

**MAGNOX
INQUIRY**

Magnox Inquiry

Interim Report

5 October 2017

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GLOSSARY

Term	Definition
Bechtel	means Bechtel Management Company Limited, part of the RSS consortium
BEIS	means the Department for Business, Energy and Industrial Strategy
Bidder	means any of the consortia that met the minimum requirements set out in the PQQ and submitted a bid as part of the Magnox Competition
CFP	means the Cavendish Fluor Partnership, the first placed bidder in the Magnox Competition
Core Competition Team	means the core team responsible for overseeing the Magnox Competition
Dialogue	means the competitive dialogue phase of the Competition prior to the submission of final tenders by bidders during which the NDA and each selected bidder discussed NDA's requirements and developed their solutions
ES or Energy Solutions	means Energy Solutions EU Limited, part of the RSS consortium
Evaluation	means the process by which the NDA evaluated the bids to determine the winning bidder
Final Report	means the final Inquiry report, due to be delivered in the first part of 2018
Inquiry	means the Magnox Inquiry
Interim Report	means this report
Liability Judgment or Judgment	means the High Court judgment handed down in July 2016 in relation to the Liability Trial
Liability Trial	means the trial in relation to the proceedings brought by ES which took place in the High Court between November 2015 and March 2016
Magnox Competition or Competition	means the competition in which the NDA sought a PBO to take ownership of the SLCs relating to the Magnox sites
Magnox Limited	means the SLC for the Magnox Sites
Magnox Sites	the NDA sites at Chapelcross, Hunterston A, Oldbury, Trawsfydd, Wylfa, Berkeley, Bradwell, Dungeness A, Hinkley Point A, Sizewell A, Harwell and Winfrith
Magnox Power Stations	means the Magnox Sites except for the former research sites (which are Harwell and Winfrith)

Major Projects Authority	means the authority that worked with the HM Treasury and other government departments to provide independent assurance on major projects. On 1 January 2016 it merged with Infrastructure UK to form a new organisation, the Infrastructure and Projects Authority
NDA	means the Nuclear Decommissioning Authority
NDA Board	means the NDA Board, comprising non-executive directors and executive members
PBO	means a Parent Body Organisation
PQQ	means Prequalification Questionnaire
Public Contracts Regulations 2006 or Regulations	means the Public Contracts Regulations 2006, SI 2006/5, implementing the Public Procurement Directive 2004/18/EC, which have now been updated and replaced by the Public Contracts Regulations 2015, SI 2015/102
Requirements	means the requirements set out in the SORR for each of the key enabler, technical scope and methodology underpinning, and cost evaluation nodes which were evaluated against specified criteria
RSS	means Reactor Site Solutions, the second placed bidder in the Magnox Competition
SLC	means Site Licence Company
SORR	means Statement of Response Requirements, which provided the scoring scheme for the Magnox Competition

PART 1. INTRODUCTION

1.1 On 27th March 2017, The Rt Hon Greg Clark MP, Secretary of State for Business, Energy and Industrial Strategy announced, by a written statement to Parliament¹, that there was to be an Inquiry in relation to the procurement process for the Magnox Sites from inception through to the award of the contract to CFP, the management of the contract for those sites by the NDA and the litigation that followed the award of the contract. I was asked to chair that Inquiry².

1.2 The Terms of Reference for the Inquiry are:

The Inquiry shall investigate the procurement process from its inception through contract award, the management of the contract by NDA to the point at which the NDA decided to terminate the contract and the litigation that followed the contract award, focusing in particular on:

- a. the course of events that led to the flaws in the contract award identified by the court;*
- b. the course of events that led subsequently to the decision to terminate the contract;*
- c. the handling of the challenge and subsequent litigation brought against NDA arising out of the procurement and the subsequent resolution of the proceedings;*
- d. the actions throughout of the NDA, including its subsidiary organisations, and the actions throughout of government departments associated with the procurement process;*
- e. the structure of governance and relationship between the NDA and government departments and whether that contributed in any way to the problems encountered;*
- f. the extent to which the various internal and external assurance processes employed during procurement were effective; and*
- g. any other matters it considers relevant and important.*

The Inquiry shall set out lessons to be learned, including about appropriate structures for governance and assurance of future complex, high-risk procurements, and make any recommendations it sees fit, including as to any disciplinary investigations or proceedings that may, in its view, be appropriate as a result of its findings.

The Inquiry will be led by Steve Holliday. He will draw on others as appropriate, including external advisers he may, by agreement with the Secretary of State, appoint.

¹ See: <https://www.gov.uk/government/speeches/nda-settlement-contract-termination-and-inquiry>

² My biography can be seen here: <https://www.gov.uk/government/people/steve-holliday>

The Inquiry shall report to the Secretary of State for Business, Energy and Industrial Strategy and to the Cabinet Secretary.

- 1.3 During the debate that followed the announcement of the Inquiry, the Secretary of State said:

“I have asked Mr Holliday to give some interim findings by October, so that they can inform the further decisions about the re-letting of the contract.”³

- 1.4 This Interim Report provides those interim findings and makes immediate recommendations to inform those decisions.

- 1.5 Until such time as my Inquiry has completed its investigations (inclusive of the comprehensive interview process that has commenced but not yet concluded), and fully considered the totality of the evidence, my interim findings should necessarily be regarded as provisional. That said, as I later describe, I am sufficiently confident in the factual foundation on which my immediate recommendations are based for them to be acted upon.

³ Hansard, 27 March 2017, volume 624, column 28.

PART 2. WORK UNDERTAKEN

- 2.1 In undertaking my role I have been assisted by an Inquiry Team which includes external lawyers.
- 2.2 The majority of the work completed so far has been to review documents. The bulk of the documents have been documents created by the NDA teams for the Magnox Competition, including governance board minutes and associated papers. We have also been provided with documents from other sources, for instance advice given to the NDA by its external lawyers and other professional advisors and assurance reports prepared by teams from central Government that at relevant times looked at how the NDA was carrying out its responsibilities. We have reviewed the court judgments relevant to the Inquiry, in particular the Liability Judgment.
- 2.3 The Inquiry has commenced its extensive interview programme. Those interviewed so far include a number of NDA (or ex-NDA) staff and board members and representatives of each of the bidding consortia (or their constituent companies). However, this task is at an early stage.
- 2.4 The Inquiry will continue its interview programme. I currently expect the Inquiry will have interviewed around 50 people by the time it finishes its work. The Inquiry has reviewed a significant number of documents including those it regards as core to the issues. However, there are millions of potentially relevant documents. The Inquiry is taking steps to ensure that through a sophisticated document management system it can identify those which are truly relevant. By the end of the process, I consider I will have a full picture of the available evidence from both documents and interviews and this will be reflected in my Final Report.
- 2.5 I expect to be providing my Final Report in the first part of 2018. The exact timescale depends primarily on the time taken to do the further work I mention above and to carry out any Maxwellisation process that may be required⁴.

