



Claim No: HT-2018-000139

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

BETWEEN:-

ABBVIE LTD

Claimant

- and -

NHS COMMISSIONING BOARD

Defendant

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PARTICULARS OF CLAIM

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The Parties

1. The Defendant is a the statutory public body with responsibility to arrange for the provision of services for the purpose of the health service in England and a contracting authority under the Public Contracts Regulations 2015 ("the Regulations").
2. The Claimant is a private limited company. It carries on business by, principally, manufacturing and supplying medicinal products that are used in the treatment of various medical conditions, including in respect of Hepatitis C. These treatments are prescription only medicines ("hereinafter referred to as "product" or "products") and so are heavily regulated. Such products must obtain regulatory approval through a "centralised" process currently governed by the European Medicines Agency. Any such approval



decision from the European Commission will approve a product for specific uses or “indications” in line with the Summary of Product Characteristics (“SmPC”). The Claimant is an economic operator under the Regulations.

### **The Tender Process**

3. On 19 April 2018, the Defendant published a contract notice in the Official Journal of the European Union (“the OJEU”) (“the OJEU Notice”) in respect of contracts to:

“(i) supply Hepatitis C Direct Acting Antiviral (DAA) treatments and  
(ii) provide initiatives and/or services to help identify and treat Hepatitis C patients so as to accelerate the elimination of Hepatitis C in England from 1.10.2018.”

(“the Contracts”).

4. The OJEU Notice provided, so far as relevant:
  - (i) the tender process would be conducted by the competitive dialogue procedure;
  - (ii) there would be 3 lots;
  - (iii) the initial term of the Contracts awarded would be 3 years, with an option to extend for up to a further 2 years;
  - (iv) paragraph IV.1.6) stated:

“IV.1.6)

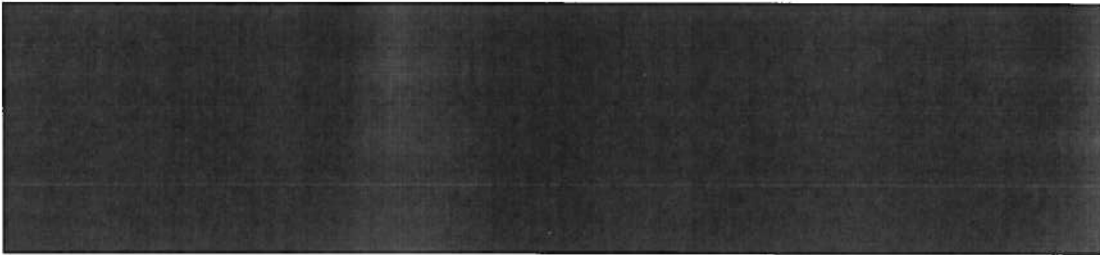


**Information about electronic auction**

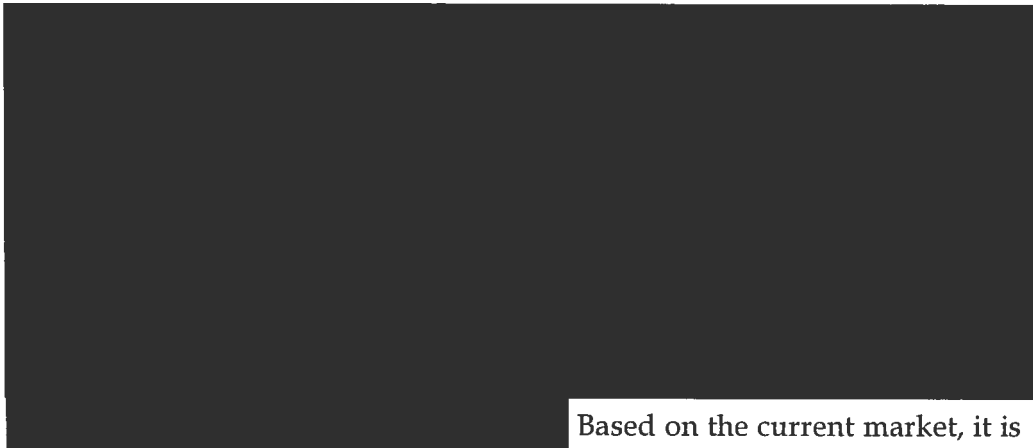
An electronic auction will be used

Additional information about electronic auction:

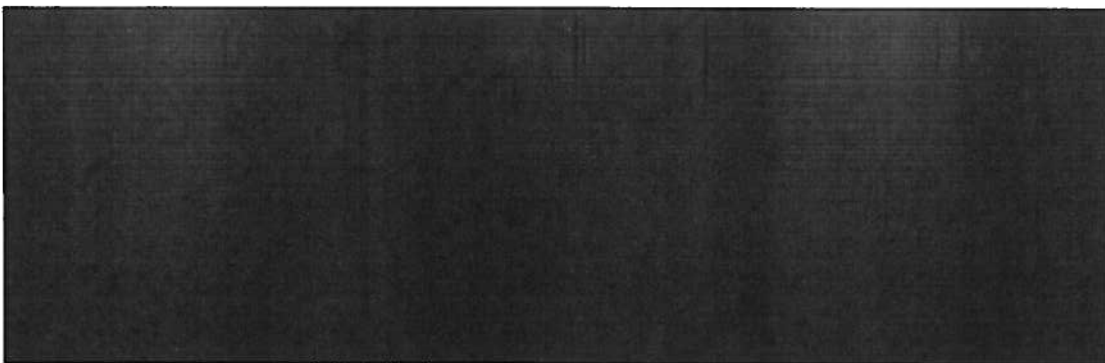
As set out in the procurement documents." (emphasis added)



6.

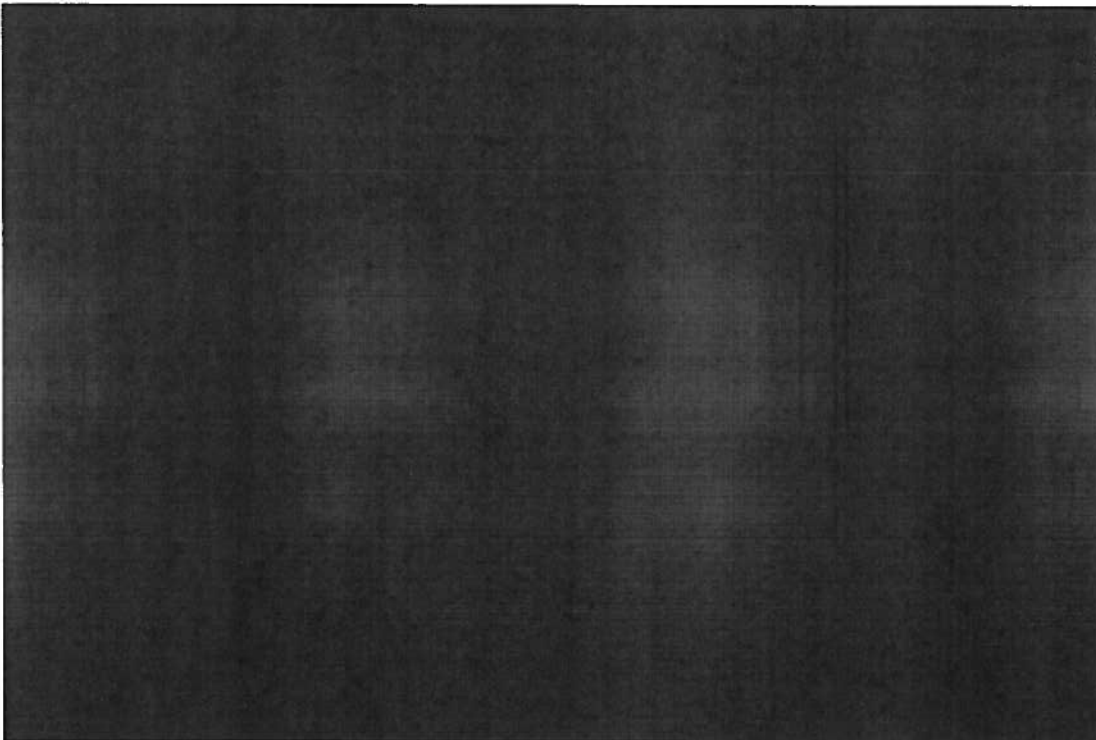
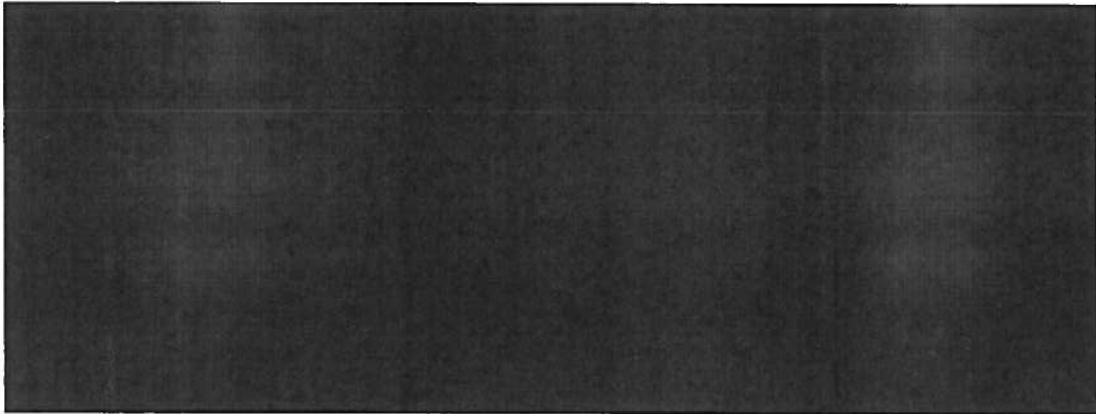


