band and within that band a margin of appreciation also exists as to the degree or gradation of concerns or issues which might exist in order to determine whether a mark of 9 or 10 might be awarded. Ultimately, it seems to me that the resolution of that issue turns on the correct interpretation of the quality scoring matrix (and I set out my conclusions on that issue below).

188. Reliance is also placed by the Authority in support of its interpretation of the evaluation criteria on another portion of the opinion of Lord Hodge in *Healthcare at Home*. In this portion of his opinion, Lord Hodge was addressing the practical application of the interpretative approach required under *SIAC* (namely what a reasonably well-informed and normally diligent tenderer would have understood by the criteria). I am also happy to adopt as correctly representing the law in this jurisdiction, these two paragraphs from Lord Hodge's opinion. He stated:

"[26] I am not persuaded that it is realistic to require a contracting authority, on pain of annulment of its decision, to frame its invitation to tender in such detail that two reasonable people could not reach different views on its interpretation without acting unreasonably. […] While this standard may possibly be achieved in very simple and straightforward contracts, it is one which is impracticable in complex agreements which are not uncommon in the field of public procurement. It is not in the nature of language for that degree of certainty to be achieved in such agreements. Further, in some circumstances, the obligation on the authority to give very precise and highly detailed descriptions of its requirements would both be very burdensome and also prevent tenderers from using their own initiative and experience to offer innovative approaches to meeting the authority's requirements.

[27] It is the task of the contracting authority to disclose to potential tenderers the existence and relative importance (or weighting) of the criteria which it will take into account in identifying the most economically advantageous tender. But that does not mean that a tenderer is not expected to use reasonable foresight in its analysis of what the stated criteria or sub-criteria entail. Indeed that appears to me to be implicit in the ECJ's use of the hypothetical standard of "all reasonably well-informed and normally diligent tenderers". I do not see a difference in substance between that objective hypothesis and the hypothetical standard of 'the reasonably well-informed and normally diligent tenderer'. I therefore agree […] that in assessing whether there has been adequate disclosure of a criterion or sub-criterion the court can ask whether the matter, which is alleged not to have been disclosed, would have been reasonably foreseeable by a reasonably well-informed and normally diligent tenderer as encompassed by that criterion or sub-criterion."

I again enthusiastically endorse those observations and have sought to apply them in my approach to determining the interpretation issue.

189. As I noted earlier, the question of context is also significant when it comes to interpreting a portion of a tender document, in this case the evaluation methodology set out in the quality scoring matrix in table 3 of Appendix 2 to the CFT (and the ITPD). This is clear from cases such *Word Perfect*, *Gaswise*, and *Clinton*.

190. I have no hesitation in concluding that the relevant provisions of the CFT, and in particular, the quality scoring matrix contained in Table 3 of Appendix 2 must be interpreted by reference to the context in which they are found in the CFT, with particular reference to Section 6 and Appendix 2 in which Table 3 appears. It would be quite wrong to focus exclusively on a small number of words in Table 3 to the exclusion of those other relevant parts of the CFT (and ITPD).

Summary of Interpretative Principles
191. In summary therefore, it is clear from a review of the relevant authorities that the interpretation of the quality scoring matrix in Appendix 2 to the CFT is a matter for the court. The court does not approach the interpretation of the documents as if it were a statute or a deed of contract or other legal instrument. The court must interpret the document in a manner which gives effect to the general principles of equal treatment and transparency. It must ensure that the interpretation is such as to allow all reasonably well informed and normally diligent tenderers to interpret the document and the criteria contained in it in the same way. The court must be satisfied that the criteria as interpreted are clear, precise and unequivocal so that all reasonably well informed and normally diligent tenderers would interpret those criteria in that way.

The contracting authority must also interpret the criteria in the same way for all bidders throughout the entire procurement process. The court must consider the context in which the words being interpreted appear and must consider the criteria as a whole and within their wider setting. Obviously, since context is crucial, the court should not focus exclusively on some words to the exclusion of others but should consider the words in the criteria being interpreted in their wider context. Finally, the court must focus on the "*industry*" concerned in which the professionals and persons involved are not lawyers but participants in that industry.

Application of Interpretative Principles
192. I now attempt to interpret the relevant criteria taking account of these important principles of interpretation.

