

IN THE HIGH COURT OF JUSTICE

BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES

TECHNOLOGY AND CONSTRUCTION COURT



Claim No: HT-2018-000139

BETWEEN:

ABBVIE LIMITED

Claimant

-- and --

NHS COMMISSIONING BOARD

Defendant

DEFENCE

1. In this Defence:

- (i) save where the contrary is indicated, references to numbered paragraphs are to paragraphs in the Claimant's Particulars of Claim;
- (ii) abbreviations used in the Particulars of Claim are adopted, but such adoption does not imply any admissions;
- (iii) headings in the Particulars of Claim are also adopted, but such adoption implies neither any admissions nor any restriction on the matters pleaded under each heading below.

Summary of the Defence

- 2. The claim fails at the outset because it was not made in time in compliance with reg. 92(2) of the Regulations. The only claim form issued within the 30-day period permitted did not contain the "brief details of the claim" as required by CPR Part 16.2 but was without any particularity at all, merely alleging unspecified breach of the Regulations. Accordingly, the claim form was invalid and/or an abuse of process. Reg. 92(2) requires issue of valid, not invalid, proceedings. The remainder of this Defence is served without prejudice to that defence.
- 3. As to the claim for *"unlawful use of electronic auction in competitive dialogue procedure"*, [REDACTED]



[REDACTED] In any event, there is no prohibition against using an auction of any kind as one means of the permitted “*optimis[ing]*” of bids within the competitive dialogue procedure.

[REDACTED]

