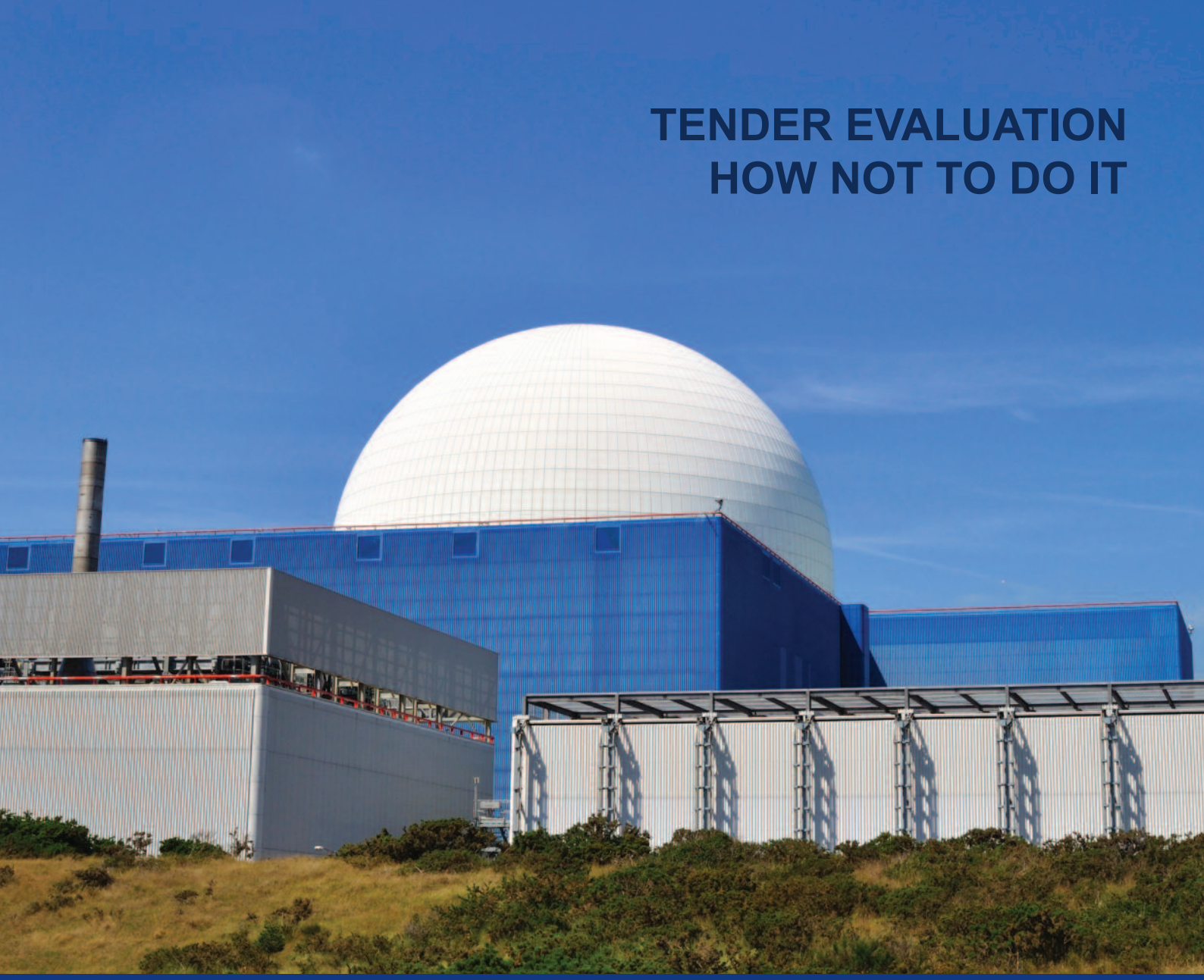
TENDER EVALUATION
HOW NOT TO DO IT



LANDMARK CASE REPORT

A comprehensive analysis of the 300-page judgment arising from *Energysolutions EU Ltd v Nuclear Decommissioning Authority* (2016) covering:

- Background
- Record-keeping and transparency
- Proportionality
- Manifest error
- Equal treatment when seeking clarification
- Lessons from this case

SHARPE PRITCHARD
Solicitors and Parliamentary Agents

HOW (NOT) TO EVALUATE TENDERS

An analysis of the landmark case: *Energysolutions EU Ltd v Nuclear Decommissioning Authority (2016)*

On 29 July 2016, the High Court handed down its judgment in one of the most high-profile and important public procurement cases in recent years, *Energysolutions EU Ltd v Nuclear Decommissioning Authority* [2016] EWHC 1988 (TCC).

