MAGNOX INQUIRY

Report of the Holliday Inquiry

Inquiry into award of the Magnox decommissioning contract by the Nuclear Decommissioning Authority, related litigation and its subsequent termination

HC 1280

March 2021

Return to an Address of the Honourable the House of Commons dated 4 March 2021

Report of the Holliday Inquiry

Inquiry into award of the Magnox decommissioning contract by the Nuclear Decommissioning Authority, related litigation and its subsequent termination

Ordered by the House of Commons to be printed on 4 March 2021

HC 1280

This publication is available from: www.gov.uk/beis

Any enquiries regarding this publication should be sent to us at: enquiries@beis.gov.uk

ISBN 978-1-5286-2448-0

CCS0221118266

Printed on paper containing 75% recycled fibre content minimum.

Printed in the UK on behalf of the Controller of Her Majesty's Stationery Office.

Contents

1. Introduction

1.1 By letter dated 27 March 2017 the Secretary of State for Business, Energy and Industrial Strategy ("the Secretary of State") asked me to lead an independent inquiry (the “Inquiry”) into, among other matters, the management by the Nuclear Decommissioning Authority ("NDA") of the Magnox Competition process, related litigation and the events leading up to the decision to terminate the Magnox Contract.

1.2 The Magnox Competition was a competition run by the NDA which sought a parent body organisation to take ownership of the site licence companies relating to 12 NDA sites (the “Magnox Sites”). It had an estimated value (as stated in the Official Journal of the European Union Notice) of £6.2 billion. The Competition commenced in April 2012 and in March 2014 the first placed bidder was announced as Cavendish Fluor Partnership (“CFP”). CFP started work on 1 September 2014 under a 14 year contract (the “Magnox Contract”). Subsequently, it become clear to the NDA that there was a significant mismatch between the work that was specified in the Magnox Contract as tendered in 2012 and as awarded in 2014, and the work that actually needed to be done. As a result, in March 2017 the NDA Board concluded that it should exercise its right to terminate the Contract with effect from September 2019.

1.3 Meanwhile, in April 2014 one of the disappointed bidders, Energy Solutions (“ES”), commenced proceedings against the NDA seeking damages. In July 2016 the High Court found that the NDA had wrongly decided the outcome of the procurement process. In August 2016 a related bidder, Bechtel Management Company Limited (“Bechtel”), issued a claim. In March 2017 the NDA came to a settlement with ES and Bechtel. The total settlement amount was £85 million for ES and approximately £12.5 million for Bechtel.

1.4 The formal Terms of Reference for the Inquiry were, in material part as follows:

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:

- *the course of events that led to the flaws in the contract award identified by the court*

- *the course of events that led subsequently to the decision to terminate the contract*
- *the handling of the challenge and subsequent litigation brought against NDA arising out of the procurement and the subsequent resolution of the proceedings*
- *the actions throughout of the NDA board and officers, including its subsidiary organisations, and the actions throughout of officials and Ministers in the various government departments associated with the procurement process*
- *the structure of governance and relationship between the NDA and government departments and whether that contributed in any way to the problems encountered*
- *the extent to which the various internal and external assurance processes employed during procurement were effective*
- *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.

Reporting

1.5 The Secretary of State asked me to report my interim findings, and then to produce a final report, both of which were to be addressed to the Secretary of State and the Cabinet Secretary. My interim findings were set out in my Interim Report of 5 October 2017. This is my Final Report which builds upon the work undertaken for and matters identified in the Interim Report, and is also the result of the Inquiry's further extensive investigations. I have reiterated some of my earlier recommendations where I consider these to be key to the future success of the NDA.

1.6 To my considerable frustration, the finalisation of this Report has been delayed by almost two years as the result of an unsuccessful legal challenge to the work of the Inquiry by certain former NDA Executives. During that time,

I understand that the NDA has continued to make progress as an organisation on the basis of my Interim Report. I have not updated or altered any of my earlier-drafted final recommendations to reflect the progress made by the NDA during this time. In addition, since the inception of this Inquiry, the Government has issued further relevant guidance applicable to complex procurements to which I refer in Section 4 of this Report. I believe my recommendations are consistent with, and should be read alongside, this guidance.

1.7 I set out in Appendix 1 my current, and the most relevant previous, roles in the interests of transparency.

Structure of Report

1.8 This Report is structured as follows:

1.8.1 Section 2 addresses the scope of work undertaken during the course of the Inquiry.

1.8.2 Section 3 sets out my principal Findings.

1.8.3 Section 4 sets out my Recommendations.

1.8.4 Sections 5 to 10 explain the factual background against which my principal Findings and Recommendations are made, and provide additional explanation as to the reasons for those Findings and Recommendations. These Sections also contain further findings, supportive of, and related to, my principal Findings.

1.8.5 Appendices 1 to 4 include, respectively, a summary of my most relevant current and previous roles; a summary of the Judgment of the High Court of England and Wales ("the Court") in July 2016; extracts from a Partnerships UK Report; and a Glossary.

2. Scope of work undertaken

Nature of the Inquiry

2.1 This Inquiry is independent and non-statutory. The Inquiry therefore has no powers to compel either the production of documents or information, or the attendance of witnesses at evidence gathering or potential criticism interviews. The co-operation of all relevant bodies and individuals throughout the Inquiry process has therefore been voluntary. It has been much appreciated.

The Inquiry Team

2.2 My Inquiry team included officials seconded by Government. DLA Piper UK LLP were appointed as external legal advisers to the Inquiry. Where I use the expression 'the Inquiry team' I am referring to any combination of myself, seconded officials and DLA Piper UK LLP.

2.3 Consistent with my Terms of Reference, I have drawn upon the assistance of the Inquiry team in undertaking the work described below. In particular, I have been greatly assisted by them with the enormity of the task of evidence gathering, review and reporting, including the conduct of many of the evidence gathering witness interviews, and in the production of my Final Report.

Limitations of the Inquiry

2.4 My Terms of Reference are broad, and require me to investigate events spanning approximately a 6 year period, and the roles and responsibilities of not just the NDA, but parts of wider Government. They do not restrict my investigation to those aspects that caused actual loss or damage, but instead mandate a much more far-reaching inquiry, which expressly includes the need for me to set out the lessons to be learned.

2.5 In discharging these terms, I have not sought to form a view on, or determine, the following:

2.5.1 As suggested at hearings of the Public Accounts Committee of the UK Parliament and speculated in the press, whether any of the bidder costs for the Magnox Competition should be reimbursed.

2.5.2 Although referenced in my Interim Report, whether the NDA's model for undertaking decommissioning work (of setting up subsidiary companies to the NDA which will manage the Site Licence Companies ("SLC")) is the most appropriate for this work. However, I have made a recommendation to explore further how the NDA manages its SLCs.

Data Collection and Review

2.6 Without statutory underpinning and powers of compulsion in relation to document production, the Inquiry team has necessarily relied on the parties to whom document requests have been made to comply fully with those requests. It has proceeded on the basis that all document requests have been fully met, and that all documents provided to the Inquiry team are authentic and true copies of the originals.

2.7 Given the scope of the Inquiry, the relevant period for the purposes of gathering relevant evidence and information was between 2011 and 2017. As one might expect, the NDA and other relevant bodies generated an extensive quantity of data during that period. The Inquiry has received documents from the NDA, its external legal advisers and other relevant Government stakeholders including BEIS (formerly DECC), Shareholder Executive ("ShEx") (now UK Government Investments ("UKGI")), the Major Projects Authority ("MPA") (now the Infrastructure Projects Authority ("IPA")) and HM Treasury. It also received information from bidders to the Magnox Competition.

2.8 The Inquiry ultimately collated over 2.8 million documents from these various sources. In circumstances where relevant data included potentially sensitive nuclear information ("SNI") and/or was subject to legal professional privilege ("LPP") or without prejudice privilege (“WPP”), the NDA worked co-operatively with the Inquiry to mitigate such complicating factors, having regard to its duties under statute to protect and safeguard SNI, and its right to preserve LPP and WPP to the extent it wished to. The Inquiry has been given access to LPP material under an agreement that the sharing of such material will not constitute a waiver of LPP; and the Inquiry has treated WPP material in a similar manner. That has helped enormously in understanding the events under consideration.