⁴ Maxwellisation is the process by which those whom an Inquiry proposes to criticise in its report are given the opportunity to make comments about the criticism to the Inquiry before the report is finalised.

PART 3. THEMES

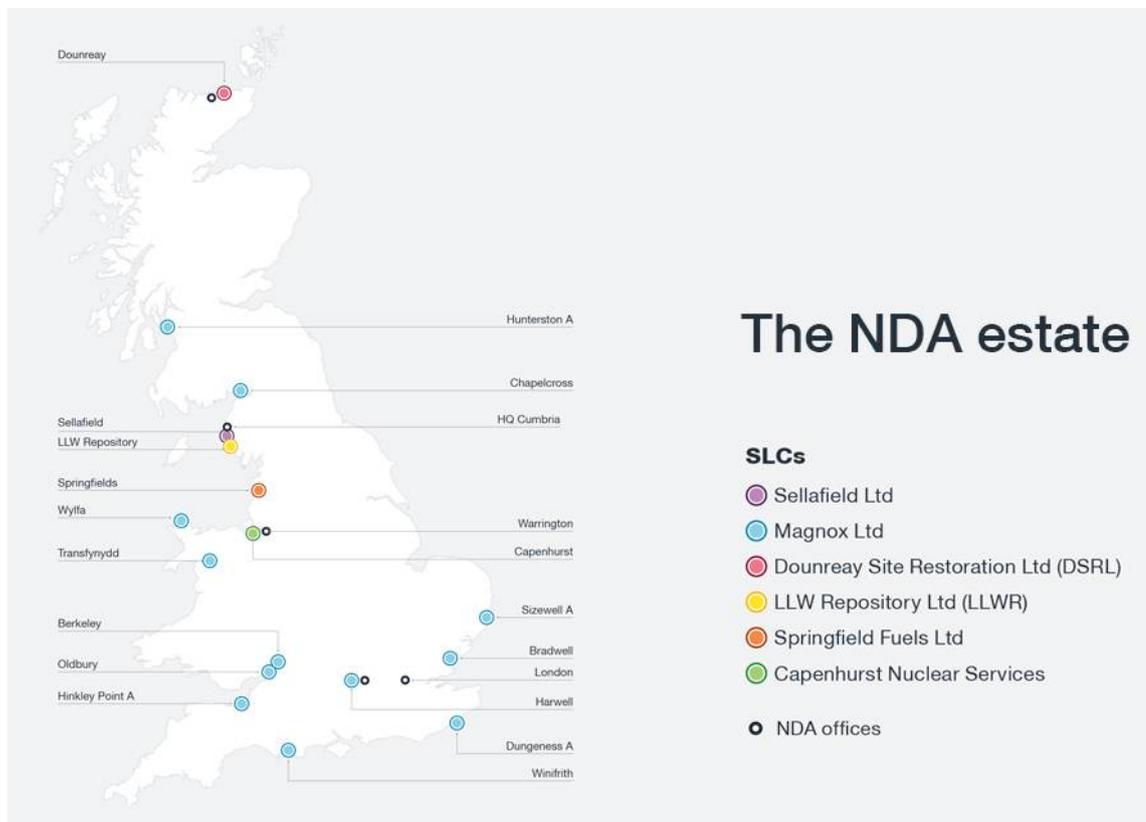
3.1 I set out my interim findings and immediate recommendations in Part 6.

3.2 Those recommendations relate to four themes:

- design of the procurement process and setting the Competition rules;
- running the competition, including the consequences of design failures;
- how the Competition was resourced; and
- governance and assurance.

The Purpose of the NDA⁵

- 4.1 The NDA is a public body established under the Energy Act 2004 with responsibility for the operation, decommissioning and clean-up of civil nuclear reactor and research sites in the UK. It employs just over 200 staff with headquarters in west Cumbria. It owns 17 sites across England, Wales and Scotland (set out below), some dating back to the 1940s, plus the associated liabilities and assets. It reports to BEIS; for some aspects of its work in Scotland, it is responsible to Scottish Ministers.



- 4.2 The NDA does not have a hands-on role in cleaning up its facilities. Instead it delivers its obligations through others, primarily SLCs. The SLCs hold the nuclear site licence, granted by the Office for Nuclear Regulation, to operate the site or sites. They are tasked with carrying out the required decommissioning; providing staff to run the sites and letting the contracts needed to run and decommission them. In total there are around 18500 people employed across the NDA estate.

⁵ In this section I use, where appropriate, information set out in the “About Us” section on the part of the gov.uk website relating to the NDA. See: <https://www.gov.uk/government/organisations/nuclear-decommissioning-authority/about> and information from the NDA’s Annual Report for 2016/17 which can be seen at: <https://www.gov.uk/government/publications/nuclear-decommissioning-authority-annual-report-and-accounts-2016-to-2017>

- 4.3 At the time of writing three SLCs (including Magnox Limited) out of six are owned by a PBO. A PBO is historically a consortium of private companies that bids for temporary ownership of the SLC through an open competition. The PBO acts as a parent company, providing additional resource and management expertise.
- 4.4 BEIS and HM Treasury set the NDA annual operational budget which is a combination of government funding and income from the NDA's commercial assets. The NDA's budget is around £3 billion a year.

Why the NDA was procuring this contract

- 4.5 The NDA resolved to run a competition to appoint a new PBO as the existing contract for the ten Magnox Power Stations was coming to an end. The competition was to appoint a PBO for the Magnox Sites (that is the ten Magnox Power Stations and the two research sites). The Magnox Competition was the final competition in the NDA's contracting cycle. The Magnox contract, at a value of around £6.1 billion over fourteen years, was one of the largest value contracts let by a tax-payer funded body in the United Kingdom.
- 4.6 The objective of the procurement exercise for the Magnox contract was to optimise value for money and performance in the delivery of the NDA strategy for the management and decommissioning of the Magnox Sites. The NDA planned to achieve savings in two ways:
 - 4.6.1 first, it aimed to improve efficiency and unlock economies of scale by appointing a single PBO to have responsibility for both the ten Magnox Power Stations and the two research sites (together the twelve sites comprising the Magnox Sites);
 - 4.6.2 secondly, it introduced a "target-cost incentive" into the contract which would result in the successful contractor's fee going up if it was able to bring the costs of decommissioning below an agreed target cost.