This case concerns various claims brought by Energysolutions EU Ltd (Energysolutions) against the Nuclear Decommissioning Authority (the NDA) in relation to the NDA's procurement of a fourteen-year contract, worth up to £7 billion, for the decommissioning of a significant part of the UK's nuclear estate.

There are several points for contracting authorities evaluating tenders submitted as part of a procurement exercise to take on board.

John Sharland, Raj Shah, Hector Wakefield and Charlotte Swift, solicitors in Sharpe Pritchard's public procurement team, have read through the hefty 300-page judgment, so you do not have to. The key points to take away from the case are set out on the following pages, and we have compiled a list of dos and don'ts at the end that should be borne in mind when embarking on an evaluation of tenders.

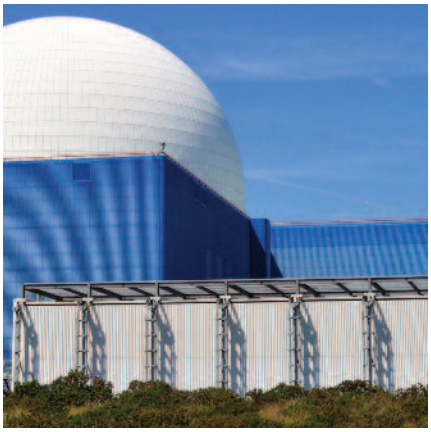
BACKGROUND

The NDA procured the decommissioning of twelve different nuclear facilities in the UK under the competitive dialogue procedure in accordance with the Public Contracts Regulations 2006 (the Regulations).

The contract to be awarded had a duration of 14 years, with a funding limit for the first seven years of approximately £4.2 billion.

Energysolutions (part of a consortium called Reactor Site Solutions) narrowly lost the procurement, scoring 1.06% in aggregate below the winning bidder's score. Energysolutions challenged the outcome, claiming damages on the basis that the NDA's decision to award the contract to the rival tenderer was unlawful.

The High Court ruled against the NDA because it had made manifest errors during the evaluation process that would have changed the scoring. The court also found that the successful bidder should have been disqualified for non-compliance against pass/fail criteria.



RECORD-KEEPING AND TRANSPARENCY

Regulation 84(8) of the Public Contracts Regulations 2015 makes clear that contracting authorities must keep sufficient documentation to justify decisions taken in all stages of a procurement process. This is closely related to what the court described in this case as contracting authorities' 'express obligations of transparency' and their compliance with this by way of producing and maintaining clear audit trails.

In this case, however, the NDA was criticised for its lack of a clear and transparent audit trail, particularly in respect of how tenders for this procurement were evaluated and scored. The court found that 'very important aspects of the evaluation process were wholly lacking in transparency'. For example, the evaluators' training pack included a document stating that only electronic notes in the software system used for the evaluation would be retained and requesting the destruction of 'all other notes pertaining to evaluation'. The training pack also stated that any hard copy notes made by the evaluators during the initial and final review stages of the evaluation were to be shredded at the end of the evaluation. A later version of the training pack stated that evaluators must keep electronic notes only so that those could 'be deleted from the system if no longer required/answered during the final review stage'. The court considered those electronic notes that had been saved and retained in the software system to be 'extraordinarily brief'.

In addition, no records of the all-important dialogue sessions between the NDA and the bidders were retained. Although the decision not to record these sessions had been communicated to bidders at introductory meetings when the procurement process began, the court considered that this was also in breach of the NDA's duty of transparency. The only way the evaluators could obtain any guidance was through oral conversations with the NDA's Head of Competition, which went unrecorded. Numerous witnesses in the trial stated that, following these conversations, members of the evaluation team had changed scores after the scoring decision had been finalised. Of particular concern was an entirely unrecorded discussion as to whether to evaluate a tender submission that had failed a pass/fail requirement, which raised issues of consistency as well as transparency.

The court was left to conclude from this that the NDA had given 'serious consideration […] to restricting the keeping of contemporaneous records of evaluation, because it was known that these would be disclosable in any litigation'. The NDA's approach to conducting the evaluation appeared to have been formulated so as to avoid subjecting the evaluation to scrutiny in the event of a procurement challenge. However, as the court went on to point out, this lack of an audit trial was counter-productive for the NDA. Had the evaluation process been conducted in accordance with the Regulations, disclosing the records of that process would not have presented any danger to the NDA if no manifest error was present; rather, it would have helped the NDA in explaining and justifying how it had arrived at the scores for the tenders it had received.