2.9 The data capture and analysis phase was complicated by the volumes of data involved. From a technical perspective, these required significant IT infrastructure and equipment, including document review platforms, along with appropriately competent support staff to maintain and manage such systems. In addition, the relevant IT infrastructure and equipment itself had to be physically secured, in accordance with the relevant statutory and regulatory framework.

2.10 Given the volume, not every document obtained, or to which the Inquiry has been provided access, has been considered. However, I am satisfied that the Inquiry has, through the document review platform, conducted reasonable and proportionate searches to identify the relevant material and narrow it to a more manageable quantity, for review by the Inquiry.

Witness Interviews

2.11 In addition to the documentary evidence, the Inquiry also obtained evidence through the conduct of evidence gathering interviews with over 70 relevant witnesses. Relevant witnesses included past and present NDA employees identified as having evidence relevant to my Terms of Reference; past and present members of the NDA Board; representatives from Burges Salmon LLP and Simmons & Simmons LLP, both external legal advisers appointed to the NDA; Junior and Senior Counsel appointed by the NDA to advise and represent it in the litigation; and a representative of Deloitte LLP who were appointed to provide advice on specific financial matters. Officials from UKGI, BEIS (including BEIS lawyers), Scottish Government, Cabinet Office, HM Treasury and the IPA were also interviewed.

2.12 All interviews were formally transcribed by independent professional transcribers engaged by the Inquiry to ensure an accurate permanent record was obtained of all witness evidence. This process is more fully described in the Inquiry's published Evidence Gathering Protocol which can be found at:

https://www.gov.uk/government/publications/magnox-inquiry-evidence-gathering-protocol.

2.13 In addition, the Inquiry team met with other stakeholders, including representatives of bidders to the Magnox Competition and Magnox Sites Stakeholder Groups (any information provided was not treated as formal evidence by the Inquiry, upon which findings or conclusions were based).

2.14 I would like to thank all those who contributed to this process.

Potential Criticism Process

2.15 As part of the evidence gathering process, the Inquiry conducted a further stage of interviews with a smaller number of individuals and/or bodies that the Inquiry team considered at the time might be subject to criticism. This process is more fully described in the Inquiry's published Evidence Gathering Protocol - Addendum which can also be found at:

https://www.gov.uk/government/publications/magnox-inquiry-evidence-gathering-protocol

2.16 The documentation and the evidence provided before, during or after all interviews, including potential criticism interviews, has provided the evidentiary foundation upon which I have arrived at my Findings and Recommendations.

Process of Representations or 'Maxwellisation'

2.17 The Inquiry has, in line with its published protocols, conducted what is known as a 'Maxwellisation' or 'representations' process. This involved providing relevant individuals and bodies with extracts of a draft of the final report which included material of interest and criticism(s) of that individual or body along with underlying evidence. A period of at least 14 days was allowed for each recipient in which to consider and respond. I have taken into account all representations made to the Inquiry during this process (including new evidence resulting from the representations), in finalising my Report.

References in the Report

2.18 Where I have identified individuals by role or job title, I am referring to the holder of that role at the relevant time. That person may differ from subsequent holders, or the current holder, of that role.

2.19 Where I refer to the NDA Board in describing its participation in certain factual events (such as being in receipt of a report or giving particular approval), I am referring to the NDA Board collectively as comprising both Executive and Non-Executive (or independent) Directors. Where I make findings, or draw conclusions regarding the NDA Board's state of knowledge or understanding of certain events and information and its ability to inquire into matters and to

hold the Executive to account, I am referring only to the Non-Executive (or independent) and not Executive members of the NDA Board.

LPP and WPP material in the Published Report

2.20 It has been necessary in order to respect LPP for the Inquiry to take precautions in referencing underlying evidence which may be covered by such LPP. As noted in paragraph 11 of the Inquiry's Information Protocol (published 8 August 2017), before finalising the report the Inquiry invited the NDA to comment on how LPP material is referred to. The Inquiry also shared relevant extracts of the report with BEIS for this purpose, and sought comment from relevant parties on paragraphs that could be considered to contain WPP material. No requests for redaction were made. In any event, I have concluded that none are required, and accordingly have made no recommendations to the Secretary of State regarding redaction prior to publication of the Report.

3. Principal findings

Introductory remarks

3.1 In this section, I set out the principal Findings of my Inquiry, which I have grouped together by theme. I have focused on what I consider to be the main reasons for the failings relating to the Magnox procurement and associated events (in the various areas broadly encapsulated in my Terms of Reference reproduced in paragraph 1.4 above), and have not sought to identify every minor contributing factor or area where minor improvements might be made. Sections 5 to 10 contain a more comprehensive explanation of the background facts and circumstances underlying my principal Findings, as well as further supportive, and related, findings, not all of which are necessarily in the same chronological order as the principal Findings in this section.

3.2 I first wish to make the following introductory remarks.

3.3 The NDA has made significant progress over recent years against its key objectives of decommissioning and hazard reduction, and at the same time has achieved meaningful cost savings.

3.4 It is apparent from the Inquiry's extensive investigations (particularly through the interview process) that there are many people in the NDA who care deeply about its mission, and pride themselves on their high standards of integrity and technical expertise.

3.5 That said, it is my task, undeterred by such considerations, to establish why the Magnox procurement ultimately went so badly wrong, and to identify what steps ought to be taken to reduce, if not prevent, the likelihood of any recurrence.

3.6 By its very nature this Inquiry is a reflective exercise, and therefore to a degree informed by the benefit of hindsight. I endorse the views expressed by His Honour Judge Teague QC in the Foreword to his report[1] last year into the death of Anthony Grainger as follows:

> *"A public inquiry is, of necessity, an exercise in hindsight. That is the whole point of the thing...The Chairman of an Inquiry must be a seer after the event, examining society's conscience, revealing even those things that could not have been known at the time and, in the process,*

[1] https://www.graingerinquiry.org.uk/wp-content/uploads/2019/07/Anthony-Grainger-Inquiry-Report.pdf

illuminating a future to which it might not otherwise have been possible to aspire. To disregard after-acquired knowledge when considering whether an historical decision or action was objectively justified risks subverting the purpose of an investigation such as this."

3.7 I have been careful to look at events with a strong sense of what could be reasonably expected of the responsible individuals and organisations at the relevant time. My findings and comments as regards the NDA as an organisation are based on the NDA as constituted and run at the relevant time.

3.8 It would be overly simplistic to describe Magnox as merely a failed procurement exercise, without acknowledging that the totality of the contributing events was caused by multiple failings. In safety investigations I am used to the "Swiss cheese" model[2] as a metaphor for how seemingly multiple layers of defence against individual and organisational failings (in the form of detailed processes and qualified and experienced personnel) can still allow significant incidents to occur. Indeed, this seems to me to be the model that best represents the failings in this procurement exercise.

3.9 In many respects, Magnox was a well-run procurement and appeared to have the critical components for successful delivery. These included a tried and trusted procurement model (competitive dialogue) that was understood by the market; a multi-level governance structure with appropriate stakeholder representation; market engagement; appropriate policies, risk identification and regular reporting; a seemingly well-resourced team; the engagement of external advisers and independent internal and external assurance.

3.10 This may well explain why the NDA, its wider stakeholders and those responsible for assurance had great confidence in, and took considerable comfort from, such a seemingly impressive process. In reality, however, there were errors and shortcomings in procurement design and execution, compounded by post competition conduct and deficiencies in corporate governance, which were not sufficiently identified by the assurance processes in place and that resulted in the events that my Inquiry has been extensively investigating. From a lessons learned perspective, the fact that an outwardly impressive process could generate such misplaced confidence in the integrity of its underlying substance and performance is a salutary lesson for those involved in conducting, assuring and sponsoring major procurements.

[2] This Report is not the place to rehearse the detail of this model or its history. For those with an interest in finding our more on the subject there are a wide range of publications on it though the best starting point is likely to be the works of James Reason.