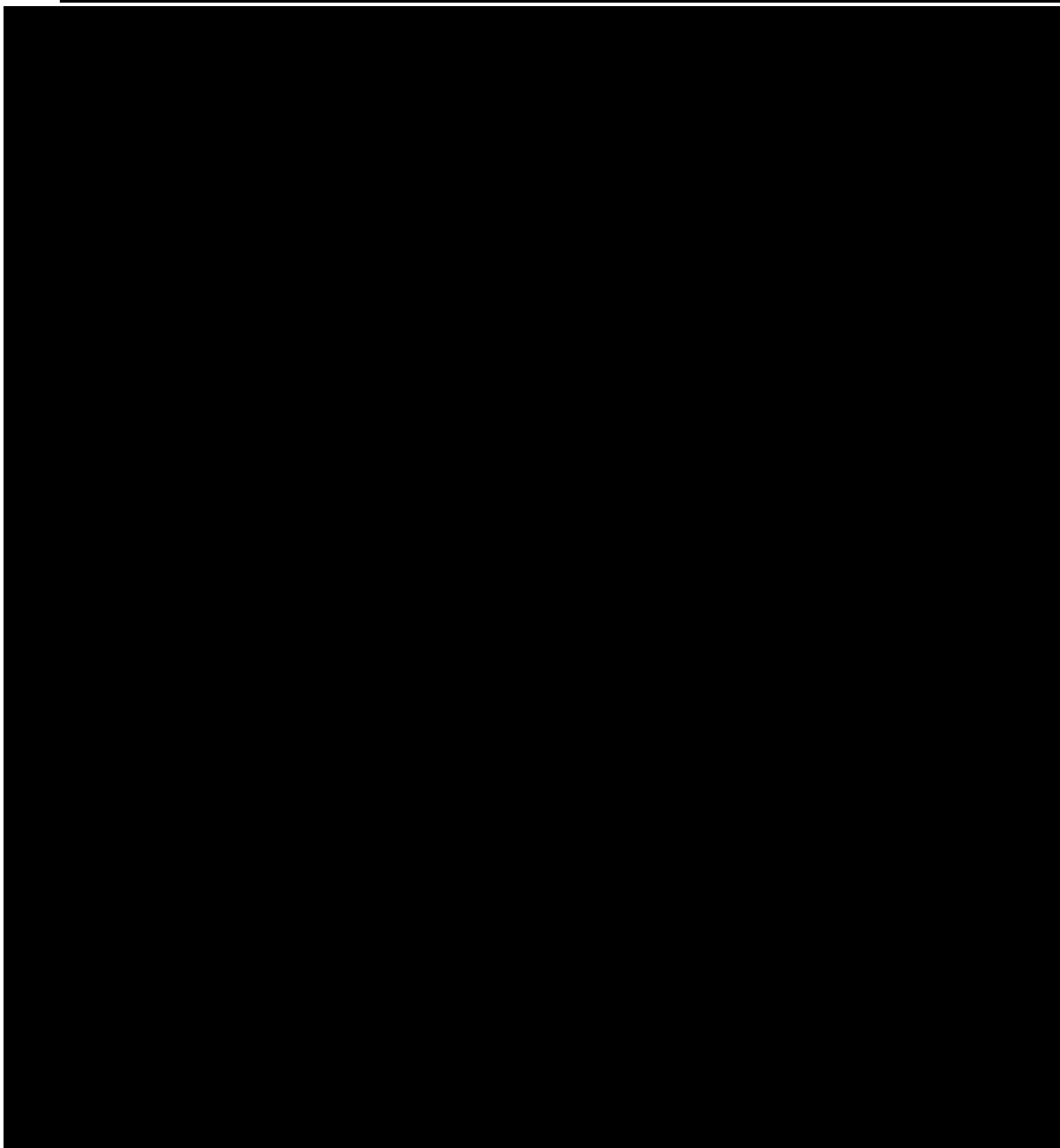
The parties

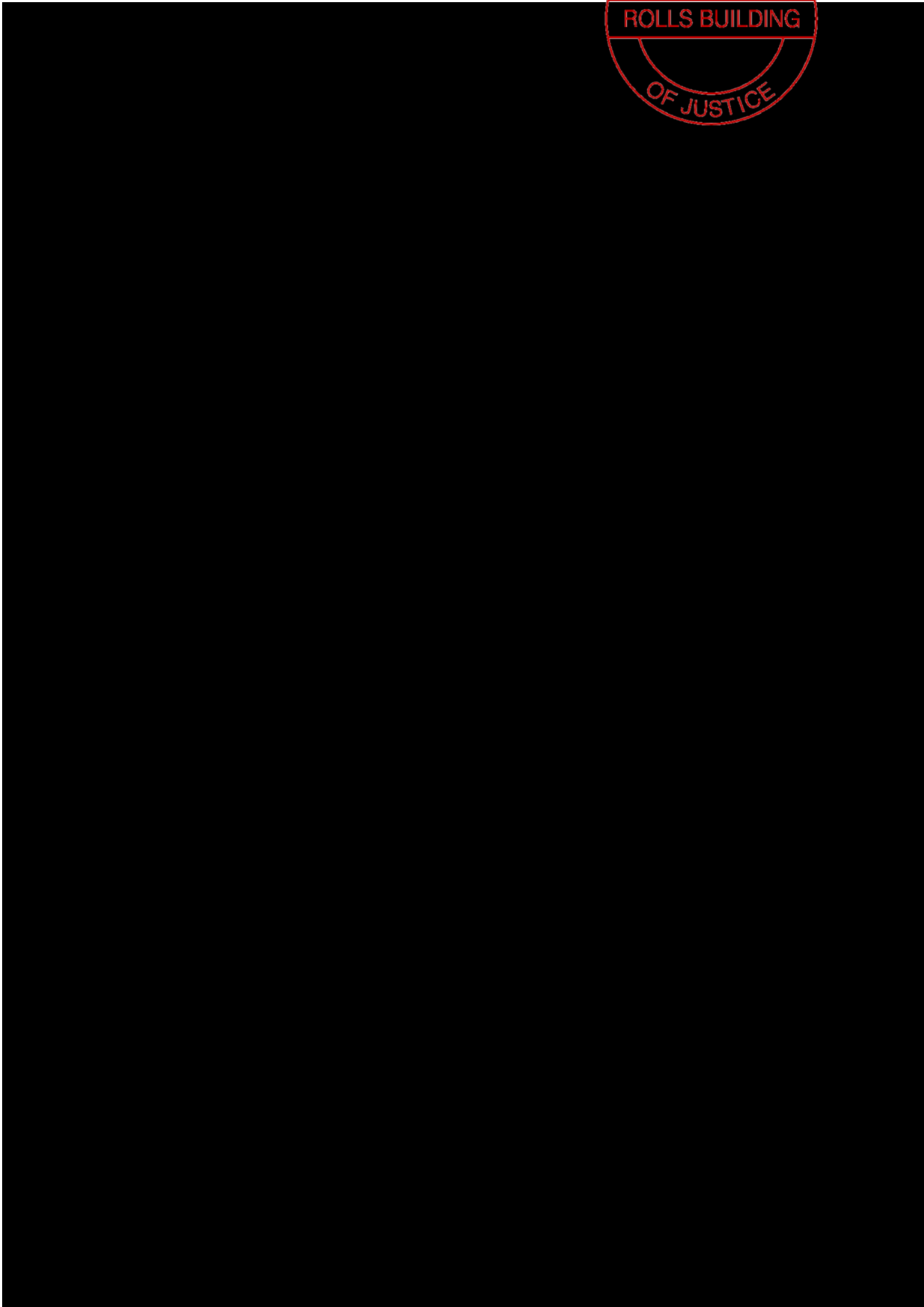
6. Paragraphs 1 and 2 are admitted.