Public procurement - EU and UK law

- 4.7 At the time of the procurement the NDA's tendering processes were regulated by European Union derived legislation; the Public Contracts Regulations 2006. Any public tender falling within those Regulations has to be conducted in accordance with detailed rules but also with general principles of transparency, fairness, equal treatment, consistency and proportionality.
- 4.8 Bidders are entitled to be told why they have lost a tender process and can bring a legal claim if the rules and/or principles have not been followed. In such cases bidders can seek to stop a contested contract being signed and/or claim damages (for example, for their wasted bid costs or their lost opportunity to make a profit).

PART 5. SUMMARY OF EVENTS LEADING TO THIS INQUIRY

The Magnox Competition

- 5.1 The Magnox Competition ran from July 2012 to March 2014. It was run by a Core Competition Team, complemented by NDA subject matter experts in technical, financial, human resources (HR) and other areas. The NDA also appointed external legal advisors and financial advisors. The Competition was the subject of extensive governance and assurance, to which I refer later in this Interim Report.
- 5.2 In November 2013 the NDA received four final tenders. To decide on the winning bid the NDA had published an evaluation methodology to assess the bidders' responses. These had to adhere to a set of rules (the SORR) which assessed a combination of cost, commercial, technical and other qualitative factors. The SORR was an exceedingly lengthy document (more than 300 pages) and laid out in detail what a bidder's final tender should contain and how individual elements of its tender would be scored.
- 5.3 In March 2014 the NDA concluded that the winning bid was that of CFP (this bid got an overall score of 86.48%). Scoring was very close, with the second placed bidder, RSS, submitting a bid which scored 85.42%. The other bidders also scored very closely.

Objections and Legal Challenge

- 5.4 All four bidders were notified of the procurement decision on 31st March 2014. The NDA signed a transition contract with CFP on 15th April 2014 after a 'standstill period'. The final set of contracts with CFP was signed with effect from 1st September 2014.
- 5.5 In April 2014, Energy Solutions, part of the RSS consortium, brought a legal claim against the NDA in the High Court, alleging that the NDA had breached the relevant procurement rules, and that RSS should have been awarded the contract. Further legal claims followed from ES. Its fellow consortium member, Bechtel, chose not to bring a claim at the time, although it did bring a later claim after the Liability Judgment was issued.

Litigation with ES

- 5.6 This was a dispute of high legal and technical complexity.
- 5.7 The main elements of the Liability Trial took place in the High Court from November 2015 to March 2016.
- 5.8 Before and after the main trial there were separate hearings on preliminary issues (technical legal issues) in the High Court, Court of Appeal and Supreme Court. These are not directly relevant to the Inquiry.
- 5.9 In July 2016 the High Court handed down its decision in relation to the Liability Trial, the content of which is summarised in the Appendix.

5.10 The High Court concluded that the NDA had committed multiple, manifest errors in evaluating the (losing) RSS bid and the (winning) CFP bid⁶.

5.11 Correcting these errors, the Court found that the RSS bid scored more highly than that of CFP, and so RSS should have won the Competition. It also found that the CFP bid should have been disqualified, as it had failed to satisfy certain technical requirements.

Settlement with ES

5.12 In March 2017, the Secretary of State for Business, Energy and Industrial Strategy announced that the NDA had reached a £85 million agreement to settle the claims of ES.

Claims by Bechtel

5.13 After the Judgment in July 2016, Bechtel also issued a legal claim against the NDA. At the same time as settling the claim by ES, the Secretary of State announced that the NDA had also agreed to settle Bechtel's claim at £12.5 million.

Proposed termination of contract with CFP

5.14 At the same time as announcing the settlements with ES and Bechtel, the Secretary of State also announced that the NDA had decided to terminate the contract with CFP nine years early due to a significant mismatch between the work specified in the tendered contract and the work that needed to be done.

5.15 The contract with CFP had envisaged a period of consolidation during which CFP would be allowed to check whether the state of the sites it was inheriting were as it was led to expect during the Magnox Competition and then reach agreement with the NDA on the changes to scope and cost.

5.16 In the period after September 2014 CFP went through its consolidation exercise. It formed the view that the degree of change was much greater than it expected. Consolidation took a lot longer than initially anticipated by the contract.

5.17 By March 2017, and more than two years into a task intended to take no more than 12 months, NDA had still not agreed the cost of change and CFP's estimate of costs had risen significantly.

5.18 The NDA decided that the value of proposed changes to the contract could amount to a material change to the basis on which the competition was founded in 2012.

5.19 The NDA Board therefore decided to bring the contract to an early end, using its right to 'terminate for convenience'. This was not a reflection on the performance of CFP. It is now agreed that the contract will come to an end on 31st August 2019.

⁶ Case reference: [2016] EWHC 1988.

PART 6. INTERIM FINDINGS AND IMMEDIATE RECOMMENDATIONS

- 6.1 In this Part of my Interim Report:
- 6.1.1 I make immediate recommendations for others to act upon now pending the Inquiry's Final Report and set out the interim findings against which the recommendations are made; and
 - 6.1.2 I flag up, non-exhaustively, related avenues of inquiry that are the subject of the Inquiry's investigations, and which will be subject of detailed consideration by my Inquiry for the purposes of my findings and recommendations in the Final Report.
- 6.2 The Judgment (summarised in the Appendix) identifies mistakes made by the NDA in the flawed procurement giving rise to this Inquiry. The Judgment is the correct starting point for my Inquiry in seeking to establish why the process went so badly wrong.
- 6.3 In considering how to avoid any recurrence I have undertaken the task of writing this Interim Report with the benefit of, and drawing upon, the comprehensive and detailed analysis of the facts contained in that Judgment. I have also had the benefit of the evidence the Inquiry has already considered. As described in paragraph 2.2 of this Interim Report, most of that evidence has been documentary. The substantial task of interviewing witnesses has begun and will continue. In this connection, I am particularly mindful of the need to hear from those who were responsible for setting up, operating, advising on and overseeing the procurement process and its aftermath (including the litigation, settlement of the litigation, the consolidation process and the termination for convenience of the contract with CFP).
- 6.4 I consider, however, that I can safely and usefully make certain interim findings and immediate recommendations at this point. Doing so accords with the Secretary of State's statement in Parliament (referred to at paragraph 1.3 of this Interim Report) and is of practical benefit now to those deciding what to do with the Magnox Sites once the current contract with CFP comes to an end on 31st August 2019.
- 6.5 Once the totality of evidence (both documentary and witness) has been reviewed, I will be in a position to report fully on precisely how and why such a flawed and costly procurement process came about, and to make comprehensive recommendations to avoid any future repetition.
- A. Design of the procurement process - setting the Competition rules**
- 6.6 In this Section I set out interim findings about the design of the Competition, make some connected immediate recommendations and identify further related avenues of inquiry.
- 6.7 **Over-complexity.** As I have said (see paragraph 5.2 of this Interim Report), the NDA set out in its SORR a 300+ page scoring mechanism, with detailed rules as to how each part of a bidder's final tender was to be evaluated. To respond to this set of requirements each bidder would have to submit a very lengthy tender.