3.11 On the evidence before the Inquiry, I have concluded that responsibility within the NDA for what went wrong at the various stages is to be attributed at both the corporate and individual level. In reaching this view, I have considered how far individual responsibility should extend along the chain of command for particular failings, and the extent to which those in charge of later activities should be held accountable for the consequences brought about by earlier failings.

3.12 I have also considered the question of corporate as against individual responsibility for the principal Magnox failings. My assessment of the role played by certain individuals, as it relates to particular aspects of my Terms of Reference, has led me to make specific mention of them in my Report. In other instances, I have concluded that responsibility properly lies with the NDA as an organisation, notwithstanding that certain individuals with senior management responsibilities were variously involved. In apportioning and reporting responsibility in this way, I have been conscious of the need to be fair both to the individuals and to the NDA itself.

3.13 I sincerely hope that the NDA and those responsible for its governance learn the lessons from this and other official reports into Magnox. I feel compelled to stress this point, having formed the view that whilst historically the NDA has been very keen to commission lessons learned exercises, it does not appear to me to have taken them sufficiently seriously, and acted on them in a readily demonstrable way. I am aware that since my Interim Report, the NDA and its Board have embarked upon a programme of improvements, that have gone some way to responding to my Interim Recommendations.

Combination of Contributing Factors

3.14 My principal Findings below relate to those features of the Magnox procurement and its aftermath that I consider were material in bringing about the flawed outcome. They should be seen not as isolated occurrences, but rather as a series of interrelated factors that collectively played their part, in varying degrees, in what ultimately went so badly wrong.

3.15 My principal Findings reinforce the essential need in complex projects of this kind to firmly maintain an holistic focus, and to deploy the most effective combination of expertise and experience, whether that be on the front line or in the quality assurance role.

Principal Findings

Finding 1 - NDA's procurement strategy

3.16 The Magnox procurement strategy was to secure the most economically advantageous tenderer who would "*do the same for less*". In other words, the competition would drive down the price for delivering the NDA's existing decommissioning programme through until 2028.

3.17 The NDA chose to use a Target Cost Incentive Fee ("TCIF") contract, designed to incentivise the winning bidder to deliver the scope of the required decommissioning to an agreed Target Cost. The contract scope was defined by reference to a planned start point (or baseline) to reflect the assumed state of the Magnox sites at contract commencement in September 2014, and a defined end point setting out the NDA's requirements for the sites at the end of the contract in 2028.

3.18 Self-evidently, for the scope of work to be accurately defined in the TCIF contract, the baseline needed to describe accurately the work undertaken at the time it was issued, and to forecast accurately the work to be undertaken by the time the contract was to commence (18 months after the baseline was issued). The evidence before the Inquiry shows that the NDA was aware of slippages at some key sites throughout the procurement period, but I have seen no evidence that the NDA turned its mind to the potential implications these might have for the accuracy of the baseline or that it took appropriate corrective action.

3.19 The risk that the baseline would be materially incorrect, and that the scope of the work programme would be greater than bidders had been invited to tender for, was not regarded by the NDA's Core Competition Team ("CCT") (set up to run the competition and led by the NDA's Head of Competition) as their responsibility, nor does the risk appear to have been recognised and managed elsewhere within the NDA.

3.20 The NDA did not undertake any assurance in order to identify, or actively consider the impact of, a significant variance (between the baseline and the actual state of the sites) for the purposes of the Magnox Competition. I cannot say definitively what action may have been taken (strategically or otherwise) had the inaccuracies within the baseline been revealed on closer examination. However, without adequately investigating the position, the opportunity for the NDA to identify the extent of any inaccuracies, to assess their implications fully, and to take appropriate corrective action, was not taken up.

3.21 It seems to me that the NDA's procurement strategy assumed that the consolidation phase would be able to deal with any variances. Consolidation was the process through which the NDA and CFP sought to agree changes to the scope of the contract brought about by the variation between the assumed state of the sites set out in the baseline, and their actual state as found in September 2014. However, if through consolidation major changes were to be made to the Target Cost, the objective of securing the savings to be generated through the original Target Cost could be materially compromised.

3.22 In the event, the extent of the variance was so substantial that it eventually gave rise to a risk of material variation (a potential breach of procurement law) which exposed the NDA to potential legal liability and played a major part in the decision to terminate the Magnox Contract with the winning bidder, CFP.

Finding 2 - Tender design

3.23 Included within the tender documentation for the Magnox Competition, was an evaluation methodology that in my opinion was unnecessarily complex. It contained 700 scoring requirements - many of which required extensive responses - which were then subject to at least 20 different evaluation methodologies. Evaluators therefore had to score over 2,800 requirements across four bids using multiple different evaluation methodologies, creating a very significant risk of human error in the evaluation.

3.24 More importantly, the evaluation methodology also contained an excessive number of thresholds (essential requirements that, if failed, would make the total bid non-compliant), and, surprisingly, included matters which were not truly critical to the service being procured, and, for breach of which, in my view, it was not in the NDA's interests to exclude an otherwise compliant bid. The NDA did not adequately assess whether this approach posed any risks to the Magnox Competition.

3.25 The NDA selected and calibrated a matrix for the scoring of target costs that reflected the NDA's expectations (based on bidder feedback) as to the level of savings the bidders were most likely to offer. In the interests of transparency, the NDA provided this matrix to bidders to explain how costs would be scored. Whilst this was advisable under procurement law, it provided bidders with a clear understanding as to what savings would secure maximum marks. Contrary to what the NDA was expecting, the costs and savings proposed in the various bid responses congregated in the same area of the matrix. Due to the way in which the matrix had been calibrated, the bids were closely scored even though the savings offered by different bidders were millions of pounds apart.

3.26 The NDA was confident in its competition design. However, although the NDA recognised the biggest risk to the Magnox Competition was legal challenge, the Commercial Director and the Head of Competition did not ensure that the NDA stood back to holistically test the risk attaching to the tender documents and, importantly, whether they remained fit for purpose. There was an opportunity missed to seek a strategic overview and related input from external procurement advisers to identify any underlying weaknesses in these documents, and the extent to which these could threaten the outcome of the Magnox Competition.

Finding 3 – Bid Evaluation

3.27 The Court in the Liability Trial found that on at least two occasions in relation to the CFP bid, and following consultation with the NDA's Head of Competition, scores on threshold pass/fail points were changed ("fudging" was the expression used by the Court), which had the effect of keeping CFP in the Magnox Competition. The Court later clarified that it had made no findings of bad faith or deliberate intention to infringe the procurement rules on the part of the NDA. I take the same view on the evidence before my Inquiry. In my view, the changes to the scores resulted from a well-intentioned desire to keep the Magnox Competition alive, and were not made in order to favour a specific bidder. For the avoidance of doubt, the Inquiry has found no evidence of any bias on the part of the NDA in favour of keeping CFP in the Competition.

3.28 During the evaluation process, the NDA's external legal advisers were invited by the Head of Competition to conduct a review of the consistency between the scores given by the NDA's evaluators, and their accompanying comments recorded on the NDA's AWARD computer system. This review identified a number of inconsistencies, which the evaluators were asked to consider, and to decide whether, in their absolute discretion, to make any changes to the comments and/or the scores. However, the Head of Competition did not put in place a system to understand the full extent of the inconsistencies, to ensure these were adequately addressed, and to understand the extent of any risk attaching to the actions taken, or not taken, by the evaluators in response.

3.29 The NDA Board was asked to approve the decision to award the Magnox Contract to CFP without a full awareness of the extent of the aforementioned external legal review. The level of inconsistencies, and the extent to which they had been addressed, should have been of considerable importance to the award approval process, particularly given the closeness of the eventual scores between competing bids. The NDA Board was therefore deprived of

the opportunity to consider the award decision in the light of that information, and to possibly request additional checks, or even a pause, in the process so as to ensure that there was full confidence in the tender outcome before endorsing the award decision.

Finding 4 - Management of the legal challenge and ensuing litigation

3.30 The risk of, and basis for, a possible legal challenge by disaffected bidders had become apparent before the Magnox Contract had even been awarded to CFP. During the statutory standstill period before the contract with CFP was signed, the NDA received comprehensive written complaints from all three losing bidders. The NDA's Leading Counsel provided robust advice to the Head of Competition against rushing out a response to a 70 page letter containing EnergySolutions' ("ES") grounds of challenge in the limited time remaining under the standstill period. I would particularly have expected the Head of Competition to have taken greater steps to ensure that the strength of that advice was communicated adequately to the NDA's appointed decision-makers.