193. What is required to be interpreted is the quality scoring matrix contained in Appendix 2 to the CFT (and the equivalent provisions of the ITPD). That scoring matrix must be interpreted in the wider context in which it appears in the tender documentation. The applicant has been criticized (correctly, in my view) for excessively focusing in a somewhat blinkered fashion on a small number of words in the quality scoring matrix in Table 3. However, that matrix and those words must be seen in their wider context in terms not only of Appendix 2 itself but in the context of the CFT itself including section 6 dealing with evaluation of tenders. I have already set out in some detail the context of the documents and reproduced the relevant provisions of those documents. Having regard to the wording of the quality scoring matrix in Table 3 and the context in which it appears in Appendix 2 and referred to in section 6 of the CFT, the question to be resolved is what would a reasonably well informed and normally diligent tenderer have understood by the provisions of the quality scoring matrix and, specifically, how would such a tenderer have understood how the Authority would proceed to assess or evaluate tenders in accordance with the evaluation methodology?

194. In my view, looking at the quality scoring matrix in Table 3 in its wider context, a reasonably well informed and ordinary diligent tenderer would have understood the following.

195. First, it would have understood that the objective of the evaluation exercise was to evaluate tenders against the evaluation criteria referred to in section 6 of the CFT and contained in Appendix 2.

196. Second, it would have understood that quality would be marked separately from price.

197. Third, it would have understood that with regard to quality, the Authority was obliged to allocate scores for each delivery plan in accordance with the evaluation criteria contained in Table 2 and scored in accordance with the quality scoring matrix contained in Table 3. Section 6.2 of the CFT stated (under the heading "*quality submissions evaluation*") that the evaluation of quality submissions would involve the assessment of the bidder's quality submission in relation to a delivery plan as noted in Appendix 2 and that quality submissions would be evaluated against the sub-criteria contained in Appendix 2 scored using the scoring guidance and evaluation methodology contained in that Appendix. Such a tender would also have understood by reference to Appendix 2 itself that the criteria used for the evaluation of each of the required plans would be as set out further in Appendix 2 and that, with regard to the operations plan, the Authority would evaluate such plan against the evaluation criteria set out in Table 2 and in accordance with the scoring table set out in Table 3.

198. Fourth, it would further have understood by reference to the "*scoring methodology*" set out in Appendix 2 (immediately following the tender evaluation criteria in Table 2) that for each of the three delivery plans, scores for the tender evaluation criteria set out in Table 2 would be allocated bearing in mind the scoring guidance set out in Table 3.

199. Fifth, it would have understood that the allocation of a score (in respect of the two criteria, Criteria A and Criteria B), for each of the three plans with reference to the methodology set out in Table 3 (quality scoring matrix)) was the objective of the evaluation of the quality submission.

200. Sixth, it would have understood by reference to the quality scoring matrix itself in Table 3 that the Authority would allocate marks by reference to any concerns which it had with regard to compliance of the relevant plan with the criteria in respect of each plan set out in Table 2 (tender evaluation criteria). This is clear from Table 3 (quality scoring matrix) and, in particular, from the reference to the relevant criterion (in the present case Criteria B) and from the express terms of the boxes or bands of scoring set

out in that table. The express terms of those boxes or bands in Table 3 made it clear to those tenderers (and I hold that a reasonably well informed and normally diligent tenderer would have understood) that scoring would be done by reference to the existence or otherwise of concerns with regard to compliance with or adherence to the relevant criterion, in this case Criteria B.

201. Seventh, it would have understood that the Authority could award marks in various bands from 0 to 10. In that regard, it would have been clear to such a tenderer that the full range of marks was available to be awarded by the Authority in its evaluation of the relevant plans. Appendix 2 stated on more than one occasion that marks were "*out of 10*". The reasonably well informed and normally diligent tenderer would have understood, therefore, that it was possible to obtain a score of 9 out of 10 or 10 out of 10 in the event that the Authority had "*no concerns*" with the submission regarding the sufficiency of the proposed resources to ensure consistent delivery of all aspects of the bidder's plan. Such a tenderer would have understood that where the Authority had "*minor concerns*" with the bidder's submission regarding the sufficiency of the proposed resources to ensure consistent delivery of all aspects of the bidder's plan, it was open to the authority to award a mark of 7 or 8.