- 6.8 As a consequence of this decision, for each of the four bidders the NDA had to score more than 700 separate criteria (including over 300 strict pass/fail criteria, with additional pass/fail criteria calculated by averaging groups of scores - see paragraph 6.10 below.) In total the NDA had almost 3,000 criteria to evaluate.
- 6.9 At this stage I find that the NDA devised and published an unnecessarily prescriptive and detailed scoring mechanism and set of related tender requirements. This had a number of consequences. First, it was unduly onerous on bidders. Secondly, it was unduly onerous on the NDA and, in addition, created significant risk for the NDA. With so much scoring to do, human error became almost inevitable, and the risk of challenge by bidders increased (since they could use the extensive detail in the SORR to point to disparities in scoring). As matters transpired, this was exactly what happened. Finally, the complexity of the approach made it difficult for governance bodies to understand the consequences of the decisions being taken.
- 6.10 **Too many pass/fail criteria.** As part of its scoring system the NDA had over 300 so called 'threshold requirements', i.e. pass/ fail scores. Failure to achieve any single one of these (however close the bidder came) would lead to its whole bid being disqualified. I find that the number of threshold requirements was excessive. It created a danger that the NDA might have to exclude a bid, if the Competition rules were followed, that, in substance, would be acceptable. The court found that the NDA had not thought hard enough about the effect of including these pass/ fail thresholds in its tender requirements⁷. This is an example of the NDA failing to focus on what was really critical in the tender process.
- 6.11 The court found that the NDA ended up not following its own scoring rules in order to avoid disqualifying the CFP bid. In doing so the NDA acted unfairly and this was one of the main reasons why the court found the NDA's decision to award the contract to CFP to be unlawful. The NDA ended up encountering the very danger it had created.
- 6.12 **Scoring of cost.** The NDA attributed 64% of the overall scoring to cost and cost-related elements, intending to emphasise the importance of cost to the NDA. However, the NDA was scoring not a fixed cost but a target cost for the work. The target cost was based on a number of assumptions given to the bidders by the NDA which, if proven to be inaccurate,, would give rise to allowable cost increases, changing the target cost. In particular, the bidders were asked to price on artificial assumptions about the starting point of the work when they took over.
- 6.13 **Sensitivity.** As is evident from the Judgment, the scoring mechanism was overly sensitive to change. This created a further risk for the NDA of a small number of changes materially altering the result. ES challenged 36 out of over 700 scores. Of these the Court found 22 had been wrongly scored. The cumulative effect of this was significant; the consequence was to reverse the result of the Competition.

⁷ Paragraph 865, Judgment

Immediate Recommendations

- 6.14 My immediate recommendations are:
- 6.14.1 **the NDA devises a transparent, but less complex, set of competition rules, focussing on the substance of what it is looking for rather than on process;**
 - 6.14.2 **prior to commencing further competitions, the NDA takes all necessary steps to assure itself that the information presented to bidders is as complete and accurate as possible so that bidders have a suitably reliable starting point for the scope of the tendered work. Such assurance could come from appropriately qualified internal or external sources. Although this may be an extensive and time consuming exercise, it will have two main benefits. First, it is essential to avoid the risk (which transpired with the CFP contract) of material cost overruns. Secondly, it will help ensure that final tenders (and business cases) are made on the basis of the best information available at the time;**
 - 6.14.3 **the NDA considers afresh its approach to 'threshold' items which would cause a bid to fail. The test for any threshold item should be that it is absolutely essential and that, without it, the NDA would genuinely not wish to accept the bid in question; and**
 - 6.14.4 **the relevant competition rules should be thoroughly tested through a range of different scenarios to ensure that they are workable and do indeed achieve the objectives of the NDA at that point.**

Further Related Avenues of Inquiry

- 6.15 For my Final Report areas for investigation include:
- 6.15.1 whether the design of the Magnox Competition, including the use of thresholds, made the failure of the procurement near inevitable by creating a situation where the NDA could not comply with its own published rules;
 - 6.15.2 whether the NDA's approach was too process-led and meant it lost sight both of what it was truly looking for from bidders and the ability to differentiate between them;
 - 6.15.3 whether the NDA's emphasis on cost was misplaced and paid insufficient attention to the capability that the NDA was seeking to acquire through the process; and
 - 6.15.4 whether the NDA paid enough attention to the need to give bidders up to date information about site conditions so that they could put in more accurate bids.

B. Running the Magnox Competition - the consequences of design failures

- 6.16 In this Section I set out interim findings about the conduct of the Competition, make some connected immediate recommendations and identify further related avenues of inquiry.
- 6.17 As far as the conduct of the Competition is concerned, I have taken account of and started from the findings of the court in this regard. More detail can be found in the summary of the Judgment in the Appendix and in the Judgment itself. However, the principal relevant findings of the court were that the NDA had:
- 6.17.1 **failed to apply its own competition rules:** in sixteen instances considered by the court the scores the NDA gave RSS did not correspond to the published scoring scheme and should have been higher; in a number of instances the scores the NDA gave CFP should have been lower; CFP should have been disqualified on threshold grounds;
 - 6.17.2 **failed to act transparently:** the court found the NDA adopted an overly defensive approach to record and note keeping. During the evaluation there were inexplicable and undocumented changes in scores and unrecorded conversations between evaluators and members of the Core Competition Team leading to changes: in the words of the court *“the need for transparency in the evaluation was never sufficiently grasped by the NDA⁸”*. The NDA used a specialised computer system to keep a record of its decisions but the court found that *“strict procedures and the audit trail of decision making were breached on a number of occasions”⁹*. The court found that the NDA introduced unplanned steps into its scoring, in particular by asking its external legal advisors to check scores arrived at for consistency; and
 - 6.17.3 **failed to act consistently:** the court found that RSS and CFP did not always get the same marks for broadly comparable elements of their tenders, that RSS was not scored in a way that was consistent with what it had been told in the dialogue phase and that, on one occasion, NDA failed to assess the RSS tender in accordance with industry standards published by its own evaluator.