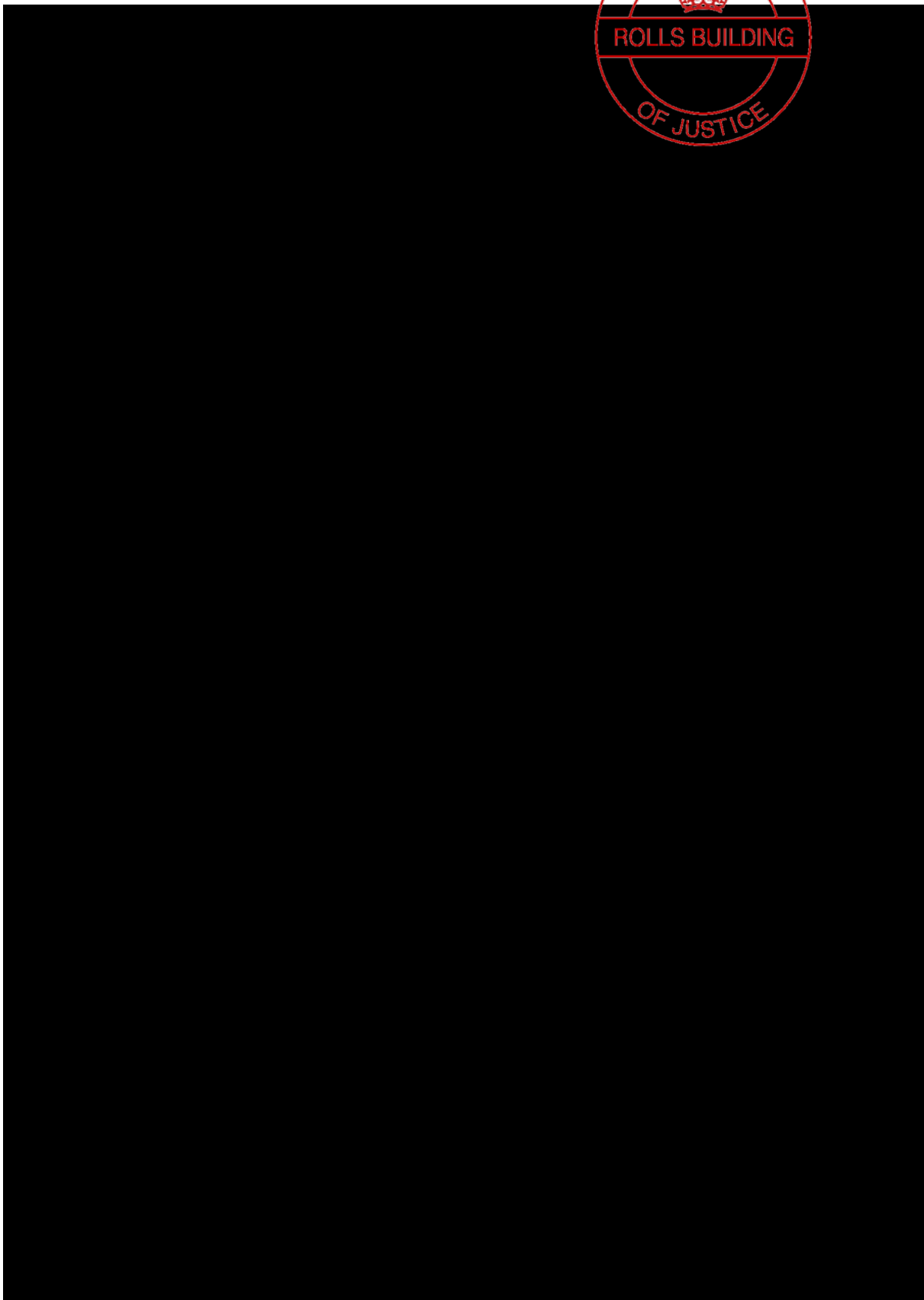
The tender process

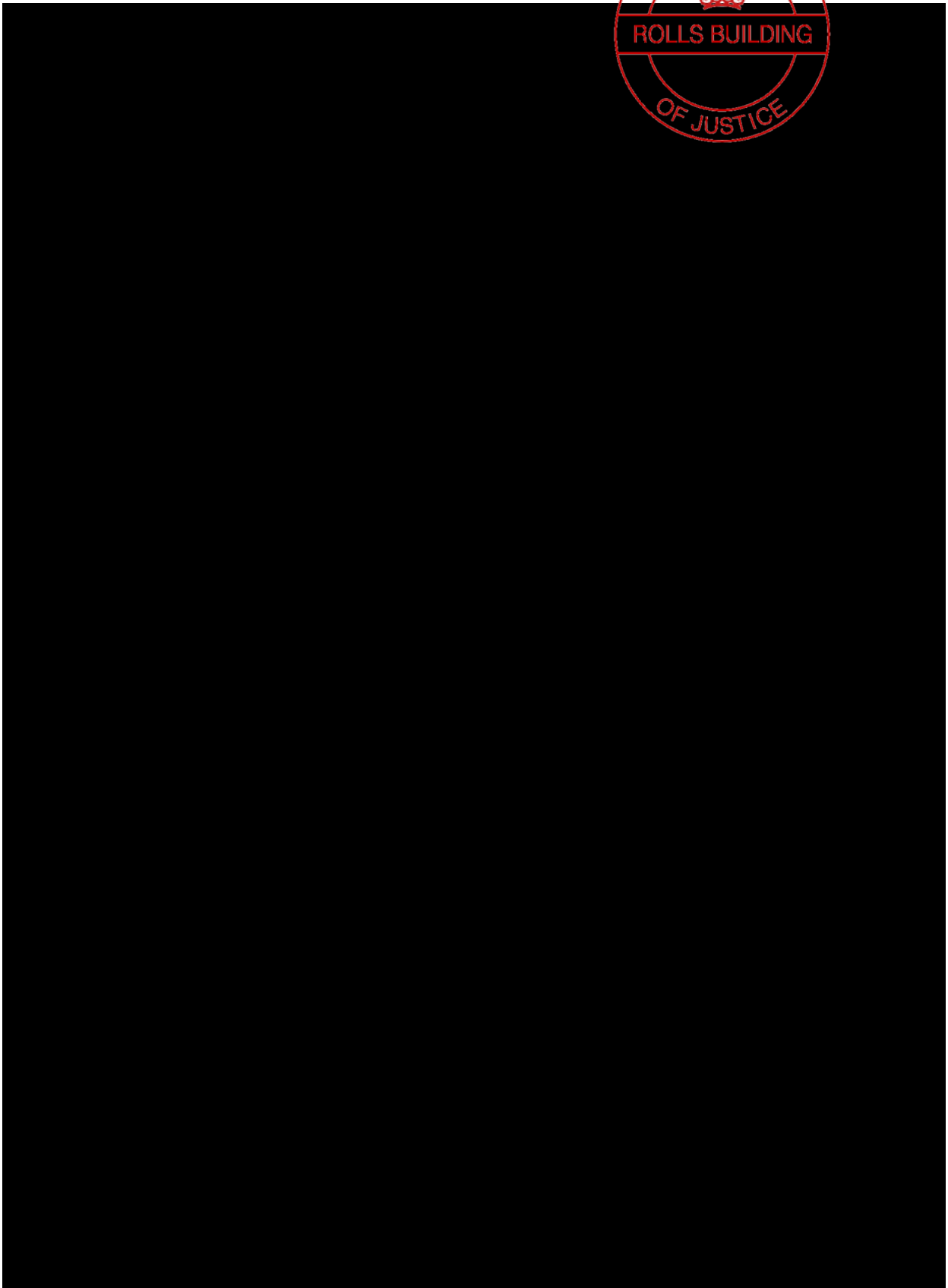
7. Paragraphs 3 to 4 are admitted.
- [REDACTED]