202. Eighth, such a tenderer would have understood that where the Authority did not have "*minor concerns*" with the submission from the point of view of the relevant criteria, or concerns greater than that, such as "*significant concerns*", "*major concerns*" or "*fundamental concerns*", a submission could not be scored in any of the bands or boxes for "*minor concerns*" or any of those greater concerns. It would have understood, therefore, that a submission in respect of which the Authority did not have "*minor concerns*" or more significant concerns, would be marked in the highest band or box as this was the only possible band in which such a submission could be placed in those circumstances.

203. Ninth, such a tenderer would have understood, in my view, that in each band or box of marks, two possible marks could be awarded. Therefore, within the top band or box, where the Authority had "*no concerns*" it was open to the Authority to allocate a mark of 9 or 10. Such a tenderer would, therefore, have understood that the Authority could have allocated a mark of 9 or 10 in respect of the relevant criterion where it had "*no concerns*" with the bidder's submission with regard to that criterion.

204. The applicant contended that a submission in respect of which the Authority had "*no concerns*" with respect to the relevant criterion could be allocated a score of 9 or 10 marks depending on the Authority's assessment as to quality and, in particular, as to whether the particular plan was better than another bidder's plan in respect of which the Authority also had "*no concerns*" or was best or better suited to the Authority's requirements than such other plan. However, I agree with the submission advanced by the Authority, and supported by Turas, that it was not open to the Authority to evaluate the plans on this basis. The bidders were informed in the CFT (and prior to that, in the ITPD) and, in particular, in Appendix 2 that plans would be assessed by reference to "*concerns*" and not by reference to anything else. In my view, were the Authority to have engaged in the sort of evaluative exercise suggested by the applicant, it would not have been acting in accordance with the tender evaluation criteria and, in accordance, with the quality scoring matrix which was communicated to bidders in the CFT (and ITPD). For the Authority to have acted in this way would, in my view, have amounted, at the very least, to a breach of the rules of the competition and consequently, a breach of the general principle of transparency.

205. I accept the Authority's submission that it was open to the Authority, in deciding what mark to award in respect of a plan in respect of which it had "*no concerns*" for the purposes of the relevant criterion, to decide to award a 9 or a 10 depending on whether it had a concern or issue with regard to any detail or aspect of the relevant plan. That is the only logical interpretation to give to the quality scoring matrix where the Authority did not have "*minor concerns*" and where it had "*no concerns*" or more serious concerns than "*minor concerns*" with regard to the relevant criterion and where it was not permitted, by virtue of the criteria notified to bidders in the CFT (and ITPD), to differentiate between bids on the basis of which is best or better than another for the purposes of the Authority's requirements. The only way in which the Authority could decide whether to give a mark of 9 or 10 within the top band was by reference to the degree or gradation of a concern or issue in relation to an aspect of the plan or submission which was not such as to give rise to the Authority having concerns with the bidder's submission regarding the sufficiency of the proposed resources to ensure consistent delivery of all aspects of that bidder's plan. It seems to me that this conclusion inevitably follows from the terms of the quality scoring matrix in Table 3. There is nothing elsewhere in the CFT (or ITPD) which is inconsistent with this interpretation.

206. On the facts, it is clear from the affidavits of Mr. Masterson that the Authority had "*no concerns*" with Turas's submission regarding the sufficiency of proposed resources to ensure consistent delivery of all aspects of its delivery plan. It did have an issue or a concern in relation to the level of detail provided by Turas in respect of an aspect of what was required under section 4 of the governance and delivery schedule to the contract which it said (in the 28th February letter) was not "*sufficiently serious to constitute a minor concern*" or to be "*unequivocally of no concern whatsoever*". In light of this, the Evaluation Committee/Authority decided to award a mark of 9 rather than 10 "*to appropriately reflect the degree of concern felt by the Committee*". This "*degree of concern*" related to the level of detail provided by Turas with regard to an aspect of the plan. It is clear from the affidavits of Mr. Masterson that the Evaluation Committee/Authority did not have a concern or any concern and was not concerned about the sufficiency of the resources proposed by Turas to ensure consistent delivery of all aspects of its plan. In my view, it was open to the Authority to decide as to whether a score of 9 marks or 10 marks should be awarded in respect of this part of Turas's plan and to award a score of 9 marks based on its issue or concern about the level of detail provided.

207. The Authority does, in my view, have a margin of appreciation or discretion when it comes to deciding as between a score of 9 or 10 in the top band of marks. This is in no way inconsistent with the well-established position that a margin of appreciation does not exist where there is a breach on one of the general principles, such as the principle of transparency. I do not believe that there was a breach of the general principle of transparency (or of equal treatment) or indeed of any of the general principles in the present case.