3.31 The evidence shows that the NDA's litigation strategy was heavily determined by the CEO. His base position was that the NDA had run a good procurement, and therefore the strategy was that the NDA should not settle, but fight any claim against it. This view does not appear to have been seriously challenged within the NDA, and it cast a huge and highly influential shadow over the discussions and decisions regarding the NDA's conduct of the litigation brought by ES, a member of the runner up consortium in the Magnox Competition. Some witnesses believed there was Government support for this strategy, but to the extent such support existed, I consider it was in principle only, and was not in any sense a clear direction from Government that the NDA should follow such a strategy.

3.32 The evidence to the Inquiry shows that limited information about the legal challenge by ES was provided to the NDA Board, and it was not informed of Leading Counsel's advice on the merits of the NDA's defence to the claim. That advice (from October 2014) began as cautious optimism about the NDA's prospects of success, but deteriorated to the more pessimistic assessment some six weeks before the Liability Trial began in November 2015 that the case could go either way, and that if pressed, the NDA was more likely to lose than win. The NDA Board was therefore denied the opportunity to react to the advice, and to provide direction, or to challenge decisions around the NDA's litigation strategy of vigorously continuing to defend the claim.

3.33 The CEO’s approach to the litigation, and the formulation of the NDA's litigation strategy, rested to a considerable degree on his belief that to settle the claim would create an unacceptably bad precedent in the procurement market. Advice to the contrary from Leading Counsel was known by the NDA's Director of Business Services, but I have been unable to clearly establish the extent to which this advice was communicated to the CEO.

3.34 I find that the NDA did not seriously consider possible settlement of the litigation, particularly prior to, but also during the Liability Trial. The CEO's steadfast adherence to the NDA's litigation strategy stood firmly in the way, and in the process the legal advice on the NDA's deteriorating prospects of successfully defending the claim failed to assume, as it should have, the prominence and influence that it deserved in challenging the strategy, and asking whether or not it made sense to maintain it. There is evidence that ES was proactively seeking settlement, particularly at a mediation between the parties a month before the liability trial began. There can of course be no guarantee that settlement would have occurred, but there were clear opportunities to do so (potentially at a lower cost than the eventual settlement, and thereby avoiding the serious damage to the NDA's reputation that resulted from the Judgment) which, in my view, were misguidedly lost. For the avoidance of doubt, I make no criticism of the NDA's external legal advisers (inclusive of Counsel) in this regard.

Finding 5 - Management of consolidation

3.35 Following contract award, the NDA and CFP undertook a consolidation process.

3.36 The NDA's CEO gave responsibility for consolidation at the operational level to the CFO, with executive oversight from the Strategy and Technology Director as SRO for consolidation. Although the CFO had previously had certain broader, non-financial responsibilities in respect of Magnox, those relating to consolidation were not a normal task for a CFO. This resulted in split lines of accountability which, in my view, was sub-optimal.

3.37 The management of the consolidation process lacked discipline and tight schedule management. Once it started, progress was allowed to drift. The contract had required consolidation to be completed by September 2015, but progress was slow and deadlines were extended by the NDA. I am of the opinion that the NDA did not focus on deploying all of its contractual rights and remedies to best advantage in these circumstances. I have concluded that the lack of anyone senior, wholly dedicated to the management of the

entirety of the contract, contributed to the NDA's poor management of consolidation.

3.38 The positive 'progress on the ground' being achieved by CFP in other respects was frequently reported to the NDA Board. At the same time there was an insufficient level of reporting on the significance of time slippages and potential cost escalation. This meant that the NDA Board did not have full exposure or understanding of the issues surrounding consolidation until very late in the process, and were therefore unable to hold the Executive to account. Even when the Chairman and the NDA Board demanded a "deep dive" into consolidation after the substantial escalation in costs was firmly established, this was not acted on with the urgency I would have expected.

3.39 When various efforts at the operational management level failed to resolve the disagreements between the NDA and CFP teams on the consolidation changes, there was an attempt, in June 2016, led by a director from the NDA and representatives of the SLC managed by CFP to agree an overall resolution of their differences. However the NDA did not follow the right process (in terms of both contractual requirements and under procurement law), and the outcome from the relevant meeting was the subject of serious concerns expressed by the NDA's external lawyers. Following the Judgment, consideration of these concerns was a key factor in the chain of events that ultimately resulted in the decision to terminate the Magnox Contract.

Finding 6 - NDA governance and accountability for Magnox

3.40 The NDA governance arrangements for the Magnox Competition were complex, but more importantly failed to provide the quality of scrutiny and truly independent oversight required for a major competition of this kind. The effectiveness of the governance framework, such as it was, was undermined by a lack of clarity in the functions of the multiple bodies and the interrelationships of various boards and set meetings.

3.41 The Magnox Competition was large, complex and high value. This necessitated a core team that would be capable of developing and delivering a commercial procurement strategy that would fully comply with procurement law, and provide the best outcome in terms of cost and quality for the tax payer. The core team selected had commercial and procurement skills, but only possessed limited experience of running large complex procurements. In this connection, some NDA personnel with deeper procurement experience had left the organisation in the period running up to the Magnox Competition. The Commercial Director was responsible for selecting the core team and I

have concluded that the depth of skills and knowledge in that team was inadequate for the challenging task they faced.

3.42 I find that the CEO failed to maintain an appropriate system of accountability for Magnox. By way of example, as the Competition progressed, different senior individuals' accountabilities were changed and/or reorganised over time. In December 2013, towards the end of the procurement phase, the CEO dispensed with the post of Commercial Director. This, together with the resignation of the Chief Operating Officer shortly afterwards, resulted in the re-allocation of responsibilities for procurement and consolidation to remaining executives, who also retained their existing workloads. The lack of dedicated senior commercial resource was an issue and, as a result, nowhere do I find anyone fully standing back, and taking a considered overview of the Magnox activities and risks and reviewing how they would best be managed. I also note that UKGI had expressed concerns during 2013 to 2016 over the capacity of and capability within the NDA Executive team, but this did not appear to result in any subsequent action.

3.43 Indeed, the CEO, the Chairman and the NDA Board were heavily focused, throughout the Magnox process, on Sellafield, which is widely recognised as the NDA's biggest operation with the greatest financial and safety risks. That understandable focus should not, however, have been at the expense of Magnox. In my view, the Chairman did not ensure that the NDA Board gave appropriate time and attention to the Magnox Competition and its consequences at the highest levels of the NDA, until it was too late.

3.44 The matters discussed in the immediately preceding paragraphs were exacerbated by the lack of a properly defined process by which legal advice would be communicated to senior stakeholders, and the lack of a senior internal legal lead with the authority and ability to challenge the NDA leadership, as and when circumstances so dictated.

Finding 7 - Oversight by ShEx/UKGI

3.45 The responsibilities of ShEx/UKGI in respect of the NDA are set out in the governance framework published in October 2013 (similar provisions applied before then). UKGI took over these responsibilities in April 2016, and a memorandum of understanding was published that sat alongside the framework. Under this, ShEx/UKGI was expected to both challenge the NDA's performance, and help the NDA navigate its way around Government in seeking approvals. In my opinion this resulted in a blurring of its oversight role, and compromised the rigorous independence required for successful

oversight. I have seen no evidence of a specific role for ShEx/UKGI in terms of oversight on the Magnox Competition.

3.46 ShEx/UKGI are rightly recognised as corporate governance experts, and in certain instances made perceptive observations within the wider sphere of corporate governance relating to Magnox: for example, their comments concerning commercial and contract management capabilities, and the stretch of the NDA Executive team. These observations appear to have carried insufficient weight with the NDA, and I have not seen evidence that they were ever fully considered or acted on.

3.47 The Inquiry heard evidence that greater weight was placed by the Government on information in submissions because they came via ShEx/UKGI rather than directly from the NDA. ShEx/UKGI produced certain submissions containing inaccurate and/or out of date information which was almost certainly the result of a dependence on information gathered from NDA personnel, and the inability to check it independently (in some cases due to the operation of legal privilege). I make no criticism of ShEx/UKGI in such circumstances.