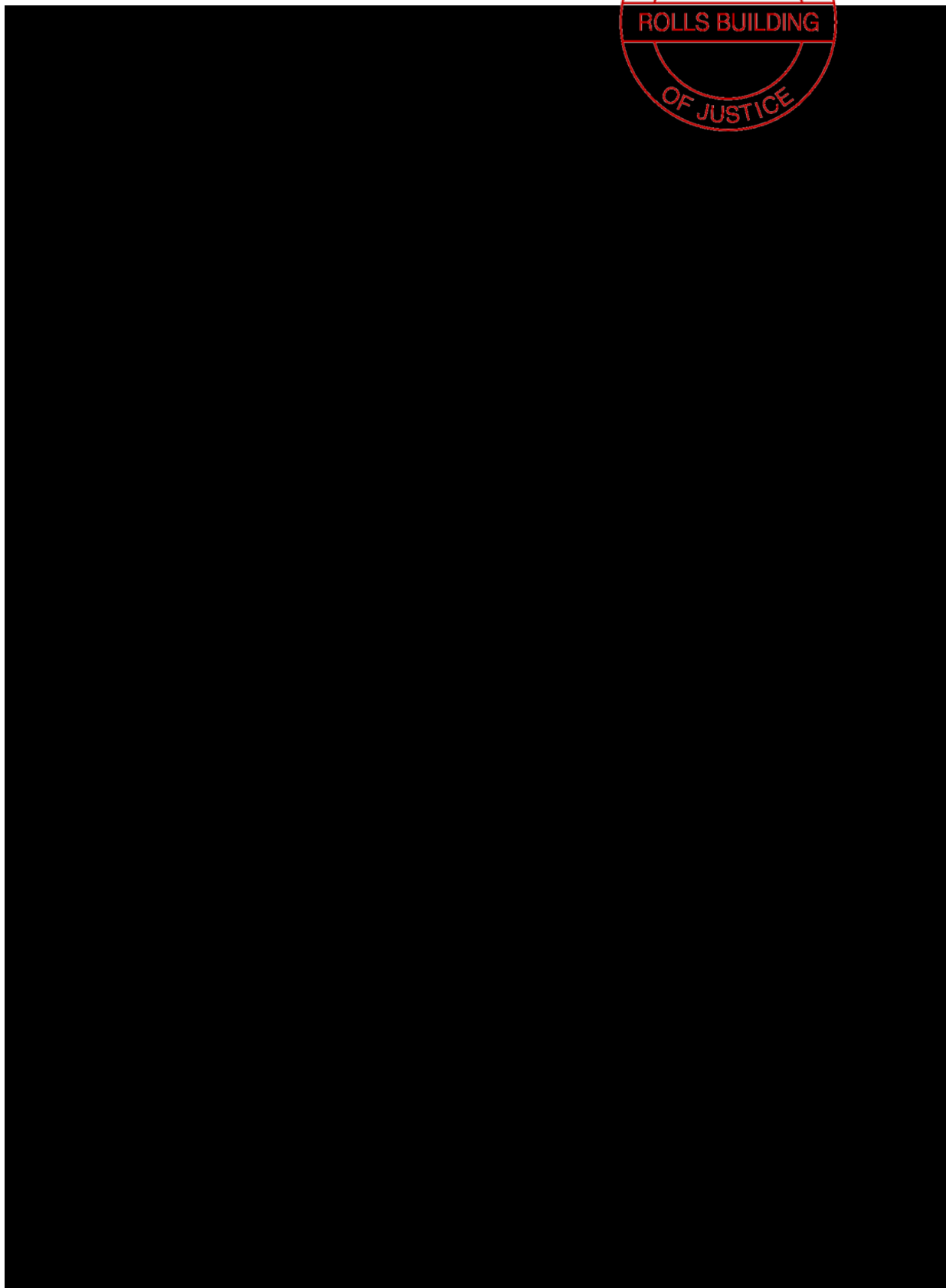
10. Hepatitis C virus (“**HCV**”) is a major public health concern in England. In 2015, there were an estimated 160,000 people living with chronic HCV infection in England.
11. The Defendant’s purpose in procuring the Contracts is to become the first country in the world to eliminate HCV as a major public health concern. It aims to do so at least 5 years ahead of the World Health Organisation target of 2030.
- [REDACTED]