208. In circumstances where the Evaluation Committee had concluded that it had "*no concerns*" with regard to the sufficiency of the resources proposed by Turas to ensure consistent delivery of all aspects of its plan, and where it did not have "*minor concerns*", the Authority was obliged to mark Turas's submission in the highest band. Further, in deciding whether to give it a score of 9 or 10 marks, it was, in my view, open to the Evaluation Committee/Authority to take into account a lack or absence of detail (or "*less detail*" compared to other parts of the plan) on any aspect of the plan which was not such as to amount to a "*minor concern*" regarding the sufficiency of the resources proposed by Turas to ensure consistent delivery of all aspects of its plan and which did not give rise to a concern or any concern on the part of the Authority, on that front.

209. The applicants submitted that in treating the absence or lack of detail (or "*less detail*") on the resources to volume issue in this way, it was downplaying or downgrading a significant requirement of the plan which had been notified as such in the dialogue meetings and in the Governance and Delivery Schedule to the Contract itself. In other words, it contended that if the Authority did have a concern about the level of detail with regard to resources to volume, it should not have not regarded Turas's submission as falling within the "*no concerns*" box. However, there are a number of significant difficulties with that submission.

210. The first is that Mr. Masterson has sworn on behalf of the Authority that the Evaluation Committee/Authority (a) had "*no*

concerns", (b) did not have "*a concern*", (c) was "*not concerned*" and (d) did not have "*minor concerns*" with regard to the sufficiency of the resources proposed by Turas to ensure consistent delivery of all aspects of its plan.

211. The Authority has sworn, therefore, that the issue or concern which the Evaluation Committee had with regard to the level of detail, was not such as to amount to a "*minor concern*" and did not give rise to a concern regarding the sufficiency of the resources proposed by Turas for the purpose of Criteria B.

212. Second, as indicated above, I have accepted that the Authority did have a margin of appreciation in the evaluation of tenders such that it was open to it to decide whether an absence or lack of detail (or "*less detail*") was such as to amount to a concern regarding the sufficiency of proposed resources to ensure consistent delivery of all aspects of the plan or not. I do not accept the applicant's submission that the Authority did not have such a margin of appreciation within the highest band.

213. The applicant contended that in respect of other plans evaluated by the Evaluation Committee in the procurement competition and in respect of other criteria in the quality scoring matrix considered by it where the Committee found that there was a lack or absence of detail in relation to an aspect of a plan, it regarded such lack or absence of detail as amounting to a "*minor concern*" attracting a score of 8 marks out of 10. The applicant drew attention to some examples of where this occurred, including the following (by reference to Appendix A to the 28th February letter):

> (a) Turas's Delivery Plan – Operations Plan, Criteria A: the Evaluation Committee considered that there were a number of minor weaknesses in the plan stemming from a lack of detail in respect of certain aspects of the service (which were then set out at points 1 and 2), it regarded those "*minor concerns*" and awarded 8 marks out of 10 in respect of Criteria A.
>
> (b) The applicant's Delivery Plan – Operations Plan, Criteria A: the applicant obtained a mark of 8 in respect of Criteria A of its Delivery Plan – Operations Plan on the basis of a lack of detail in certain respects which the Authority regarded as "*minor concerns*".
>
> (c) The applicant's Delivery Plan – Mobilisation and Transition Plan, Criteria A: The Evaluation Committee considered a lack of sufficient detail in respect of aspects of the plan to be of "*minor concern*" and awarded the applicant a score of 8 marks for this aspect of the plan.

214. However, Mr. Masterson explained in his affidavits (for example at para. 159 of his first affidavit and at paras. 95 to 97 of his fourth affidavit) how the issues or concerns in relation to aspects of a plan were viewed and evaluated by the Evaluation Committee. At para. 159 of his first affidavit, Mr. Masterson explained that the Evaluation Committee scored the delivery plans "*in the round in a holistic manner, with regard to the evaluation criteria and the materiality of any concern or group of concerns identified*". He further stated that as part of this exercise, the Evaluation Committee considered and discussed "*the level or scale of the identified concerns both individually and holistically where there were multiple concerns identified for a particular Delivery Plan and began to narrow down the category of concerns in accordance with the scoring guidance*". He then stated (also at para. 159):

> "*The Evaluation Committee may have identified similar concerns in different Delivery Plans but ultimately agreed to award different scores to the different Delivery Plans where it was agreed, for instance, that there was a difference in the materiality of the concern/s identified".*

215. In other words, where the Evaluation Committee had an issue or concern (such as with regard to the level of detail provided by a bidder) it assessed the materiality or otherwise of that issue or concern. This approach was well within the margin of appreciation enjoyed by the Evaluation Committee in the evaluation of tenders.