Recommendations

Contracting authorities should therefore be wary of encouraging any measures that minimise record keeping, as this case makes clear that such practice is not consistent with their duty of transparency. Contracting authorities are advised to regard the keeping of contemporaneous records of the procurement process (which includes not only scoring decisions, but also anything that is procedurally important) as a help rather than a hindrance, since a clear audit trail will not only assist in clarifying how evaluations were undertaken should any queries or challenges later arise, but will also by its very existence help to dispel any suspicion of non-compliance with the Regulations.

PROPORTIONALITY

The NDA's Statement of Response Requirement (SORR) stated that certain failures would lead to disqualification, with no discretion allowed. However, during the evaluation process the NDA attempted to introduce a test where only bids that were 'not fit for purpose' would result in failure. The court saw this as an attempt to rewrite the SORR.

When discussing the NDA's attempt to rewrite its own rules, the court discussed in detail the principle of proportionality, summarising it as 'requiring a proper relationship between the action taken and the objective to be achieved'. In a procurement context, the 'objectives' are compliance with the obligations of transparency and equal treatment and with the rules of the competition. The 'action' in this particular case was the disqualification of bidders in certain circumstances.

Situations where it would not be disproportionate to disqualify a bidder, the court held, included a bidder failing to meet a threshold requirement marked as critically important and failings affecting either the content of the tender submission or the evaluators' confidence of the tender submission's compliance with the SORR (or equivalent).

Where the threshold requirements were scored, the NDA's altered evaluation process had a knock-on effect on the overall percentage and, therefore, the outcome of the competition. The court suggested these requirements should have been marked correctly and the NDA could have waived the below-threshold consequences. Instead, the NDA artificially scored one bidder's submission as above the threshold so as to avoid these consequences.

The principle of proportionality does not outweigh the obligation of transparency on the contracting authority. The NDA's behaviour was contrary to the obligation of transparency not only because of the effect on the overall result, but also because the unsuccessful tenderers would never have known.

The court laid out a two-step process to determine what is proportionate. First, the contracting authority should decide whether the failure is one of form or content, as only failures of form should be considered under the principle of proportionality. If it is one of form, the second step is to consider the scope and extent of the failure. In exceptional circumstances, it may be possible to waive the failure if it is trivial as long as this does not breach the obligations of transparency and equal treatment.

The time to decide whether parts of the tender are of particular importance is when the scoring matrices in the evaluation methodology are being drafted, not after the bids are submitted. A contracting authority must not question the importance of a threshold requirement after a bidder has failed to meet it, and then increase the score to a higher one than merited. A failure to apply the terms of the evaluation methodology to that particular bidder would result in a manifestly erroneous score. In addition, this increased score would become part of the bidder's overall total score, potentially distorting the overall result of the competition.

MANIFEST ERROR

The court reminded the parties that the function of the courts is a supervisory one. Contracting authorities are given a 'margin of appreciation' where the courts consider their marking exercise, and consequently the courts will not remark every tender exercise at the behest of every unsuccessful tenderer. Instead, the task of the courts is 'to ascertain if there is a manifest error, which is not to be established merely because on mature reflection a different mark might have been awarded'. Fundamentally, 'absent a manifest error, the court will not interfere'. The key question, therefore, is how a manifest error is established.

Reviewing the existing case law on manifest error, the court concluded that 'when referring to "manifest" error, the word "manifest" does not require any exaggerated description of obviousness. A case of "manifest error" is a case where an error has clearly been made'. The court elaborated on whether an error has 'clearly' been made, stating it 'will depend on what may be involved in the particular assessment alleged to be in error and the nature of the error alleged'. In addition, the court stated that, within the field of procurement, an error 'does not need to have made "a real difference to the outcome" in order to properly to be described as a manifest error.'

However, establishing a manifest error alone is not enough for the claimant's case to succeed. A manifest error must be material before the court will interfere. The court used an example to illustrate this point where a score of three out of five may have been awarded with four supporting reasons.

If one of those reasons was found to contain a manifest error but the remaining three reasons still supported the score of three out of five, then the erroneous fourth reason has 'made no difference in practice to the outcome'. In this instance, the court did not interfere, as the manifest error was not material.

In an attempt to bypass the test entirely, the NDA asserted that evaluative judgment of Energysolutions' tender was 'not capable of constituting a manifest error'. This notion of an untouchable evaluator was not accepted by the court. The NDA argued in the alternative that the court should solely be concerned with the score awarded and whether that was manifestly wrong. The court rejected this argument too, stating that the court must consider three elements: the reasons the score was given, the application of the criteria, and the final score.