Immediate Recommendations

- 6.18 My immediate recommendations are:
- 6.18.1 **the NDA should revise its approach to record keeping with bidders. In any complex procurement there will be a high level of interaction with bidders. This is entirely desirable (and the point). Proper record-keeping and sharing of decisions made by the NDA (and relied upon by bidders) is essential. Agreements reached or positions shared with bidders should be documented and shared with bidders by the NDA and so help avoid misunderstanding at a later date;**

⁸ Paragraph 223, Judgment

⁹ Paragraph 123, Judgment

- 6.18.2 **the NDA should devise a standard corporate approach to internal record keeping during evaluation of procurement competitions, such approach to be transparent and address the failings identified by the court. There should be adequately skilled oversight of its application. Through training, NDA competition staff should understand their legal duties in recording evaluation decisions. They should be required to keep contemporaneous notes. The NDA should take steps to ensure that each evaluator can form and record their opinion and scores (with reasons). Where changes are made there should be a record of reasons for them; and**
- 6.18.3 **the NDA's evaluation decision making process should be set out in advance and be strictly followed.**

Further Related Avenues of Inquiry

- 6.19 In my Final Report I will further consider:
- 6.19.1 the extent to which the NDA had an overly defensive attitude to record-keeping, the reasons for this and the impact on the NDA's legal obligations to act fairly and transparently; and
- 6.19.2 the circumstances and the actions of individuals surrounding the way in which scores were arrived at (including the scores which the Court found to have been incorrect) and the impact of the legal review of the scoring I have mentioned.

C. How the Competition was resourced

- 6.20 In this Section I consider how the Competition was resourced, set out interim findings in this regard, make some connected immediate recommendations and identify further related avenues of inquiry.
- 6.21 The general perception within the NDA was that procurement competitions it had run prior to Magnox (most recently in relation to the Dounreay site) had been successes and that it was effective as a procurer. However, a number of experienced staff who had worked on previous competitions had left the NDA in the period leading up to the Magnox Competition. This reduced the number of suitably skilled and experienced staff remaining and available to work on the Competition. In fact, there was a decision taken not to invest in the NDA team responsible for the Competition, on the basis that this was the last in the cycle of decommissioning procurements.
- 6.22 The NDA supplemented the Core Competition Team with selected technical, HR, financial and commercial experts from within the NDA. There was some limited support from external financial advisors and the process was supported throughout by external legal advisors.

Immediate Recommendations

- 6.23 My immediate recommendations are:
- 6.23.1 **for future procurements of nuclear decommissioning services the NDA should build and maintain a strong and well-resourced team (seeking external expertise and resource where necessary) to achieve both breadth and depth of**

expertise. That team must have both significant experience of the procurement of nuclear decommissioning services and significant experience of current best procurement practice outside of the nuclear decommissioning industry; and

- 6.23.2 **in considering how to resource the team, the NDA should use as its benchmark resourcing profiles for comparable procurements (not just those in the area of nuclear decommissioning).**

Further Related Avenues of Inquiry

- 6.24 In my Final Report I will consider further whether:
- 6.24.1 the NDA put in place sufficient resource and experience to meet the demands of the Magnox Competition (noting that I refer to other resource related issues in Part 7 of this Interim Report);
 - 6.24.2 the NDA's team would have benefited from thinking outside of the nuclear decommissioning industry and/or additional external resource;
 - 6.24.3 the Core Competition Team and evaluators were put under unnecessary strain;
 - 6.24.4 there was enough clarity of responsibility within and outside the Core Competition Team; and
 - 6.24.5 the Core Competition Team and evaluators were sufficiently supported by line managers and the executive team and whether there was the correct balance between independence of the Core Competition Team and informed oversight of their work.

D. Governance and Assurance of the Competition

- 6.25 In this Section I consider how governance and assurance worked in relation to the Competition, set out interim findings in this regard, make some connected immediate recommendations and identify further related avenues of inquiry.
- 6.26 For major procurement projects it is common to put in place a layered decision-making model. It is also common that major decisions are assured at key stages in the process. The Magnox Competition was no different.
- 6.27 During the Magnox Competition itself, the work of the Core Competition Team was overseen within the NDA by multiple layers of governance (in particular a Competition Project Board, a Competition Programme Board and the NDA Board itself), by line management and by the Senior Responsible Officer. The senior executives at the NDA had (or had the opportunity of) oversight of all strategic matters and key decisions in relation to the Magnox Competition.

- 6.28 Outside of the NDA, approvals were sought from the Department of Energy and Climate Change¹⁰ and HM Treasury at requisite stages in the process.
- 6.29 Apart from approvals, independent checks were carried out and assurances given about certain aspects of the delivery by the NDA of the Competition. Four independent reviews were carried out by the Major Projects Authority. The NDA also sought and obtained some assurance from external financial and legal advisors.
- 6.30 The Competition was audited on two separate occasions by the NDA's internal audit team. On the first occasion the team was asked to consider whether the lessons learned from the Laidlaw Inquiry¹¹ had been properly applied. On the second occasion the internal audit team considered whether the NDA's evaluation procedures had been complied with. On each occasion the internal audit team provided a positive report and these were used at the different layers of governance as evidence that the procurement process was on track.
- 6.31 None of the multiple layers of governance, assurance and audit were successful in preventing the flaws in the Magnox Competition or intervened to stop the chain of events which gave rise to the Inquiry.

Immediate Recommendations

- 6.32 My immediate recommendations are that:
- 6.32.1 **the NDA ensures that there are clear lines of responsibility, including at a senior level, in the reporting structure for future competitions and senior line management provides active oversight of the Core Competition Team (commensurate with, and proportionate to, the need to maintain the integrity of the procurement);**
 - 6.32.2 **the NDA ensures that its governance boards have the right level of commercial and other experience to bring active and constructive challenge to the work of the NDA;**
 - 6.32.3 **governance boards assure themselves that they have a clear understanding of the risks that may arise from future competitions; and**
 - 6.32.4 **external legal, financial and other advisors have regular exposure to the NDA Board and the Senior Responsible Officer alongside the ability, outside of these regular meetings, to escalate matters to the Board. Governance boards should understand the advice they are being given by external advisors (and the limitations of that advice) in the knowledge that they remain responsible for the decisions taken.**

¹⁰ During the Competition the NDA reported to the Department for Energy and Climate Change. Following government reorganisation it now reports to BEIS

¹¹ Report of the Laidlaw inquiry: inquiry into the lessons learned for the Department for Transport from the Intercity West Coast competition, HC 809 2012-13. See <https://www.gov.uk/government/publications/report-of-the-laidlaw-inquiry>.

Further Related Avenues of Inquiry

- 6.33 In my Final Report I will further consider why, despite the extensive governance and assurance framework, such governance and relevant responsible individuals did not intervene to stop the chain of events which gave rise to the Inquiry.
- 6.34 Specifically I will consider:
- 6.34.1 whether there was sufficient oversight and management of the Core Competition Team;
 - 6.34.2 whether there was sufficient challenge from the NDA Board to what it was being told in accordance with the Board members' experience and good corporate practice;
 - 6.34.3 whether there was enough transparency and exposure to the NDA Board members of key facts, risks, documents, advice and decisions to be taken to enable each of them to perform their role;
 - 6.34.4 the effectiveness of NDA's internal governance and of governance and approval bodies outside of the NDA. These bodies include the Shareholder Executive (and subsequently UKGI), DECC (and subsequently BEIS) and HM Treasury. They had various governance roles and responsibilities in overseeing the NDA during the time the Inquiry is interested in. I will investigate whether there was adequate oversight by these bodies and individuals within these bodies, and whether they undertook their responsibilities and executed them in accordance with the NDA governance framework;
 - 6.34.5 whether such internal and external governance bodies and approvers introduced sufficient levels of expertise and challenge;
 - 6.34.6 whether there was too much governance and not enough accountability; and
 - 6.34.7 whether internal and external audit and other assurance functions were appropriately resourced and effective.