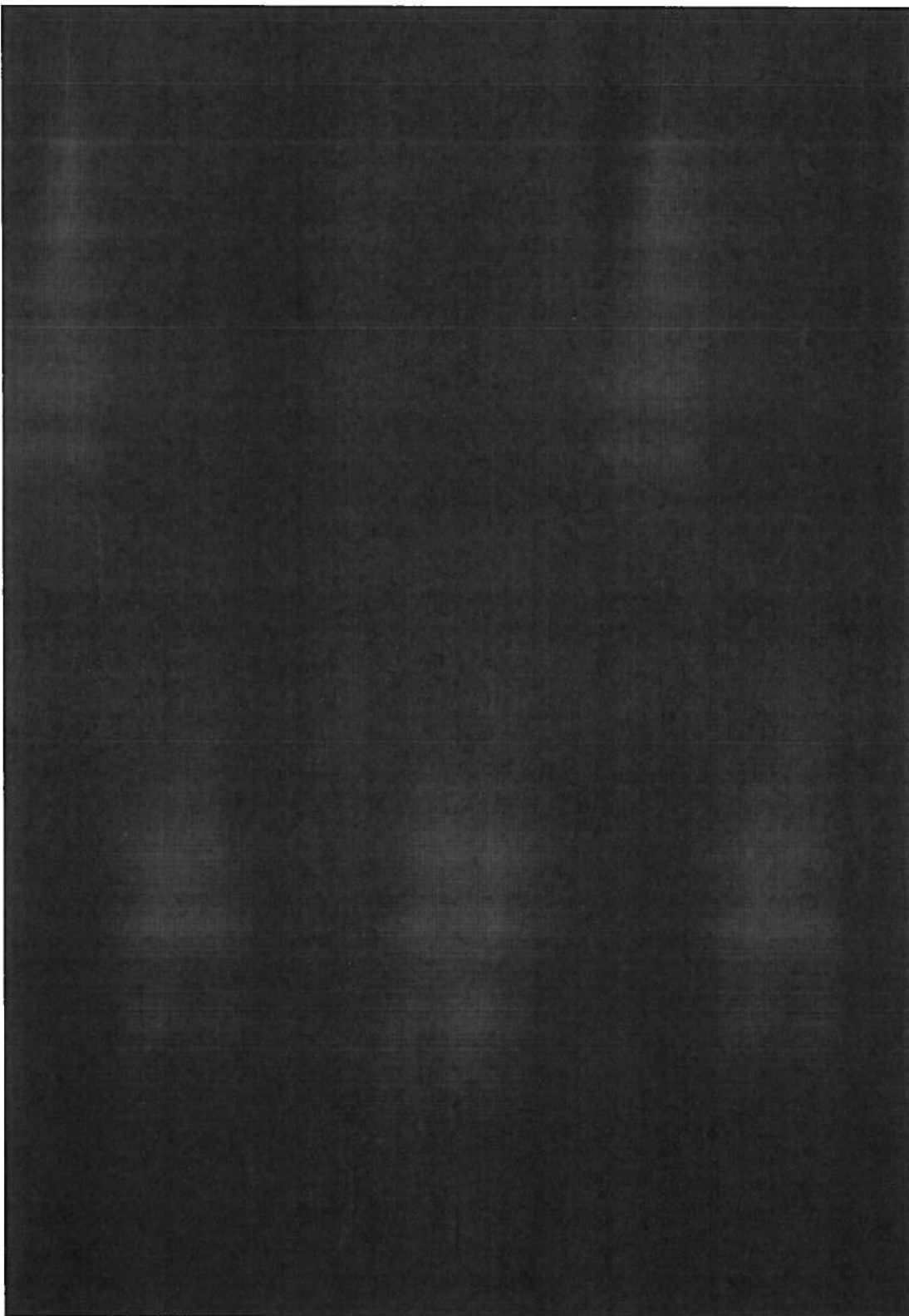
Based on the current market, it is expected that there will be three bidders.