The court considered other factors that might mitigate or contribute to the finding of a manifest error. The court said that it would not adopt a 'default position' in favour of a well-organised competition when considering if a manifest error has been made. The organisation of the competition on the whole is irrelevant when considering manifest error. Explanation for a decision is also important. As mentioned above, evaluators often changed ostensibly finalised scores. The lack of any explanation as to why this occurred was something that the court considered could be taken into account when considering if there had been manifest error in arriving at a particular score.

If a manifest error is found, it then falls to the courts to determine what score should lawfully have been. In this particular case, a number of manifest errors were found and these were held to be material. The court subsequently re-scored a number of the tender requirements, applying the correct tests and removing the manifest errors, often changing a score of one out of five to a score of five out of five.

EQUAL TREATMENT

The court briefly addressed the balance that must be struck by contracting authorities when seeking clarification of bids as follows:

'[T]here is a power under regulation 18(26) [of the Regulations], and in some circumstances there may be an obligation given the principle of proportionality, upon a contracting authority to seek clarification of a bid. But unless an authority in this position treats tenderers equally and fairly, it will not satisfy the requirements for equal treatment and non-discrimination. Because the authority must treat tenderers equally and fairly, any request for clarification should not appear to have unduly favoured or disadvantaged the tenderer to whom it is addressed'.

Unfortunately, no further guidance was given as to how a contracting authority might request a clarification from a tenderer in a way that does not unduly favour or disadvantage the tenderer.

EXCESSIVE WORKLOAD

In the court's opinion, the evaluators' 'extraordinarily heavy' workload was 'verging on, if not completely, unmanageable', such that the court considered it 'not surprising' that mistakes were made during the evaluation of the tenders.

The judgment made clear that the courts will be unsympathetic to a contracting authority attempting to defend itself on the basis that it did its best with the resources it had at its disposal. As the court stated in this case, it was 'entirely a matter for the NDA how it manages and deploys its own employees'. The obligations of a contracting authority to get the evaluation process right will not be diluted simply because the evaluators were stressed or time-pressured. It is also advisable to ensure that evaluators have a thorough understanding of the subject matter of the procurement and have the time and ability to formulate clear and coherent reasons for any scores they award, which should ideally be backed up with evidence and examples taken from the relevant bid submission.

WITNESS TRAINING AND BEHAVIOUR

The credibility of the witnesses was put under scrutiny. Those appearing for Energysolutions appeared to have had witness training insofar as their oral evidence came across as a pre-ordained script. The court found this 'counter-productive' and 'unhelpful', as relying on rehearsed statements meant that the witnesses avoided answering certain questions and instead answered what they would have liked to have been asked.

The NDA's witnesses, meanwhile, were so highly defensive that the court found their evidence 'at times, of extraordinarily limited assistance'.

The lesson to learn from this is that evasiveness and ultra-defensiveness is, unlikely to assist you in a trial, as the court will consequently ascribe less weight to the evidence you do provide.

ADVERSE INFERENCES

Energysolutions invited the court to draw adverse inferences from the absence of three key witnesses that the NDA chose not to call. This led to 'substantial evidential gaps in the justification or explanation by the NDA for the scoring in certain important respects'.

The court dealt with the potential adverse inference for each requirement in turn as '[it] would be wrong to approach the matter with a blanket approach when the evidence in respect of each is different'.
The court did make the point that, in procurement proceedings, there is an express obligation of transparency upon the contracting authority. Although this does not shift the burden of proof, it helps compliance with the obligation of transparency if the directly relevant personnel are called as witnesses.

JUSTIFYING A DECISION AFTER THE EVENT

The lawfulness of the contract award decision will be considered by reference to the reasons provided by the contracting authority to the tenderer prior to the issuing of proceedings by the tenderer. Subsequent disclosure of additional reasons by the contracting authority will not be considered when assessing the lawfulness of the original decision. However, such subsequent disclosure will be considered when assessing the claim for damages by the claimant, as it may impact on the legal principle of causation. Therefore a finding of unlawfulness at the first stage, will not automatically entitle the claimant to damages.

OVERCOMPLICATING EVALUATION METHODOLOGIES

One of the reasons that this procurement was susceptible to challenge, apart from the minimal difference in the final scores of each tender, was that it had been fragmented into many separately scored elements many of which were evaluated on a pass/fail basis.

Overcomplicating procurements in this way not only means that it is easy to lose sight of what is the best solution overall, but also risks breaking the procurement into many discreet items that are not consistently scored (particularly if allocated to many different evaluators) and may be more easily targeted as the subject of a potential challenge.