216. The explanation given in Appendix A to the 28th February letter explained with reference to each criterion for all of the three plans the reasons why a particular mark was awarded. In respect of those criteria for the relevant plans where the Evaluation Committee found there was a lack or absence of detail, it explained very clearly where that lack of detail was such as to amount to a "*minor concern*" or "*minor concerns*". In my view, it was open to the Evaluation Committee to assess where a lack of detail or absence of detail (or where "*less detail*" was provided in one area than in others) was such as to constitute a "*minor concern*" or "*minor concerns*". It was equally open to the Evaluation Committee to take the view (as it did in relation to Turas's delivery plan – operations plan, Criteria B) that a lack of detail or the provision of "*less detail*" in one area than in others was not such as to amount to a "*minor concern*" or "*minor concerns*" with regard to the sufficiency of the proposed resources to ensure consistent delivery of all aspects of the Turas plan. To conclude otherwise would, in my view, amount to an impermissible intrusion on the margin of judgment, expertise and experience which the Authority was entitled to exercise and apply in the evaluation of tenders in accordance with the evaluation methodology set out in Appendix 2 to the CFT (and the ITPD).

217. The 28th February letter informed the applicant with regard to Criteria B of Turas's delivery plan – operations plan, that the reduction in the staff head count proposed by Turas was credible, that while there was a significant level of detail on certain assumptions, there was "*less detail*" on the resources to volume issue, that the Evaluation Committee did not consider those issues to be sufficiently serious as to amount to a "*minor concern*" or to be "*unequivocally of no concern whatsoever*" to justify a score of 10 marks, and that in order to "*appropriately reflect the degree of concern*" felt by the Committee, a mark of 9 was being awarded. The Authority has sworn on affidavit that it did not have "*minor concerns*" with regard to the sufficiency of the resources proposed by Turas for the purposes of Criteria B, that it had "*no concerns*" with regard to the sufficiency of those proposed resources and that it did not have any concern regarding their sufficiency.

218. In my view, the reasonably well informed and normally diligent tenderer would have understood that if such were the case, it was open to the Authority to award a score within the top band of marks, being a score of either 9 or 10 marks. It would also have been understood by such a reasonably well informed and normally diligent tenderer that in such a situation it would have been open to the Authority to take into account in deciding whether to award 9 or 10 marks whether there was less detail in one area than in another or an absence or lack of detail in respect of one aspect of the plan where that lesser detail or absence of detail was not sufficiently serious or material as to amount to a "*concern*" with regard to the sufficiency of the assets proposed by the relevant bidder or to a "*minor concern*".

219. I conclude, therefore, that the approach actually taken by the Authority was consistent with what a reasonably well informed and normally diligent tenderer would have understood to be the position. The Authority did not in my view act inconsistently with the evaluation methodology set out in the quality scoring matrix in Table 3 of Appendix 2 to the CFT (and ITPD) or otherwise inconsistently with the CFT (or ITPD). In fact, the Authority acted entirely in accordance with that evaluation methodology as properly interpreted. There was, therefore, in my view no breach of any of the general principles including the principles of transparency and equal treatment.

220. That conclusion is sufficient to dispose of the issues in this case. While not strictly necessary to do so in light of the clear affidavit evidence on behalf of the Authority that it had "*no concerns*" in relation to the sufficiency of the resources proposed by Turas for the purposes of Criteria B, I should, however, briefly address the alternative or fall-back position adopted by the Authority. This was that in circumstances where the Authority had no "*minor concerns*" (or any greater concerns) with respect to the sufficiency of resources for the purposes of Criteria B, there was only one band into which the submission could fall, namely, the top band (being that applicable to "*no concerns*"). It seems to me that that submission is correct as a matter of logic and a reasonably well informed and normally diligent tenderer would probably have viewed and interpreted the scoring matrix in that way. If the Authority did not have a "*minor concern*" with regard to the sufficiency of the resources proposed for the purposes of Criteria B and if it did not have any more serious concerns than a "*minor concern*", then there was only one band into which the plan could be placed for the purpose of scoring and that was in the highest or top band. Moreover, there had to be some basis on which the Authority could then decide as between awarding 9 or 10 marks within that top band. Since it was made clear to bidders that the evaluation would be carried out by reference to the existence or otherwise of "*concerns*", it had to be open to the Authority to decide as between a 9 and a 10 depending on whether it had a "*concern*" falling short of a "*minor concern*".