PART 7. ADDITIONAL AVENUES OF INQUIRY

- 7.1 In this Part I identify some additional avenues of inquiry known to me today that I have not already mentioned but which I will be investigating for the purposes of my Final Report.
- 7.2 The Dounreay competition, which immediately preceded the Magnox competition was, as I mention at paragraph 6.21 of this Interim Report, regarded as a success within the NDA. I want to further investigate whether it was appropriate for the NDA to take the comfort it did from the Dounreay competition, whether the lessons which the NDA decided it could take from that competition and apply to the Magnox competition were appropriate and, if they were, whether they were correctly applied.
- 7.3 At this stage the evidence I have seen does not suggest that the PBO/SLC model adopted for the Magnox competition was inherently flawed. However I will examine further whether an alternative contract and commercial approach would have been more appropriate bearing in mind the risks that existed.
- 7.4 I will further investigate whether the scope of the contract against which bidders were asked to submit bids was sufficiently robust to be used for that purpose. This will include looking further at how the scope was derived, whether the mitigation put in place for any uncertainty of scope was appropriate or sufficient, whether the financial impact on the procurement model of any uncertainty was properly understood and dealt with and whether the uncertainties about the scope that existed made an alternative model for procurement appropriate (for instance one which provided for an initial short term contract to allow for a more robust scope to be developed, to be followed by a procurement competition for a longer term contract based on that scope).
- 7.5 I will continue to investigate why the work that in fact needed doing under the contract was different to that procured for, the extent of the difference (and the additional costs), and the way in which the NDA and those in government dealt with the analysis of the difference, the costs and the legal issues connected to the additional costs.
- 7.6 In addition to my consideration of the resource available for the Competition itself, I will consider the wider resourcing decisions made by the NDA with regard to the management of the CFP contract. In particular I will investigate whether there was sufficient resource and experience in the contract management team (including the team responsible for managing changes arising from consolidation under the CFP contract) and whether that team was mobilised in sufficient time to actively manage the volume of changes under the new contract. I will also investigate how that team was overseen and whether those in the NDA with oversight and those outside the NDA who had governance responsibilities over the work of the NDA were given timely and adequate information to understand and act upon issues arising from consolidation.
- 7.7 I will continue my consideration of how the legal claims made by ES and Bechtel were dealt with from the time the ES and Bechtel claims were lodged until the eventual financial settlement. This includes consideration of whether appropriate legal advice was requested and given during this time (including during the litigation), and the approach to settlement (including whether a settlement should have been pursued at an earlier stage).

- 7.8 As a general point I will consider how legal risk was managed by the NDA throughout the whole chain of events which gave rise to this Inquiry. I will investigate when and how internal and external legal advice was sought and the effectiveness of that advice. This will include considering whether legal advice was sought too late in the day and/or ignored. I will also consider how legal advice and risk was communicated to the NDA Board, other governance bodies and approvers and whether legal advice always became a Board level issue when it should have. When legal advice was communicated, I will investigate whether it was done in a way that allowed the NDA Board or other governance bodies to make well-informed decisions.
- 7.9 I will further investigate whether the actions of individuals within the NDA , and those of government officials and ministers, were consistent with the standards expected of them, including relevant codes of conduct.
- 7.10 I will continue to investigate whether decision makers (individuals, including government officials and ministers or boards) had the necessary information to make those decisions and, if not, why not. This will cover decision making at all stages of the matters covered by the terms of reference, including the procurement, the litigation and the matters leading to the termination for convenience.

APPENDIX: SUMMARY OF THE JULY 2016 JUDGMENT

Background

1. In July 2012 the NDA began a procurement process under the Public Contracts Regulations 2006 for the award of a contract for decommissioning 12 former nuclear facilities in the UK . Energy Solutions EU Limited formed a consortium called Reactor Site Solutions, which submitted a tender for the contract. It was one of four prequalified bidders who tendered. ES was awarded an overall score of 85.42% by the NDA, and was unsuccessful. The Competition was won by the Cavendish Fluor Partnership, whose score was 86.48%. The difference was a narrow margin of 1.06%.
2. ES brought a claim against the NDA in the English High Court for breaches of the Regulations (including by the making of manifest error and through contravening the NDA's statutory obligation to "treat economic operators equally and in a non-discriminatory way; and act in a transparent way"), and for damages by way of compensation.

The Court's decision

3. The Liability Judgment was delivered in July 2016. The court found that the NDA had committed "*manifest errors*" in its evaluation of the RSS bid, such that RSS's overall score should have been increased, to 91.48%, and that of CFP revised slightly upwards to 85.56%. The NDA should therefore have found RSS's bid to be the most economically advantageous tender, and the RSS consortium to be the winner of the Competition.
4. In addition, the court found that the NDA had "*fudged*" the evaluation of certain aspects of the CFP bid to avoid the consequences of CFP having failed to satisfy certain threshold requirements of the Competition that had been devised by the NDA. The court concluded that in two respects CFP would have been disqualified from the Competition if the NDA had correctly applied their own threshold criteria.

Tender Framework

5. The Competition, which the court described as "*evidently complex*", was conducted by the NDA using an evaluation framework. That framework subdivided the areas for evaluation by the NDA into four core topics (cost, commercial, key enablers and technical scope and methodology underpinning) called Evaluation Nodes, which themselves were comprised of different detailed requirements. The bidders were required to submit very detailed responses addressing each Requirement, which were evaluated and scored by Subject Matter Experts within the NDA against criteria fixed by the NDA, and set out in a lengthy Statement of Response Requirements.
6. The SORR was developed by the NDA in conjunction with the bidders during the dialogue phase of the procurement process, which ran from January 2013 to September 2013. The final version of the SORR was therefore arrived at by the NDA following a process of evolution in which the bidders participated. The court concluded that:

"The final version of the SORR was therefore a document of central importance in the procurement exercise, and hence in these proceedings. It is against that document that the different elements of the different Evaluation Nodes (both of the RSS and the CFP bids) were

evaluated, and that document which must be considered when the allegations of breach of statutory duty on the part of the NDA come to be examined in the evidence."