3.48 Given the dual role of ShEx/UKGI referred to above, I am clear that its involvement in the day to day oversight of the NDA detracted from crisp accountability and ownership of the relevant tasks and issues. As there was no specific role for ShEx/UKGI in the oversight of the Magnox Competition, the general ShEx/UKGI governance arrangement could not effectively provide the quality of scrutiny and oversight required at material points of the Magnox Competition.

Finding 8 – Assurance and the Major Projects Authority

3.49 I was initially struck by what appeared to be an impressive amount of assurance in respect of events considered under my Terms of Reference. However, on closer examination, I found many of these assurances, in reality, to be very narrow in nature with clear limitations in terms of scope and methodology. The NDA may have regularly sought independent assurance but it was, in my view, principally seeking comfort or positive confirmation of its decisions and actions, rather than a more rigorous identification of key risks, and possible reasons to stop or pause. I have concluded that the NDA readily interpreted external assurance reports in an unduly positive light, partly reflecting the widely held confidence that the NDA was an effective procurer and contract manager. This was not consistent with the philosophy of good assurance, which is to provide an effective and robust check on and challenge to processes and decision-making.

3.50 The MPA reports were seen as the main independent form of assurance by the NDA, UKGI and HM Treasury. The methodology used at that time by the MPA (and later the IPA) for their reviews was to send a small team (three or four people, one of whom was the team leader) to look at project documents, conduct interviews with those working on the project, and write up findings over a short period of time (three to five days). The reviewers were drawn from a list of potential reviewers held by the MPA.

3.51 In the context of a very substantial project such as Magnox, the MPA would therefore have had limited opportunity to get deep under the skin of the project. The problems with the Magnox Competition existed at a deeper level, and the form of MPA review conducted at this time could not identify many of the issues. With a more in depth review of the evidence, facts and figures, and with a more critical assessment of the evidence provided by those interviewed, the MPA might have obtained a more realistic picture.

3.52 There is no evidence that MPA reports were shared in their entirety with decision-makers, and certainly not to the NDA Board and, importantly, the limitations of such reports were not made sufficiently clear by the MPA. In many instances only MPA RAG ratings were provided to the NDA Board, without any of the underlying rationale, comments and recommendations. The lack of visibility of the actual reports and/or this underlying narrative limited any ability to probe and question the scope and limits of any assurance. Despite this, great reliance was placed on MPA RAG ratings in progressing to the next stage.

Finding 9 - NDA culture

3.53 Throughout the Magnox Competition, litigation and consolidation the NDA had an approach indicative of a reluctance to entertain bad news, and the apparent placing of insufficient weight on legal risk.

3.54 I consider that this approach was exacerbated by the lack of an NDA General Counsel (or equivalent) present before the NDA Board. In the context of a statutory body with significant legal responsibilities, and the beneficiary of one of the largest budgets in the public sector, I find that extraordinary. I understand that a board level General Counsel has now been appointed.

3.55 There appears to have been a culture that sought to self-justify, and which was inward looking. In particular:

(a) The NDA had a belief in its own skills and intellectual ability, and did not recognise or seriously contemplate that it may have any weaknesses.

(b) When contracting and managing external advisers, it had a propensity to limit their role, and did not appear to welcome strong challenge.

(c) It failed to take sufficient steps to bring in people from other industries with different skills and experience, and to learn lessons from them.

Although an undoubted world leader in the technical aspects of nuclear decommissioning, this did not of itself make the NDA a competent procurer.

3.56 The NDA had the benefit of a number of reviews and reports at the time of the Magnox procurement, in particular the Partnerships UK (PUK) report produced in 2007 on the NDA's PBO Competition Programme. The purpose of the PUK report was to provide the NDA with assurance that the proposed contracting structure, competition process, commercial strategy and governance arrangements were in line with good practice, and were commercially sound. It was also to identify any issues of concern and recommend actions to address them. Having read that report, I was astonished to discover that a number of the observations and recommendations made in 2007 still reverberate, and closely resemble some of my own Recommendations. This reinforces the remark I make in my introductory comments regarding the NDA's ability to ensure it learns appropriate lessons.

4. Recommendations

4.1 The scope of my Inquiry was limited to events surrounding the award of the Magnox decommissioning contract by the NDA, and its subsequent termination. Whilst there is no absolute certainty that the flaws in the procurement process and its aftermath are confined to Magnox, it would be wrong simply to assume that they are commonplace in the NDA.

4.2 I set out below my Recommendations[3]. My objective is to provide firm recommendations to ensure that the problems with the Magnox procurement identified in this Report are not repeated, and that future nuclear decommissioning programmes can be undertaken with the full confidence of Ministers, taxpayers, and the nuclear industry.

4.3 I recommend that BEIS takes overall responsibility for the implementation of those of my Recommendations that relate to the NDA and ensures that it has in place a system of regular and robust reporting from the NDA Board on how these are being implemented and managed by the NDA in practice.

4.4 I have split my Recommendations into two distinct parts: those that are specific to the NDA; and those that I consider have relevance across wider Government and the public sector.

4.5 My Terms of Reference allow me to recommend any disciplinary investigations or proceedings that I consider may be appropriate as a result of the Inquiry's investigations and findings. I make no such recommendations.

Recommendations relating to the NDA

Recommendation 1 – Review the strategic nature of the NDA

4.6 Although I am generally aware of related work undertaken by the NDA internally as regards its strategy and functions, I remain of the view that BEIS should promptly consider the scope of work that the NDA is accountable to deliver in light of the size and resources of the organisation, in comparison

[3] Since the inception of my Inquiry and before completion of this Report, the Cabinet Office has published comprehensive and relevant guidance which is applicable to complex procurements - see its Outsourcing Playbook https://www.gov.uk/government/publications/the-outsourcing-playbook. In addition, the Government Commercial Function has made available to central Government procurement professionals a number of detailed guidance notes on various aspects of complex procurements. I believe my recommendations are consistent with and should be read alongside the Playbook and such internal guidance.

with industrial companies that are directly managing such complex and expensive programmes.

4.7 The review should include questioning how the NDA manages its site licensing companies, including (a) whether the PBO/SLC model (where the NDA is essentially at least one step removed from the supplier in charge of delivery), can ever adequately manage the programme, and (b) whether risk can ever be adequately passed onto the supply chain.

4.8 Specific consideration should be given as to how, in any operating model that it puts in place, the NDA will ensure that it maintains both sufficient oversight and adequate quality assurance of the services and work performed by contractors and sub-contractors.

4.9 The review should also consider whether, and how, the NDA can attract and retain the world class expertise to be an 'intelligent' buyer of such services, and how this might be supplemented effectively with suitable external experts.

4.10 This review should be carried out in conjunction with, or as part of, any review undertaken as a result of the Public Accounts Committee Report: The Nuclear Decommissioning Authority's Magnox Contract dated 28 February 2018[4].

4.11 The outcome of the review should result in an action plan to be agreed with the Secretary of State.

Recommendation 2 - NDA organisational capability

4.12 Following the review and drawing up of an agreed action plan in Recommendation 1, I recommend that the NDA should undertake and implement a root and branch review of its organisational structure, staffing levels, and competency, and develop and implement a plan to ensure it has in place a structure with suitably qualified and experienced resources at all levels to deliver its business plan. The review should include a critical evaluation of the skills and capabilities of relevant existing staff matched against the NDA's current and future skill set requirements.

4.13 The NDA must, where necessary, supplement its own resources through the whole of the nuclear decommissioning procurement process with external expertise (which may include financial, technical and legal advice) to ensure that the best possible overall skill set is utilised. External providers should be encouraged to contribute widely to the successful accomplishment of the entirety of the procurement process, and thus to the success of the NDA.

[4] https://publications.parliament.uk/pa/cm201719/cmselect/cmpubacc/461/461.pdf

4.14 The NDA should ensure there is an adequate diversity of background, training and experience of those individuals fulfilling leadership and other management roles within the organisation. This will help ensure that new ideas and best practices used in other industries can find fertile ground in the NDA, and encourage and support a more outward looking approach.