8. [REDACTED] due to its approved indications [REDACTED] does not provide a product capable of treating certain genotypes forming part of the Hepatitis C cohort in England [REDACTED]  
[REDACTED]







14. The Claimant has sought clarification and/or further information in respect of the above mentioned matters. In particular, on 17 May 2018 the Claimant wrote a detailed pre-action letter to the Defendant setting out its serious and legitimate concerns in respect of the matter addressed above.
15. In order to comply with the limitation period in reg. 92(2) of the Regulations, the Claimant was required to issue proceedings herein, and did so on 18 May 2018. However, the Claimant and the Defendant agreed a consent order to extend time for service of these Particulars of Claim generally, provided always that such extension would end 5 working days after the Defendant served notice on the Claimant confirming the end of the extension.
16. On 29 June 2018, over a month after the Claimant sent its pre-action letter, the Defendant provided a letter that it described as its "*substantive response*" to the Claimant's concerns in respect of the matters addressed above. The content of the said letter is addressed further below. However, in summary, the Claimant considers that the letter demonstrates that the Defendant has no defence to the claim with a realistic prospect of success and that, furthermore, certain elements of the letter demonstrate that the Defendant is conducting the procurement in grave and manifest disregard of its legal duties under the Regulations.

#### **The Defendant's Obligations**

17. The Defendant was obliged to carry out the procurement in accordance with the Regulations.



18. The Regulations give effect to Directive 2014/24/EU ("the Directive").
19. The Defendant owed the Claimant duties:
  - (i) to comply with the Regulations, the Directive and the general principles of EU law in conducting the tender process;
  - (ii) to conduct the tender process consistently with the principles of equality of treatment, transparency, non-discrimination, legitimate expectation, proportionality and good administration and in a manner that does not distort, narrow or undermine competition and is free from manifest error;
  - (iii) to award the contracts to the most economically advantageous tender(s).

#### **Breaches of the Defendant's Obligations**

20. The Defendant breached its obligations set out above in the manner stated below. The matters pleaded below are the best particulars the Claimant can currently provide, the Defendant having refused (or otherwise failed), as stated above, to provide any more detailed response to the Claimant.

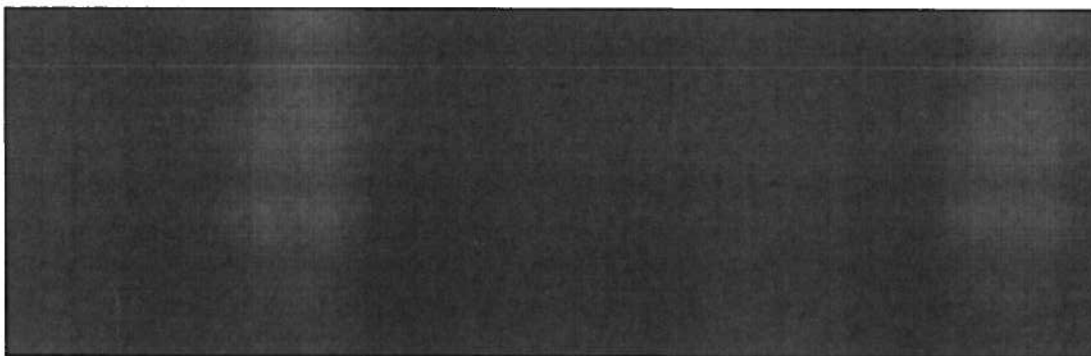
#### **Unlawful use of electronic auction in competitive dialogue procedure**