7. During the dialogue phase the four bidders received feedback from the NDA on their proposals, which included drafts of their likely tender responses called 'Interim Drops'. These documents were not scored by the NDA, but the court accepted ES's submission that they were an important mechanism for making sure the bidders knew that they were developing solutions that would meet the NDA's requirements, and which were fundamentally acceptable to the NDA.
8. The final version of the SORR was fed into the NDA's Invitation to Submit Final Tenders, which was finalised and sent out to the four bidders in October 2013. They then submitted their detailed tender responses which were scrutinised by teams of SMEs, who were required to reach a consensus score for the bidder's response to each Requirement against the SORR. Those scores would be entered into an electronic system called AWARD which was used by the NDA for noting and evaluating the different bids. The lead SME could make changes to the scoring for a Requirement until it was 'closed down' in AWARD, a process that required each SME involved in particular scorings to sign and confirm that the scores in the consensus entries were complete.
9. The court found that in practice two additional stages were introduced by the NDA to the formal SME review process as it applied to the Competition. The first was informal discussions between the SMEs and the Head of Competition at the NDA with overall responsibility and accountability for the management and delivery of the Competition, after which, on occasions, scores were found by the court to have changed, and 'closed down' entries on AWARD were re-opened to action them. No notes were kept of these conversations giving rise to concerns, expressed by the court over their transparency: see further below.
10. The second was the so-called Burges Salmon review. This was a process by which members of that law firm, who had been retained by the NDA to advise on the procurement, undertook a review to examine whether comments on AWARD appeared to be consistent with the score given, and whether the appropriate evaluation methodology for the particular Requirement (as set out in the SORR) had been applied. The NDA claimed privilege over the documentation produced by Burges Salmon, which prevented its consideration by the court: see further below.

Manifest errors

11. ES argued that the NDA had made numerous errors in the evaluation of the RSS and CFP bids against the SORR, and that it was open to the court to correct in RSS's favour the original scores awarded by the SMEs, and to declare RSS the winner. The court held that ES would have to demonstrate that the NDA had committed "*manifest errors*", or else its claim would fail.
12. The court rejected the NDA's submission that an evaluative judgement made in respect of the tender Requirements was not capable of constituting a manifest error, and held that it was possible for the NDA's reasoning process (and not just the score for each Requirement ultimately awarded by the NDA) to disclose a manifest error, or manifest errors, that were material, and which would justify the court's intervention in the scoring arrived at by the NDA.

13. The court concluded that the NDA had committed numerous manifest errors. Its reasoning is extremely detailed, and takes up more than half of the 324 page Judgment, as well as a confidential Appendix 3. The following examples serve to illustrate the nature and extent of the manifest errors found by the court.
14. In relation to Requirement 411.5.3(c), the court was asked whether a score of 1 (the low-end of the scoring regime, 5 being the highest) was lawfully awarded by the NDA "*because the active effluent treatment plant (AETP) and saline groundwater pumping system were not treated as key critical assets in the RSS's response.*" The court found that the NDA's score had not been lawfully awarded because neither the plant nor the pumping system were critical assets, let alone key critical assets. The same kind of material error was upheld by the court in relation to the NDA's scoring of other Requirements concerned with the identification of critical assets.
15. In relation to Requirement 410.5.3(i), the court was asked "*whether a score of 1 had been lawfully awarded by the NDA on the basis that RSS's assumptions should have included the construction of the interim storage facility, as a key handover point or one whose omission as an assumption was sufficiently serious to be a material omission.*" The court again held the score of 1 was not lawfully awarded. The Requirement had initially been scored as a 5, changed to a 3 and then to a 1 following the Burges Salmon review. The court found that there had been no missing assumption, and that NDA's analysis of the particular Requirement was "*manifestly erroneous*".
16. Manifest errors were not just made by the NDA in respect of the RSS response. The court found that in a small number of cases (4) the CFP score should be reduced because the score awarded by the SMEs was also "*manifestly erroneous*".

Threshold Scoring

17. As a consequence of the court's findings in confidential Appendix 3 to the Judgment, it concluded in the main Judgment that CFP ought to have been disqualified if the NDA had properly applied the terms of the SORR to CFP's tender response for two particular threshold Requirements, namely 306.5.1(j) and 401.5.1(b)(ix).
18. The Judge found that "*insufficient consideration was given by the NDA to the effect of the inclusion of threshold provisions in the SORR*". He rejected the contention that the NDA was permitted to "*lean against disqualification and increase the score that would otherwise be given*".

Compliance with Legal Principles

19. The court found that the NDA did not carry out the Competition in accordance with its obligations to do so transparently, and with equal treatment. Throughout the Judgment, the Court made a number of criticisms of the approach taken by NDA to the procurement process. In summary these were:

Lack of consistency

20. The court acknowledged that ES had criticised the fact that the SMEs had failed to evaluate the RSS tender consistently with what RSS had been told by the NDA during the dialogue

phase. Mr Giffin QC (for the NDA) accepted as a general point of principle that feedback during the dialogue should be consistent with the subsequent evaluation of the bids.

21. The court was unimpressed with the evidence for the NDA that SMEs would ensure consistency by memory (in the absence of any notes of the 9 month dialogue phase kept by NDA personnel.) He concluded that "*project management [of the dialogue phase] does not seem to have involved any mechanism or process whereby there was any proper record available to the SMEs of what had occurred during the dialogue process. It is difficult to see how consistency was going to be achieved in those circumstances.*"
22. The Judge warned that "*inconsistency in treatment of different bidders can amount to unequal treatment*". Drawing on the example of a material error in relation to critical assets (Requirement 411.5.3(c) referred to above), he stated:

"RSS was marked down, and given a score of 1 not 3, for not identifying either the AETP or the saline groundwater pumping system as key critical assets. However, CFP did not identify either of those as key critical assets either. It is a point for consideration as to whether either were key critical assets. But if they were, then they must have been key critical assets for both bids, or not key critical assets for both bids. Both bids should have been marked on the same basis. There can be no justification, in my judgment, where there is an obligation of equal treatment, for scoring the RSS bid as though these were key critical assets that were missing (justifying a 1) yet overlooking that omission in the CFP bid (and giving that bidder a score of 3)".