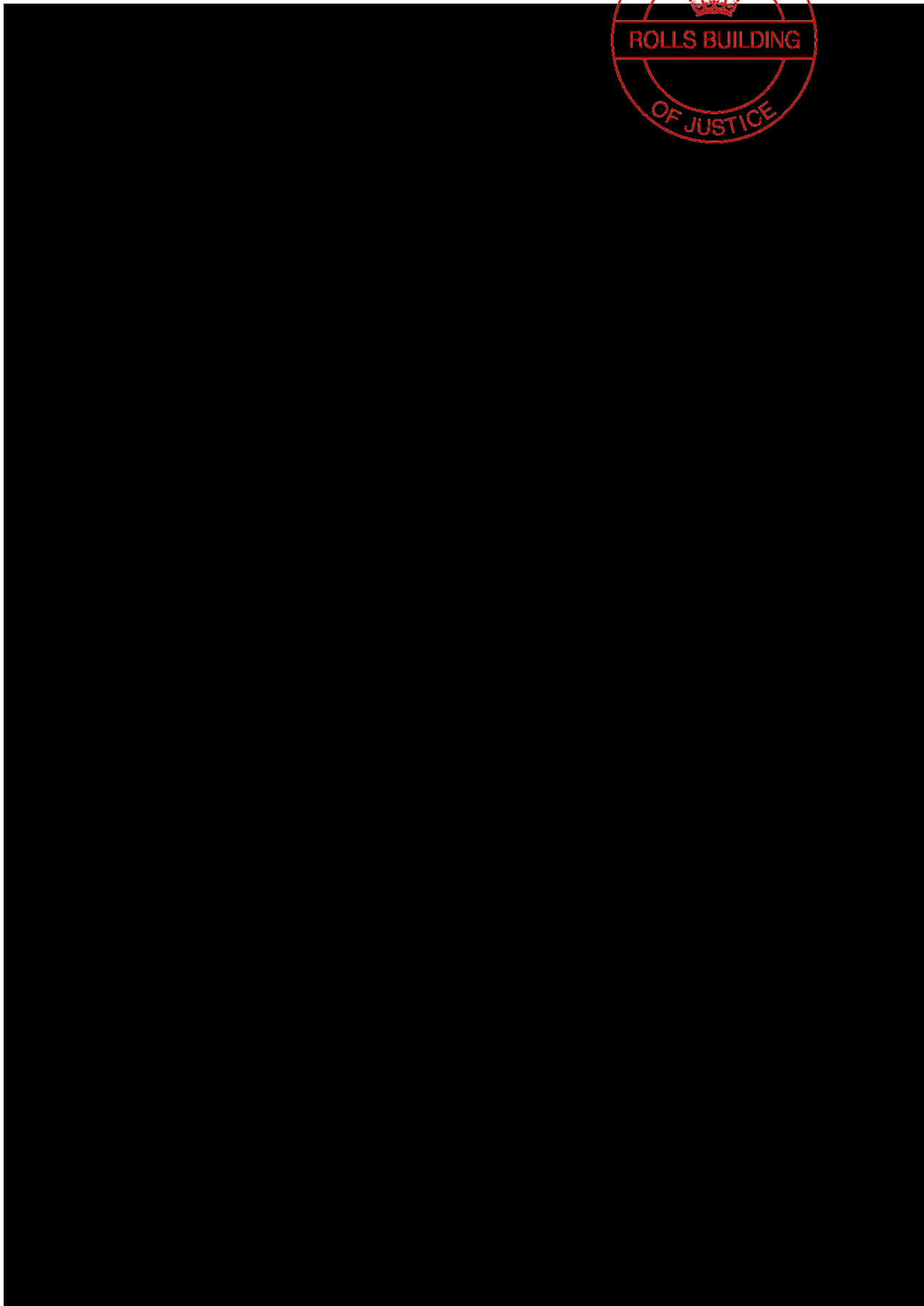


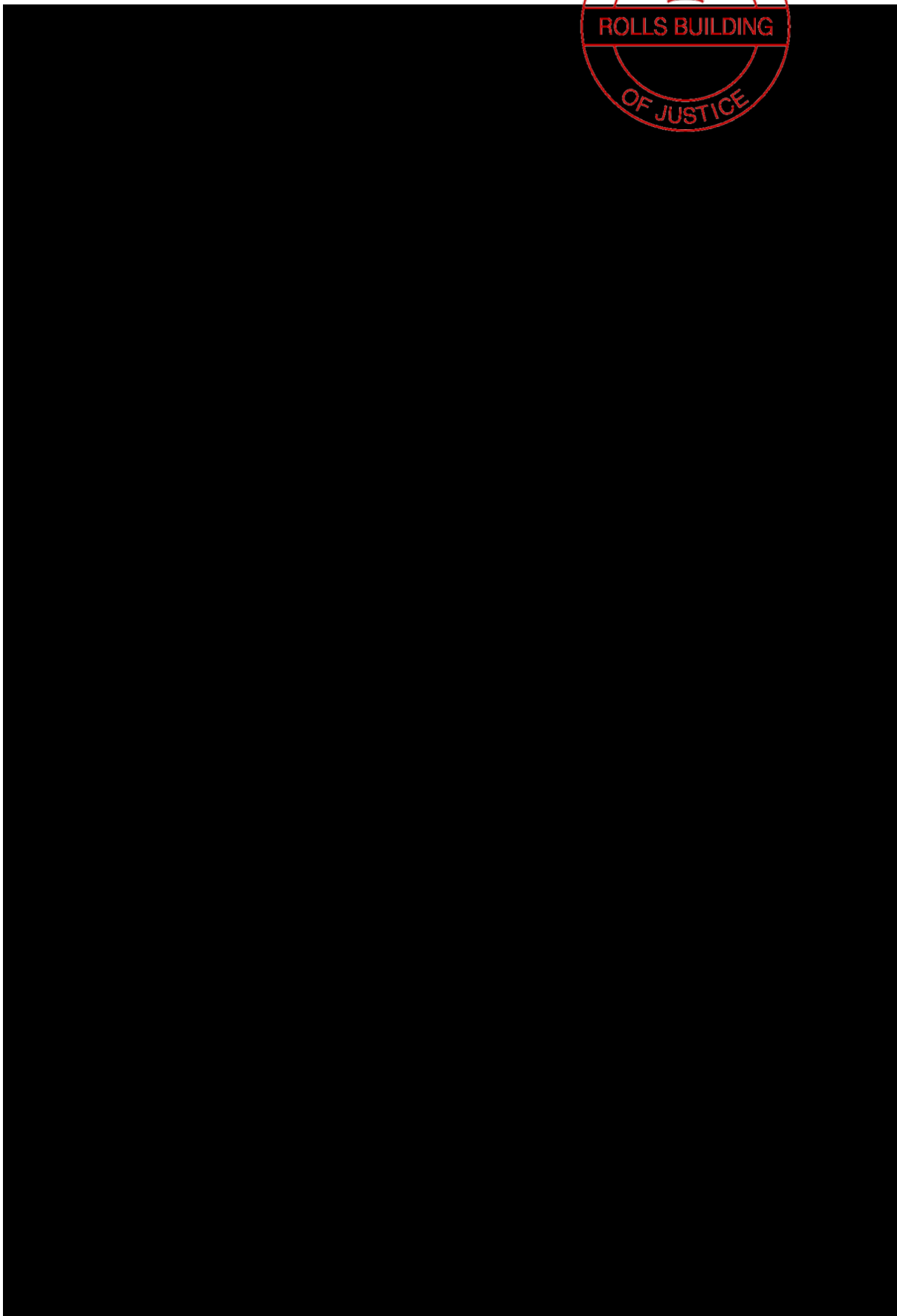














32. Paragraph 14 is admitted, save that the Claimant's concerns are not well-founded.
33. Paragraph 15 is admitted, save that it is denied (for reasons set out in the Defendant's application which was issued on 20 July 2018 and accompanying evidence) that the Claimant has in fact complied with the limitation period in reg. 92(2) of the Regulations: see above.
34. The first and second sentences of paragraph 16 are admitted. The third sentence of paragraph 16 is denied.