4.15 The NDA Board should at all times be confident that the CEO has in place an NDA Executive team with roles and accountabilities that are clear, appropriate and properly documented.

4.16 The commercial capability within the NDA has already been increased by the recruitment of a suitably experienced Commercial Director. Any future material changes to the scope and seniority of this role should be determined by the NDA Board and approved by BEIS.

4.17 The role of General Counsel within the NDA should continue to be embedded at Executive level with the NDA Board agreeing the job description (and any material changes to it) for this role. As a minimum, the General Counsel shall attend Board meetings, and shall be the only Executive charged with reporting to the Board on any matters of legal risk. The General Counsel should oversee the internal legal team (which I recommend should increase its capacity and capabilities on complex procurement and contract management). External advisers, including legal advisers, should have an established route by which to escalate any concerns they may have arising out of their involvement or their advice. In appropriate circumstances, they should also have direct access at Board level.

Recommendation 3 - Oversight by the NDA Board of the business of NDA

4.18 The NDA (and BEIS) should focus on improving the operation of the NDA Board.

4.19 The NDA Chair should be given delegated authority to decide on the mix of expertise required, and the appointment of Non-Executive Directors, to ensure that the NDA Board has a spread of expertise from within and outside the nuclear sector, which maps onto those areas of greatest risk and importance to the NDA.

4.20 The Chair should also ensure that the NDA Board is able to provide an effective challenge to the NDA Executive across the entirety of its business, and not just with a focus on Sellafield. In particular:

4.20.1 the Board should satisfy itself that accountability for delivery of all key objectives is clearly laid down, and that the resourcing and organisation plans are appropriate;

4.20.2 SROs for major projects should personally provide regular updates to the Board; and

4.20.3 the Board should set up a subcommittee to provide stronger oversight of all projects and assurance activities, and ensure key pieces of assurance are presented directly to the subcommittee members.

Recommendation 4 – Oversight of the NDA by BEIS and role of UKGI

4.21 The governance and management structure of the NDA ought to be streamlined and simplified. I recommend that BEIS should take a more active, direct role in overseeing the NDA, and that UKGI (acting on behalf of BEIS) should be removed from the day to day oversight of the NDA.

4.22 UKGI should be called upon by BEIS to provide independent advice on its areas of expertise, in particular to review and advise periodically on governance arrangements. Any recommendations UKGI make must have teeth, and either be followed through, or formally rejected with written reasons by the NDA.

4.23 Corporate performance objectives and appropriate key performance measures should be agreed by the BEIS Accounting Officer (Permanent Secretary), who should take an active role in managing the NDA against these measures on a quarterly basis. Formal quarterly reports on progress against these measures should be part of the regular information reviewed by the NDA Board.

4.24 In addition, I recommend that the NDA Chair must have annual performance objectives set by the Permanent Secretary, who should conduct a formal annual performance review of the Chair. The review should include feedback from the Senior Non-Executive Board Member, the Non-Executive Directors, and the NDA's CEO.

4.25 I further recommend that the NDA CEO must have annual performance objectives set by the NDA Board, and a formal annual performance review conducted by the Chair, which should include input and feedback from the Senior Non-Executive Board Member and the Non-Executive Directors. The review should be formally documented, and sent to the Permanent Secretary.

Recommendation 5 - Future procurements by the NDA

4.26 In the second part of this section, I set out certain general recommendations which I consider relevant to all complex procurements being conducted by central Government and the wider public sector. The NDA Board should require the NDA Executive to demonstrate how its policies and procedures have responded, or will respond, to these recommendations in relation to future procurements.

4.27 In particular, as I recommended in my Interim Report, the NDA should devise a transparent, but simplified, set of competition rules, which focus on the substance of what it is looking for, rather than on process. Self-evidently this requires those responsible for devising and managing the procurement process to have a clear understanding of what they are trying to achieve, and how it will be effectively delivered.

4.28 The NDA should carefully consider its approach to 'thresholds', when these should be adopted and how they should be evaluated. Particular consideration should be given to the potential consequences (inclusive of the avoidance of unintended consequences) for a bidder not meeting a proposed threshold.

4.29 Prior to commencing further competitions, I recommend that the NDA should take all necessary steps to assure itself that the information presented to bidders is as complete and accurate as possible. Such assurance could come from appropriately qualified and experienced internal and/or external sources. This will help ensure that final tenders (and business cases) are put together on the basis of the best information available at the time and, in doing so, reduce the risk (which transpired with the Magnox Contract) of material cost escalation.

4.30 I further recommend that the evaluation criteria should be thoroughly tested through a range of different scenarios to ensure that they are workable, do not give rise to unintended consequences, and do indeed achieve the objectives of the NDA.

4.31 I also recommend the targeted use of challenge or peer reviews, whose terms of reference would be signed off by the NDA Board, and any lessons learned from the reviews would be the subject of appropriate follow up action.

4.32 Where risks of bidder challenge or other material bidder disputes are identified, the NDA must ensure that they are escalated appropriately, and considered at NDA Board level with the benefit of access to independent legal and commercial advice where necessary.

Recommendation 6 - Future assurance by the NDA

4.33 I recommend that the NDA should significantly enhance its own internal assurance resource, by ensuring that it has the right level capability and skills that can in turn be supplemented by external assurance of its activities. The NDA must ensure that the scope and limitations of internal and external assurance are clear upfront, and that where possible all assurance carries out sample checks, and goes beyond purely relying on interviews.

4.34 The NDA must develop annual assurance plans and programmes commensurate with its activities, and the risks to which they give rise. Assurance requirements must be specified in detail, and include a sufficiently broad scope of the activity or process to be assured. Reviews must ensure that themes can be identified, such that corrective actions and plans can be effectively developed.

4.35 A Board subcommittee should ensure that the full programme of assurance will cover the spectrum of possible risks. The mandate for the reviews should be to identify all reasons which might prevent a particular decision being taken, and senior management should consider and address all of those before proceeding. Thorough documentation of the relevant accountability, and the decision to proceed, must be a base requirement. External assurance should be forensic and thorough, and should stand on its own, that is, not be reliant on other assurance reviews for its conclusions.

Recommendation 7 - Developing the right NDA culture

4.36 My final Recommendation relating to the NDA is as much by way of general observation.

4.37 The culture of an organisation is at the heart of what it and its employees do, and how they do it. The NDA has world class expertise in nuclear decommissioning, but needs to realise that 'nuclear is not an island', and that there is much to be learned from comparable sectors grappling with complex infrastructure and costly, long term commitments.

4.38 There has to be a change in culture in the NDA to ensure full and open dialogue, one that encourages challenge and embraces the delivery of 'bad news', and moves away from optimism bias. Individuals should be empowered to bring forward concerns, and a clear system of identifying the risks, combined with open discussion, should be integral to decision making, rather than pressing ahead in the belief that doing so accords with the particular leader's wishes.

4.39 Assurance should be an aid to and support good decision making, not just a hurdle to be crossed.

4.40 I would encourage future CEOs to keep under review the need for an injection of external, competent personnel to be seeded in the organisation to help ensure it remains dynamic and high performing, and operates with sufficient regard to current industry best practices and processes. This must be underpinned by a strong system of accountability and reporting. Tools like an annual employee survey would help focus on whether an individual's responsibilities and accountabilities are clear.

Recommendations for the Wider Public Sector

Governance of complex procurements

4.41 Procuring authorities should ensure that Boards or senior Departmental oversight bodies appoint a Non-Executive director (with a background in procurement) to advise on key decisions to be taken by the Board or equivalent body in relation to a complex procurement.

4.42 Procuring authorities should consider the composition of the steering group/ body directly involved in oversight of a complex procurement. Care should be taken to ensure that that body has a majority of members who are not directly involved in delivery of the complex procurement itself.

4.43 Procuring authorities should embed appropriate involvement of senior executives with relevant responsibilities within any strategy for complex procurement from an early stage. This may avoid any subsequent perceived need to exclude senior input and oversight in order to ensure an untainted procurement process.