Restricted record keeping/proposed destruction of notes

23. The Court considered a range of evidence dealing with the fact that NDA anticipated from a very early stage that a legal challenge was possible, if not likely, from an unsuccessful bidder.
24. Two versions of training slides shown to the SMEs were put before the court. In the earlier version, it was stated to be 'a matter of policy' that hard copy notes made by the SMEs 'must be destroyed', and the SMEs were told that "*Any hard copy notes will be shredded at the end of evaluation*". A Clarification Note pro forma was also shown which included the wording: "*All clarification Note Sheets to be returned at the end of evaluation for shredding*".
25. The Judge considered it "*wholly unacceptable for a publicly funded body such as the NDA ever to consider a policy of shredding notes because they may become subject to disclosure in subsequent legal proceedings.*" The NDA's Head of Competition explained that another version of the training did not include the wording about shredding, which he said was 'contrary to policy'. The court nevertheless criticised its inclusion "*even if deleted in a later version*".
26. The Judge's very clear concern about the proposed destruction of notes is captured in the following extract:

"Regardless of the findings that I make in this case regarding the specific challenges to the evaluation, I find it extremely worrying that any public authority or its advisers on any procurement, could contemplate any policy that would involve the routine destruction of such important documents. Public authorities have express obligations of transparency under

the Regulations. It is difficult to see how the proposed or intended destruction of contemporaneous documents could ever be consistent with those obligations."

27. The court observed that the NDA was under an obligation to perform the evaluation transparently, and said that the discouragement of SMEs taking notes "*can hardly have helped such a complicated factual evaluation of the tender submissions*".
28. The Judge concluded that the deliberate restricting of note-taking by SMEs was part of the overly defensive approach adopted by the NDA, in light of its acute awareness that the unsuccessful bidder might challenge the outcome of the tender process:

"In circumstances where there is an express obligation of transparency upon the NDA, this approach to note and record keeping, and sensitivity about retaining written material, simply does not seem to me to be justified. That is putting the point at its most favourable for the NDA".

29. He added:

"In my judgment, the need for transparency in the evaluation was never sufficiently grasped by the NDA. This has led to important matters, such as the lack of any records of most important conversations... being dealt with in a manner that is wholly contrary to the obligation of transparency".

30. The Judge concluded that: "*The effect of NDA's approach was to limit the permanent record of what occurred to the absolute minimum of information*".

Unreported/undocumented changes to the NDA's evaluation, rationale and scoring

31. The AWARD system allowed the lead SME to change an entry for a Requirement until that Requirement was formally 'closed down' (the final stage in evaluation of any particular Requirement). For a Requirement to be 'closed down', each SME had to sign a form to confirm that the scores and consensus evaluation were complete.
32. The Judge concluded that scores in AWARD were changed unilaterally, rather than by consent, with the SMEs given slips to sign after the event to evidence their approval. The Judge noted that this was "*not in accordance with the way that scores were supposed to be arrived at, and also had the disadvantage that the other SMEs were being presented with a fait accompli*". In his view:

"The reason for having three separate SMEs independently considering the tender responses against the SORR at different stages (initial and final), with those SMEs then arriving at a consensus score, was so that the final score would be the independent conclusion of their separate and collective judgement. That was how the evaluation process was carefully designed. The "post-closed down" final, new, separate and informal stage permitted so that this consensus view could be changed was, in my judgment, not part of the process of evaluation as it was designed. It was also an extra stage fraught with danger for the NDA in this sense; it ran the obvious risk that depending upon who was doing the challenging, and why, and which parts of the consensus results were being challenged, and in respect of which bid, this informal stage may not have been applied equally to the different bidders. It is also not transparent because no records are available of it".

33. The Court concluded that the NDA's

"strict procedures, and the 'audit trail' of decision making, were breached on a number of occasions. AWARD was accessed and scores were changed after evaluation was completed".

The role of Burges Salmon

34. Burges Salmon, external legal advisors to the NDA, were initially asked to conduct a review into evaluation nodes which had been 'closed' on AWARD to examine 'whether the comments [of the SMEs] appeared to be consistent with the score [given to a bidder] and appeared to have applied the appropriate evaluation methodology for the Requirement as set out in the SORR'.
35. Burges Salmon's involvement was initially intended to be by way of 'sample checks', but this was reconsidered after the commencement of the evaluation process. The Judge considered this was because *"a legal challenge from a bidder was considered to be 'the top risk' to the competition and because 'greater legal input was required into the process"*.
36. The NDA had, at an earlier stage in the proceedings, successfully argued that the documents produced by Burges Salmon were covered by legal professional privilege ('LPP'). LPP entitles a party to withhold evidence from production to a third party or the court. The privileged evidence can be either confidential communications between a client and its lawyers created for the purposes of giving or obtaining legal advice, or communications between the lawyer or client and a third party created for the dominant purpose of use in actual or pending litigation.
37. The court was not asked to consider the privilege issue further and the Judge held that no adverse inferences could be drawn from *"the absence of any detail of that [Burges Salmon] review"*.
38. The Court expressed surprise that the Burges Salmon Review *"could have led to such changes in the scoring as it did"*.
39. The Judgment records that personnel from Burges Salmon were present at some of the dialogue meetings, but that the court was not given a clear answer as to whether or not they had made notes of the meetings. It further records that there is no evidence at all that any notes of the meetings that may have been made by Burges Salmon were made available to any of the SMEs, either for the evaluation process or at all. LPP had been claimed by the NDA for all documents created by Burges Salmon, which led the Judge to remark that *"existence or content of such notes does not have any effect upon this unsatisfactory aspect of the way this phase of the competition was organised."*

Revelations of July 2016

40. Shortly before Judgment in the liability proceedings was to be delivered, the Judge was informed by the solicitors for ES that they had just discovered that ES had entered into written agreements with certain of the ES witnesses to be paid bonuses in the event that ES was successful in the litigation against the NDA. In response the judge ordered a hearing to enable the NDA to cross-examine the affected ES witnesses on this state of affairs, if it so wished. Before the hearing, the NDA issued an application seeking dismissal of the whole of

ES's claim against the NDA, or alternatively a declaration the proceedings already heard by the court amounted to a mistrial.

41. The starting point for the High Court was that English law is hostile to agreements to pay witnesses dependent upon the outcome of litigation, for the perfectly understandable reason that the temptation to a witness to give untruthful evidence because of the prospect of monetary reward means that such agreements are contrary to public policy. The Judge concluded, however, that the existence of such agreements is something which affects the weight to be attached by the court to the witness's evidence. Neither the existence of the agreements themselves, nor the failure to disclose them (which had been remedied), would justify granting the NDA the orders it was seeking.
42. Instead the Judge revisited the findings of fact in his draft judgment on each and every Requirement in dispute, for both the RSS and CFP bids, so as to consider whether they would have been any different should he have concluded (which he did not) that any of the ES witnesses should have their main evidence discounted to a significant degree, or entirely. He concluded that even in those hypothetical circumstances, his findings would be exactly the same, and he therefore dismissed the NDA's application.

Settlement of legal proceedings

43. The court concluded the Judgment by observing that the consequences of its findings on liability meant that the proceedings between ES and the NDA would continue to the next stage, that is to say determination by the Court of the ES's entitlement to damages, and the amount thereof payable by the NDA.
44. As matters transpired the settlement between ES and the NDA brought to an end the entirety of the legal proceedings before the High Court.