Where using pass/fail criteria, it is important to ensure that there can be no doubt as to what constitutes either a pass or a fail. Ambiguity in scoring for binary criteria is more likely to give rise to a challenge by an aggrieved bidder. In addition, overly prescriptive marking systems should be discouraged if they are not suited to a particular procurement where, for instance, it may be more difficult to be objective.

LEGAL PRIVILEGE

External lawyers had been invited by the NDA to review the evaluation process including the requests for clarifications raised by the evaluation team, as well as the scores and consensus comments for each stage of the evaluation. Some scores were consequently changed.

The lawyers' involvement led the NDA to claim legal professional privilege over communications with their lawyers, which meant those could not be disclosed in the litigation. Although the court did not have a problem with the fact that the communications were subject to legal professional privilege, it pointed out that the reliance on privilege left the NDA in a position where it was unable to explain why it had changed certain scores, which did not assist its defence. It also left the court 'with the suspicion that deflecting any legal challenge to the outcome of the competition was foremost in the collective mind of the NDA at all stages of the competition'. The court added that the contracting authorities' duty of transparency and the principle of legal professional privilege do not conflict but 'have to be considered consistently with each other'.

Contracting authorities should therefore consider the respective merits of either risking the ability to defend a claim or waiving legal professional privilege in order to explain their evaluation methodologies.

RECOMMENDATIONS FOR CONTRACTING AUTHORITIES

This judgment contains a wealth of recommendations for evaluators and procurement teams to remember in any procurement exercise. The following lists will help to ensure they comply with their duties of transparency, equal treatment and consistency.

Do make a written contemporaneous record of any oral conversations concerning the evaluation of tenders, with clear and coherent explanations for why specific scores are awarded. We recommend issuing all evaluators with clearly numbered notebooks for this purpose, and collecting all of these at the end of the evaluation.

Do make sure the evaluation team is sufficiently resourced to manage the evaluation in time and has the ability to formulate clear and consistent reasoning for their scoring decisions.

Do make sure that pass/fail criteria are clearly defined so that there can be no doubt about what constitutes a pass or fail. Consider whether such binary criteria are suitable for what is being evaluated.

Do make written contemporaneous records of anything procedurally important in the procurement, including any reasons for modifying an evaluation score. Make sure the reasons for doing so are coherent and consistent.

Do consider carefully in a litigation scenario whether training witnesses could prove to be more of a hindrance than a help.

Do consider whether relying on legal professional privilege over communications in court could hinder your defence by preventing you from explaining your evaluation choices and methodologies.

Do decide your evaluation methodology before going out to tender and ensure that the evaluation team stick to the agreed evaluation process.

Do respond to requests during the standstill period promptly: during a standstill period a tenderer is entitled to demand additional information within a short time period. This is to enable the tenderer to have sufficient information as quickly as possible to decide whether to bring proceedings. If such a demand is made of a contracting authority and it is reasonable in scope, then the contracting authority should respond as soon as possible.

RECOMMENDATIONS FOR CONTRACTING AUTHORITIES

Do not destroy (or suggest destroying) contemporaneous documents recording the procurement and the evaluation process.

Do not overcomplicate the elements of each bid that are to be scored. The more fragmented this is into separately scored items, the greater the risk of a challenge arising.

Do not put the evaluation team under the strain of an excessive workload with unrealistic timescales.

Do not rely entirely on a rehearsed script if you are giving evidence in court in relation to a procurement challenge.

Do not revisit or change a score for a stage of the evaluation that has been closed down after an agreed consensus has been reached following discussion with all evaluators, unless this revision is justifiable, the reasons for it are clearly recorded, and to do so would not risk jeopardising consistency across the evaluation exercise.

Do not amend the evaluation methodology after the bids have been submitted or artificially increase a bidder's score to favour that particular bidder over the others.

Do not hold back pertinent details: disclosure of information after the original contract award decision may affect the claim for damages, but it will not assist the defence of the original decision. If there is pertinent information that a contracting authority wishes to rely on to support the contract award decision, then this should be disclosed at the outset.

Do not leave your best witnesses at home when defending a procurement challenge at trial. If possible, call the witnesses with the greatest knowledge of the particular area of your case that you wish to defend.

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SHARPE PRITCHARD'S CREDENTIALS IN PROCUREMENT

Sharpe Pritchard has a large public procurement team with an outstanding reputation amongst national and local public bodies and contractors.

If you require any further advice in relation to the matters raised in this case or anything else concerning contentious and non-contentious procurement issues, we would be happy to hear from you.

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