Ensuring robust, accurate contract information

4.44 Procuring authorities must recognise that successful procurement is materially assisted by robust and effective contract management, which, in particular, should produce sufficient, accurate quality data. This enables both the procuring authority and bidders respectively to identify, offer and assess a sustainable and affordable delivery model and pricing structure.

Evaluation of complex procurements

4.45 Procuring authorities should clearly differentiate between items in their decision-making process which are compliance–related and pass/ fail, and

those which are qualitative and go to the nature of the tendered proposals. A pass/ fail item should be just that i.e. an omission or mistake in a tender which is of such magnitude that the authority would want to have the ability to decline that tender.

4.46 Procuring authorities should decide whether pass/ fail items are mandatory or discretionary. If the latter, there should be a documented decision-making process to ensure that any discretion is lawfully and defensibly exercised.

4.47 There should be clear business ownership of the award criteria with direct linkage to the procurement strategy.

4.48 The evaluation criteria should be scenario tested thoroughly to ensure that the desired business objectives are achieved, and that any unintended consequences are understood and dealt with.

Transparency and audit trail – conduct of complex procurements

4.49 Procuring authorities should keep contemporaneous records of dialogue meetings and share with bidders a record of any decisions reached or assurances given, which they may rely upon in their tenders. These do not have to be audio recordings.

4.50 Evaluators should understand that their written remarks and observations made during evaluation may be discoverable in the event of litigation. Subject to this, they should be permitted and encouraged to keep working notes so that they have an accurate record of their conclusions.

4.51 Evaluation may be and often is an iterative process. Procuring authorities should ensure that their processes allow for provisional scores to be arrived at, and that systems and records clearly denote what are provisional and final scores.

4.52 All evaluation processes should employ moderation to ensure consistency, and to ensure that evaluators have a common view of what good looks like.

Managing legal risk

4.53 Legal advisers should be asked to assess and report on legal/challenge risk and mitigations at the outset of a complex procurement, and to review this advice on a regular basis. Such advice should be addressed to the oversight body (not simply the individual directly leading the procurement) and should be provided in its own terms to ensure legal risk is accurately reported and legal privilege respected.

Communicating award decisions

4.54 In the context of complex procurements where bidders may have invested many millions of pounds, procuring authorities should regard debrief interviews as a key part of the procurement process, not simply an administrative step (involving if necessary the SRO or CEO). Debrief interviews provide a significant and genuine opportunity to listen to bidders, and to mitigate concerns/risk of challenge.

Conduct of procurement litigation

4.55 The relevant authority must seek legal advice on the merits, cost and timeframe for the dispute, and weigh those considerations against the prospect and size of any formal claim. It must articulate and regularly review its commercial and legal strategy in the light of material developments (for and against) which fundamentally will be whether to defend or settle the dispute.

4.56 Where the dispute involves policy considerations, carries reputational risk and/or a material cost risk, the sponsoring Department (in the case of an arm's length body) and Cabinet Office should be consulted. Their views on those matters should also be weighed carefully in the balance when devising - and revising - the commercial and litigation strategy.

4.57 In my view, using the same law firm in litigation as has advised on a procurement should not be considered automatic. I recommend that the decision on legal representation, once legal proceedings have been brought, should be taken only after the fullest consideration of all potential implications, and should also be formally sanctioned at senior management level.

4.58 Wider Government should review the approach it takes to public procurement litigation generally. Although a sub-species of public law litigation, this should not disguise the fact that many issues underlying public procurement litigation are comparable to those within complex commercial litigation. This accentuates the need to adopt a consciously more commercial approach to the assessment and quantification of the relevant costs and risks involved.

4.59 Cabinet Office, with input from the Government Legal Department, should put in place suitable procedures to capture key lessons learned and best practice in the conduct of procurement litigation on an ongoing basis, and ensure these are shared across Government and the broader public sector, given the financial and wider reputational impact of such cases.

Future assurance by the IPA of major projects

4.60 I am aware that the IPA is developing improvement plans, and in this connection I recommend it should focus on fewer but deeper reviews for high risk, high complexity projects only. Reports by the IPA should be presented to the board or relevant subcommittee of the organisation, and should be clear and upfront about exclusions, and thus leave no doubt about areas where no assurance can be given.

4.61 In light of the recommendation in the preceding paragraph, the IPA ought to undertake a skills and capability assessment of all IPA reviewers, and formally document and regularly audit the competence and capability, skills and experience required, before assigning reviewers to particular reviews.

4.62 The IPA should clearly state the purpose of each review, and identify the prime 'customer' of any review (e.g. the SRO, the CEO or possibly the full board of an organisation). It should make it clear what actions should be taken as a result of the review.

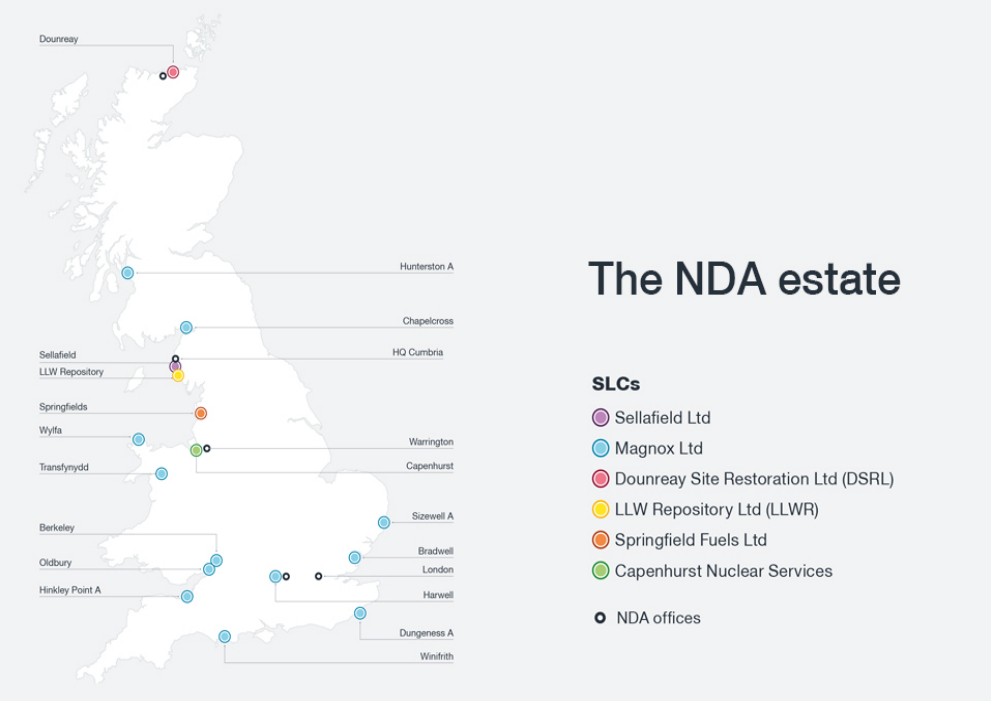
4.63 The review must have real teeth. Ratings should be unambiguous, which may include recommending that progress be halted, if that is judged to be necessary.

5. NDA activities and governance

The Purpose of the NDA

5.1 The NDA is a non-departmental 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 offices in Cumbria, Caithness, Cheshire, London and Oxfordshire. It owns 17 sites across England, Wales and Scotland (set out below), some dating back to the 1940s. It reports to BEIS; for some aspects of its work in Scotland, it is responsible to Scottish Ministers.[5]

5.2 The task of cleaning up the UK's civil nuclear legacy will span many decades and is highly challenging, not least because the NDA did not inherit a clear 'baseline' of information about its estate (assets, materials and waste, nuclear and non-nuclear). Sellafield in particular proved to be a major challenge and absorbed a considerable amount of funding, resources and attention from the NDA at every level. I will explain later how this affected the Magnox Contract.