21. The Regulations, including in particular reg. 35, do not permit a contracting authority to use an electronic auction in a competitive dialogue procedure. The Claimant relies, in particular, on reg. 35(4) which permits the use of

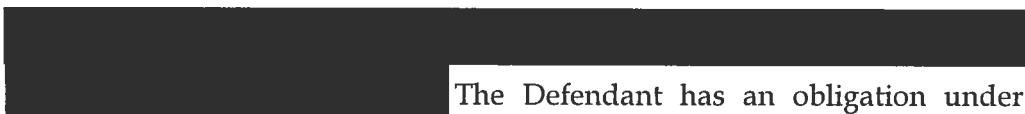




electronic auctions in open and restricted procedures and competitive procedures with negotiation. Further, the Claimant will also refer to the provisions of the Directive for their full force and effect. It follows that the tender process and documents are unlawful and should be set aside and/or modified.



23.



The Defendant has an obligation under Regulation 35 to provide details of how the auction is to take place. These details must be set out in the ITPD. As at the date of these Particulars of Claim, no response to this request has been received.

24. However, in its letter dated 29 June 2018, the Defendant



contended that the use of an electronic auction in a competitive dialogue procedure was lawful. Notably, however, the letter made no reference to the provisions of the Regulations and the Directive which set out the circumstances in which electronic auctions may be used.

#### **Unlawful evaluation and tender methodology**





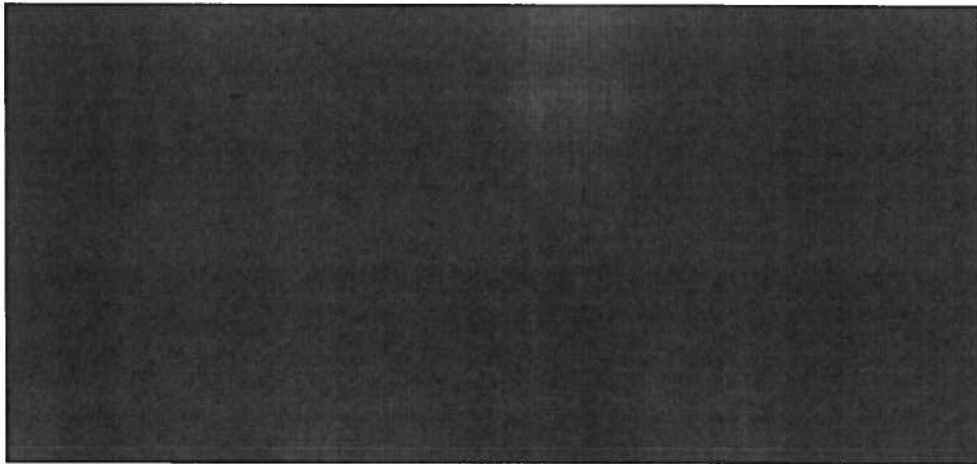
25. Having regard to the facts and matters stated in paragraphs 6 to 14 above, [REDACTED] the tender process provided for in the ITPD and other tender documents: (a) is not consistent with the principles of equal treatment, transparency, non-discrimination and proportionality, (b) distorts, narrows and/or undermines competition and/or (c) is manifestly erroneous. It follows that the relevant parts of the tender documents and/or process are unlawful and should be set aside and/or modified. Without prejudice to the generality of the foregoing averments, the Claimant will say that the provisions of the ITPD referred to in paragraphs 6 to 14 above:

- (i) breach the general principles of equal treatment, transparency, non-discrimination and proportionality,
- (ii) advantage bidder(s), [REDACTED]  
[REDACTED] other than the Claimant,
- (iii) deprive (in whole or part) the Claimant of legitimate advantages that it enjoys relative to other bidders,
- (iv) distort, undermine and/or narrow competition, and/or
- (v) comprise an evaluation methodology which is not directed to the identification of the most economically advantageous tender or is a manifestly erroneous means of identifying the most economically advantageous tender.