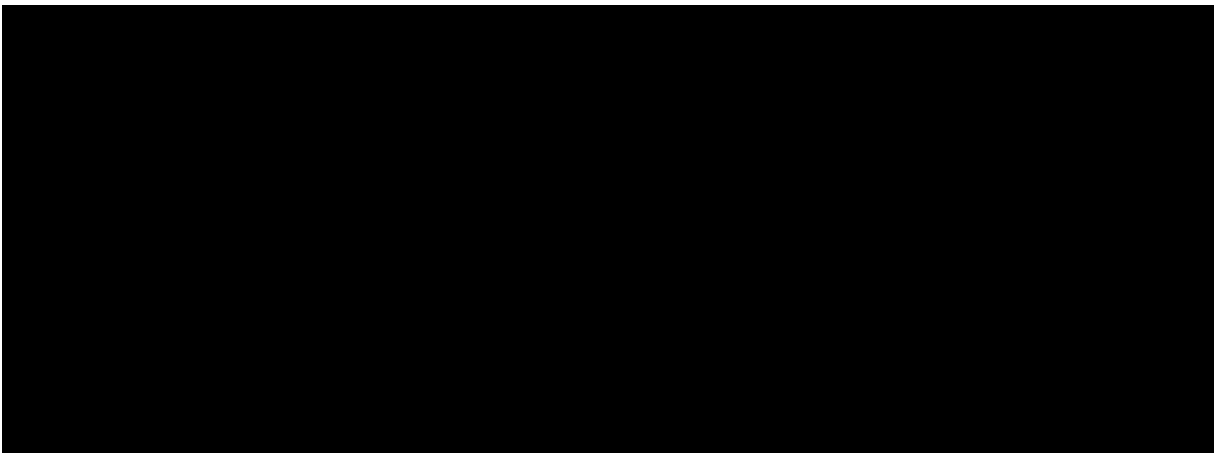
The Defendant's obligations

35. The abstract references in paragraph 19(ii) to the general principles of "*legitimate expectation*", "*proportionality*" and "*good administration*" are embarrassing for lack of particulars. Without particularisation of (a) precisely what obligations arose under these general principles in the context of the instant case and (b) how such obligations are alleged to have been breached by the Claimant, these references are liable to be struck out.
36. It is denied that the Defendant "*owed the Claimant duties ... to conduct the tender process ... in a manner that does not distort, narrow or undermine competition*". The correct formulation of the Defendant's duties in this respect is that the design of the procurement was not to be made with the intention of artificially narrowing competition: see reg. 18(2) of the Regulations. No allegation is made by the Claimant of breach of reg. 18(2).
37. As to the alleged duty "*to award the contracts to the most economically advantageous tender(s)*", the assessment of what is economically advantageous is a matter for the contracting authority and not the Court.
38. To the extent (if any) that the Court is entitled to assess the lawfulness of the Defendant's design of the Tender Process beyond reg. 18(2), the Court should afford the Defendant a margin of discretion and/or reach a finding of unlawfulness only if the Defendant's approach is manifestly erroneous.
39. Paragraphs 17 to 19 are otherwise admitted.

Breaches of the Defendant's obligations

40. Paragraph 20 is denied.

Unlawful use of electronic auction in competitive dialogue procedure





45. Paragraph 21 is denied. There is no prohibition in the Regulations against using an electronic auction [REDACTED] in a competitive dialogue procedure.

(ii) The second sentence is denied.