221. I should stress, however, that it is not necessary for my decision to reach a conclusion on this alternative position adopted by the Authority in light of the clear affidavit evidence adduced on its behalf that it did not have a concern with regard to the sufficiency of the assets of the resources proposed by Turas for the purposes of Criteria B.

OBSERVATIONS ON TRANSPARENCY OF PROCESS

222. Finally, I should add that while it was open to the applicant to challenge the decision and to argue that the Authority did not comply with the evaluation methodology and that in that sense it was in breach of the general principle of transparency, and while I have rejected the applicant's case based on that allegation, it is only fair to record the fact that on several occasions throughout the process including after the outcome of the process was notified to the applicant, the applicant was (quite properly, I believe) extremely complimentary of the Authority and the procurement process itself, while, at the same time understandably being disappointed at the outcome, Mr. Whitt Hall on behalf of the applicant stated in an email on 20th October, 2016:

> *"On a personal note, I wanted to let you know, how much we truly enjoyed getting to know you and the TII team over the course of the last year. We have all noted that as a procurement it's been one of, if not the best, and fairest processes we've ever been apart (sic) of."*

223. Later, on 16th March, 2017, after the outcome of the process was notified to the bidders, Mr. Tracy Marks is recorded as having stated on behalf of the applicant at a debriefing session with the Authority as follows:

> *"TM expressed his appreciation that Transcore got the highest quality score and that it is even more disappointing, knowing how thorough TII were during the process. Transcore are very disappointed but were encouraged to hear TII's feedback and understand the closeness of the competition is a result of TII having followed their process. TM commented that the transparency throughout the competition was second to none and the overall procurement process implemented was refreshing and there is nothing like it in the US were TM has been bidding for contracts with Transcore for 25 years. Transcore considered that it would be positive if some of the US agencies could follow a process similar to TII's for the larger contracts."*

224. In my view, these sentiments (together with those contained in the 3rd March letter, referred to earlier in my judgment) quite properly and correctly reflect the transparency of the procurement process operated by the Authority for the contract at issue in this case. This was borne out and supported by the extensive documentation provided by the Authority in the course of discovery which enabled the parties to demonstrate to the court precisely how the Evaluation Committee reached the conclusions it did in relation to the disputed aspects of the Turas tender. While I appreciate there were certain difficulties in the course of the discovery process and certain misdescriptions in a small number of the documents gave rise to confusion and misunderstanding on the part of the applicant, the documentation itself clearly demonstrated to me how the thinking of the members of the Evaluation Committee evolved in the course of the process and how its decision was ultimately reached. In my view, on the basis of the evidence and submissions in this case, the Authority fully respected the required solemnity of the process and put in place and operated an extremely transparent procurement process. The compliments bestowed on the transparency of the process by the applicant prior to the commencement of these proceedings were, in my view, entirely justified. I would fully endorse them.

CONCLUSIONS

225. In conclusion, on the basis of the evidence adduced on behalf of the Authority (which I accept) and on the basis of what I have held to be the proper interpretation of the scoring methodology contained in Appendix 2 to the CFT (and prior to that, in the ITPD) and, in particular, in Table 3 (quality scoring matrix) of that Appendix which was applied by the Authority in its evaluation of Turas's delivery plan – operations plan, Criteria B, I am satisfied that the applicant has failed to establish any breach by the Authority of the rules of the procurement competition at issue or any breach of the general principles of EU law which applied to this competition. In the circumstances, I refuse the reliefs sought and dismiss the applicant's claim in the proceedings.

226. By way of further concluding comment, I should make clear that I have decided the issues in these proceedings on the basis of the evidence and submissions made in the proceedings. I have not purported to decide any issue which may arise in any other proceedings, including those brought by Emovis, which remain to be heard by the High Court.

227. Finally, I am extremely grateful to counsel and solicitors for all parties for the exceptional quality of the written material put before the court and for the excellence of the written and oral advocacy of all counsel which gave me considerable pause for thought before being in a position to reach my conclusions in this case.