26. In its letter dated 29 June 2018, the Defendant accepted that the meaning and effect of the disputed measures in the tender documents was as stated above (and also in the Claimant's letter of 17 May 2018). However, notwithstanding those admissions, the Defendant sought to deny that it was in breach of its legal duties under the Regulations. However, the contentions relied on by the Defendant demonstrate a fundamental misunderstanding of its legal duties:

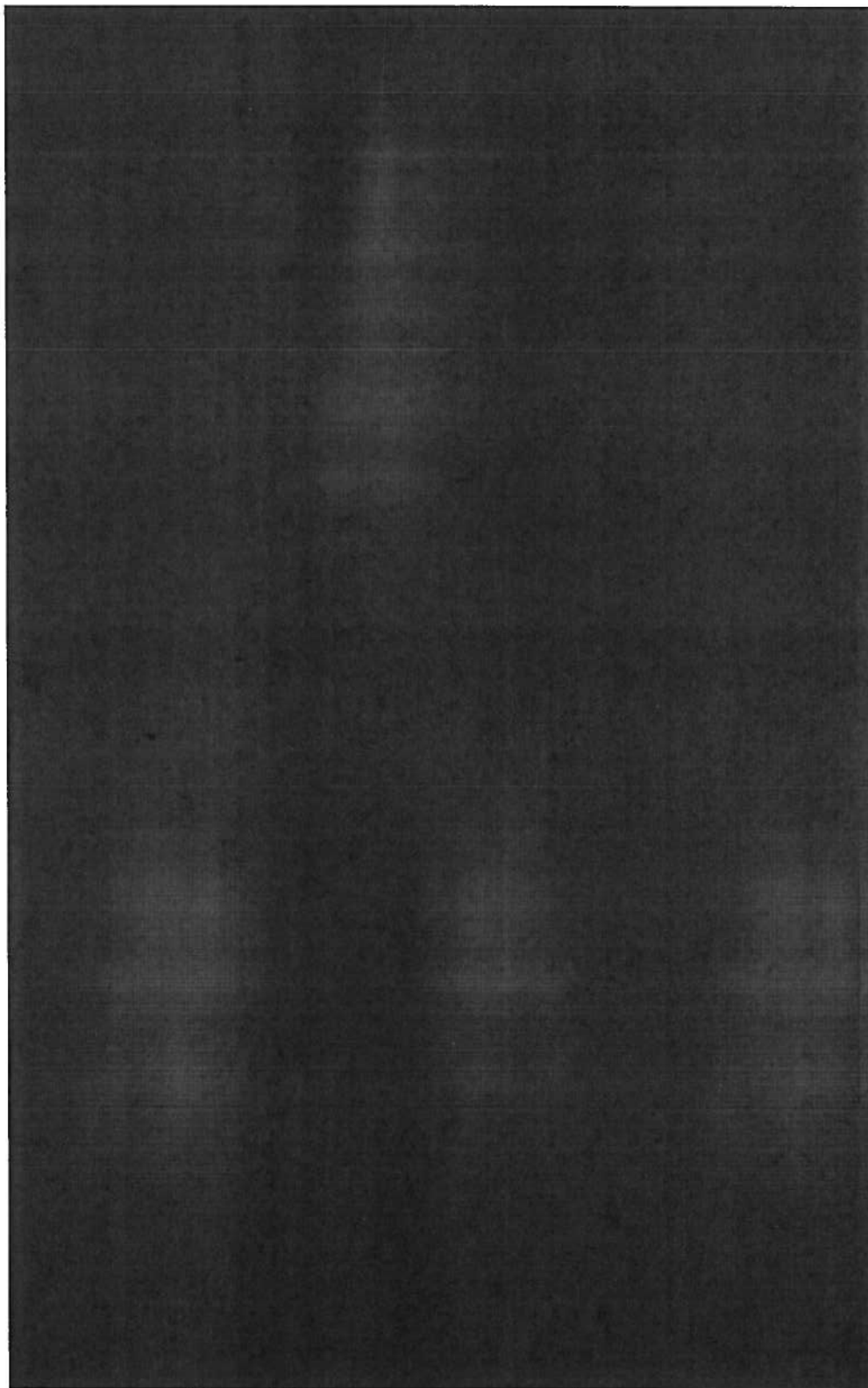
(i)