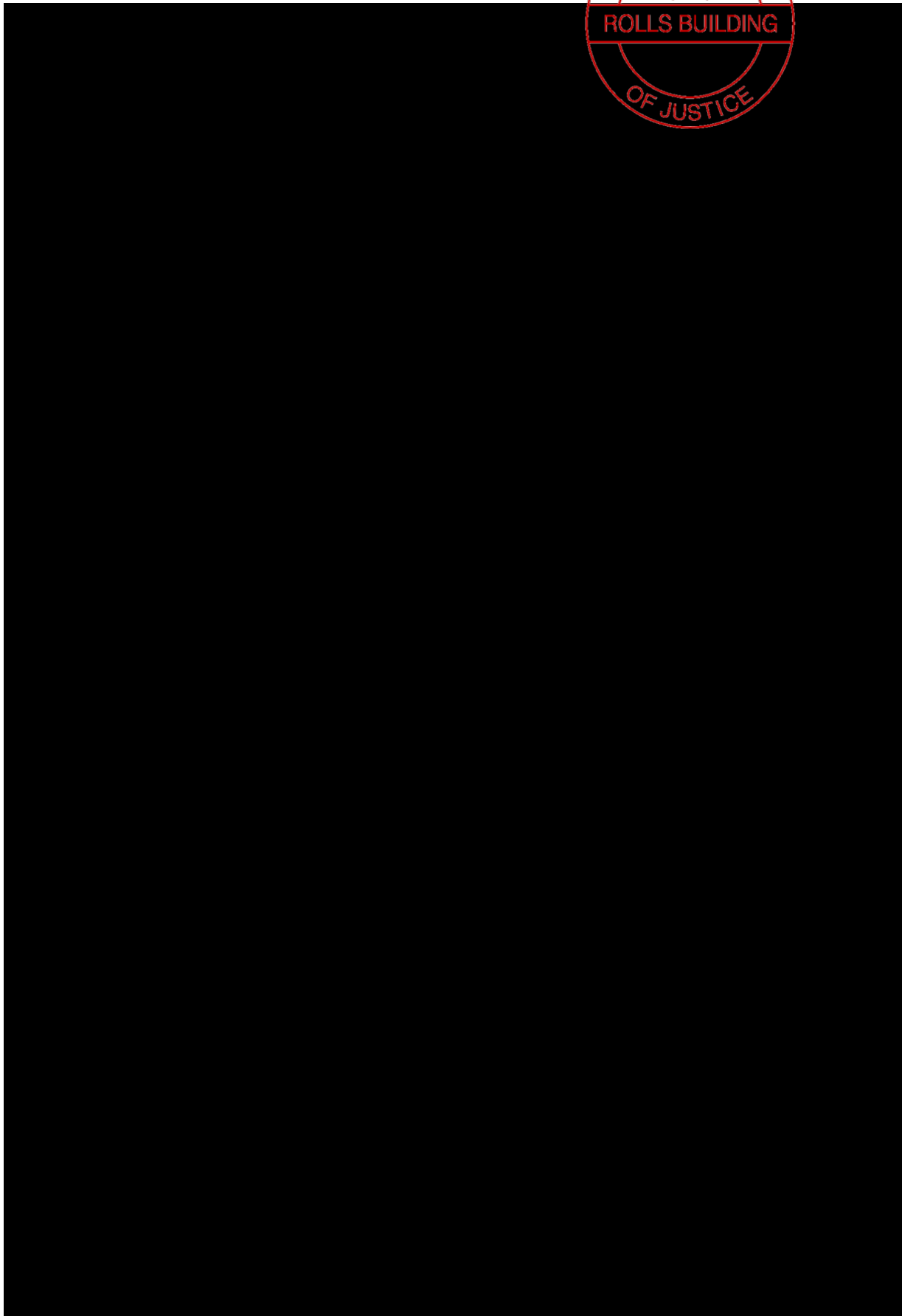
(iii) The third sentence is denied. Even if the Defendant is required by regulation 35 to provide details of how the auction is to take place, there is no requirement for it to do so specifically in the ITPD. Regulation 35 requires various details of electronic auctions to be included in "*the procurement documents*". "*Procurement document*" is defined by regulation 2(1) to mean any document produced or referred to by the contracting authority to describe or determine elements of the procurement or the procedure. That definition may include

documents published by the Defendant subsequently to the ITPD.



Unlawful evaluation and tender methodology

49. Paragraph 25 is denied its entirety.





The remaining allegations in paragraph 25

57. The allegations of breaches of the general principles of transparency and proportionality are embarrassing for lack of particulars and are denied.

60. Paragraph 26 pleads to the contents of correspondence and advances various legal arguments; it does not plead any facts which could form the basis of the Claimant's alleged causes of action. So far as relevant, the Defendant will respond to these points in submissions at trial. For the avoidance of doubt, however, the Defendant denies that the Claimant's interpretation of the relevant correspondence is accurate.

Consequences of the Defendant's breach of its obligations

61. Paragraph 27 is admitted.

62. Paragraph 28 is embarrassing for lack of particulars and is denied



Relief

63. It is denied that the Claimant is entitled to the relief claimed in paragraph 29 and in the prayer for relief, or to any relief.

CHARLES BÉAR QC

PATRICK HALLIDAY

29th July 2018

STATEMENT OF TRUTH

The Defendant believes that the facts stated in this Defence are true. I am duly authorised by the Defendant to sign this statement of truth.

Signed:

Name: Joanne Thompson

Position: Senior Associate

Date: 29 July 2018

Defence filed and served on
Defendant.

by Blake Morgan LLP, solicitors for the