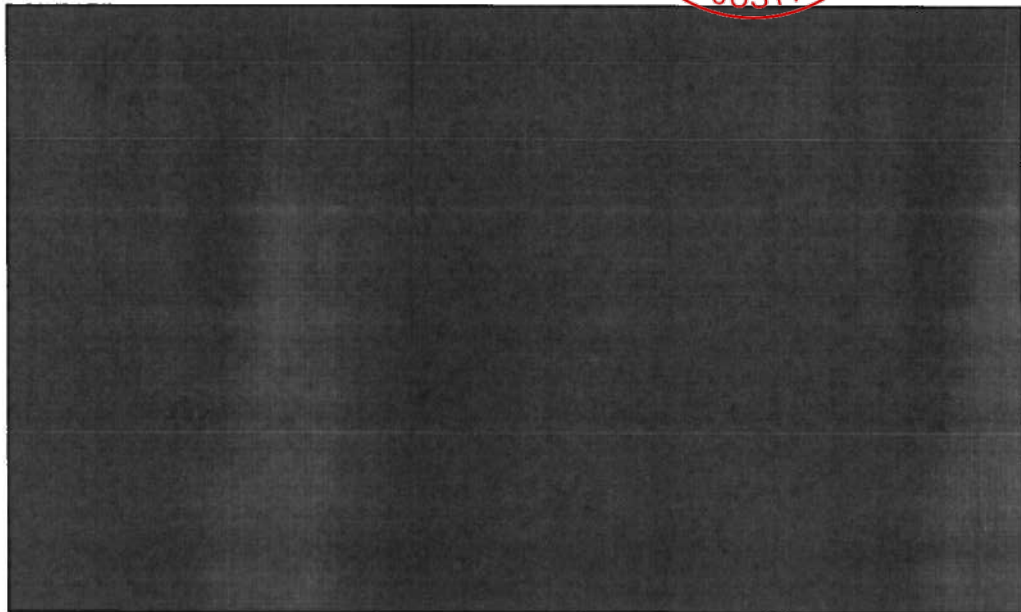


(ii) As already noted, in relation to the electronic auction the letter alleged that it is lawful to use an electronic auction in a competitive dialogue procedure, pursuant to reg. 30(17) and (18), but does not refer to the regulation (reg. 35) which actually governs the use of electronic auctions. The Claimant will say that it follows that the Defendant has no defence to this claim with any realistic prospect of success.

(iii)







#### Consequences of Defendant's Breach of its Obligations

27. Under the Regulations, the Defendant's obligations were owed to the Claimant, which (as stated above) is an economic operator within the meaning of the Regulations.
28. By reason of the matters stated above, the Claimant has suffered or risks suffering loss or damage. The Defendant's breaches of duty are actionable by the Claimant in contract and under the Regulations.
29. The Claimant seeks an order:
  - (i) setting aside the tender documents and/or process;
  - (ii) declaring that the tender documents and/or process (as currently constituted) is unlawful; and/or



(iii) requiring the Defendant to modify the tender documents and/or process to remedy those parts held to be unlawful.

AND THE CLAIMANT CLAIMS:

- (1) an order: (i) setting aside the tender documents and/or process; and/or (ii) declaring that the tender documents and/or process (as currently constituted) is unlawful; and/or (iii) requiring the Defendant to modify the tender documents and/or process to remedy those parts held to be unlawful; and
- (2) such other relief as the Court considers appropriate.

JASON COPPEL QC  
JOSEPH BARRETT

STATEMENT OF TRUTH

The Claimant believes that the facts stated in this Statement of Case are true and I am duly authorised to sign this statement of truth on its behalf.

Signed:

Full name: Graeme Young

Job title: Partner

Dated: 5 July 2018