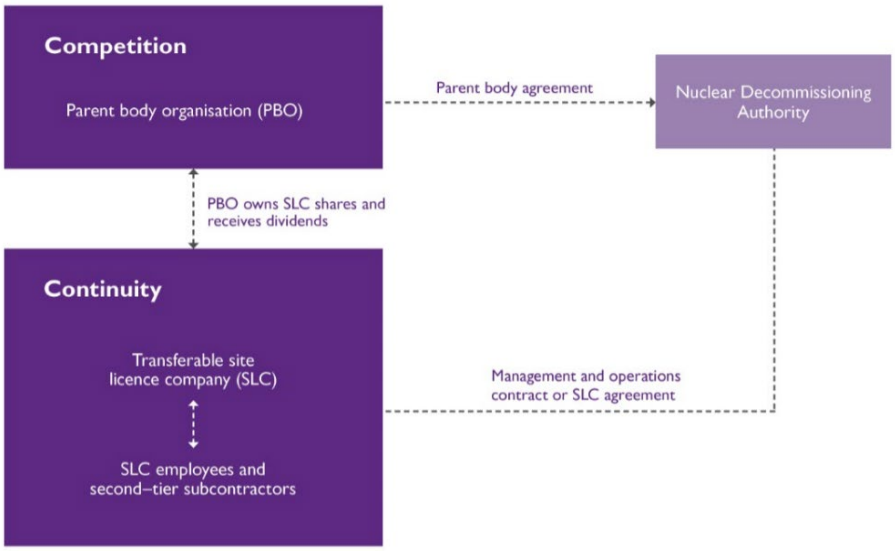
[5] In this section I use, where appropriate, information set out in the "Who we are" section on the part of the gov.uk website relating to the NDA. See: https://www.gov.uk/government/organisations/nuclear-decommissioning-authority/about#who-we-are and information from the NDA's Annual Report for 2018/19 which can be seen at: https://www.gov.uk/government/publications/nuclear-decommissioning-authority-annual-report-and-accounts-2018-to-2019

NDA Activities

5.3 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 for which they are responsible. 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 currently around 18,500 people employed across the NDA estate.

5.4 In order to bring private sector expertise in to run the SLCs, the NDA operates a model whereby some of the SLCs are owned by a Parent Body Organisation ("PBOs"). A PBO is historically a consortium of private companies that bids for temporary ownership of the SLCs through open competition. The PBO acts as a parent company, providing the vision for the running of SLCs during its period of ownership. It provides a senior management team for SLCs and additional resource and expertise through secondment. Through a parent company guarantee the PBO underwrites some performance and liability risk of the SLCs. The PBO is rewarded by dividends from the SLCs.

NDA's MANAGEMENT OF DECOMMISSIONING THROUGH SLCs AND PBOs



5.5 For convenience, I refer in my Report to the 'Magnox Contract'. However, as the diagram above illustrates, there are in fact two contracts which govern the PBO relationship. The first is the Parent Body Agreement - this is directly with the private sector PBO. The second is the Site Licence Company Agreement

("SLCA"). This is the main agreement which provides for the services to be delivered to the NDA and is between the NDA and the SLC.

5.6 The SLCA is managed by the NDA's Site Facing Team ("SFT"). Its responsibility is to ensure monies paid to SLCs (including fee) are properly paid in accordance with the contract. The SFT includes financial management, project and programme controls and contract management roles, as well as health and safety representation, communications and stakeholder relations. To put it in context, the NDA had fewer than 20 people in its Magnox SFT; when CFP took over Magnox Limited and RSRL (the two SLCs involved in the Magnox Competition) they collectively employed in excess of 3,500 staff.

5.7 The SLCs themselves stood at the head of a complex supply chain, and in turn entered into multiple 'Tier 2' sub-contracts with a substantial number of suppliers to deliver their obligations to the NDA.

5.8 The Magnox Competition was the last in the wider PBO Competition Programme run by the NDA - which had started in 2006 with a PBO competition for the Low Level Waste Repository.[6] Immediately prior to the Magnox Competition the NDA had finished a PBO competition for its site in Dounreay ("the Dounreay PBO Competition").

5.9 At the time the NDA believed the PBO model would give the best of both worlds - long term regulatory and operational continuity, but also access to world class private sector expertise and resource.

How the NDA is run and governed

5.10 Although an arm's length body, the NDA has, like any other executive non-departmental public body, to operate within a governance structure incorporating Government controls.[7] Since my Inquiry has considered the effectiveness of this structure and these controls, I will explain them now in broad terms.

[6] The NDA's facility in West Cumbria for disposal of low level waste. See: https://www.gov.uk/government/organisations/low-level-waste-repository-ltd/about

[7] For example see the NDA governance framework document between it and BEIS - Framework Document 2013 https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/451401/FNM01-Framework-Document-2013.pdf

Accountabilities

5.11 The NDA itself is run by a Chief Executive Officer or CEO who is responsible for the day to day activities of the NDA, and for appointing his Executive team. The CEO is accountable to the Board of the NDA. He is also the NDA Accounting Officer, which means that he is personally responsible for the application and value for money of public funds made available to the NDA. The NDA Accounting Officer has responsibilities to the Departmental Accounting Officer (within BEIS) and to Parliament.

5.12 The BEIS Permanent Secretary is the Departmental Accounting Officer, and is in turn accountable to Parliament for ensuring that proper controls are in place within the NDA, and ultimately for the disbursal of public funding to the NDA.

NDA Board composition

5.13 During the period in question the NDA Board consisted of a number of Executive Directors (including the CEO, the Chief Finance Officer, the Chief Operating Officer/ Sellafield Programme Director and latterly the Strategy and Technology Director), and between six and nine Non-Executive Directors. The Non-Executives were drawn from a range of backgrounds, including energy, operations and finance.

5.14 Initially, the NDA Board had no formal representative from BEIS (or before that the Department of Energy and Climate Change ("DECC")) or UKGI (and before that ShEx) - in line with the then Government policy. This policy has changed, and since late 2017 a senior employee of UKGI (on behalf of BEIS) has been appointed as an NDA Board member.

5.15 There was no regular attendance at the NDA Board by a General Counsel or equivalent senior in-house legal representative during much of the period that is relevant to my Terms of Reference.

5.16 The NDA Board is collectively accountable to the Secretary of State or Scottish Ministers as appropriate.

5.17 The Chair of the NDA Board is accountable to the Secretary of State and Scottish Ministers for the NDA's activities and performance in implementing the NDA Strategy and Annual Plan.

Sponsoring Department

5.18 During the period in question there was a change in the sponsoring Department for the NDA. At the start of the Magnox Competition DECC was the sponsoring Department; in July 2016 DECC's responsibilities were transferred to BEIS.

Role of ShEx (now UKGI)

5.19 As the NDA accounts for the second largest portion of BEIS' annual budget, it is critical for BEIS to ensure that the NDA is operating effectively and delivering value for money for the taxpayer. When the NDA was set up in 2005, the sponsoring Department at the time, DECC, concluded that it was not best placed to oversee delivery by the NDA. Oversight was therefore entrusted to another government organisation, ShEx, a body accountable to both HM Treasury and Cabinet Office. The reasons given for this oversight responsibility were that ShEx had commercial and governance skills, and was in the best position to exercise an intelligent shareholder function on behalf of DECC. ShEx was not appointed for (and did not profess to have) any procurement skills. ShEx (which in 2016 was incorporated into UKGI) conducts a similar shareholder function across a wide range of UK Government arm's length bodies.

5.20 Working through a dedicated team, ShEx acted as the agent of DECC/BEIS. It was the primary source of advice to the Secretary of State on the discharge of his responsibilities in respect of the NDA. Among other things it was responsible for advising the Secretary of State on (i) how well the NDA was achieving its objectives and whether it was delivering value for money; (ii) ensuring effective processes, including risk management were in place and were used by the NDA in producing its Strategy and Annual Plan; and (iii) monitoring and reporting the NDA's performance against agreed targets and against its financial provision. ShEx was also responsible on behalf of DECC/BEIS for the day to day oversight of the NDA. During the period in question DECC/BEIS officials and Ministers would rely upon ShEx to be kept informed on commercial and financial matters relating to the NDA, and to be briefed on these when they had to make decisions.

5.21 ShEx was then, and UKGI remains, the primary contact point for the NDA with Government, and is responsible for helping the NDA navigate its way through DECC/BEIS approvals and wider government approvals.

Role of HM Treasury

5.22 HM Treasury is a key stakeholder within Government for the NDA. HM Treasury provides approval of certain expenditure-related commitments which may be contained in, for example, business cases for major projects. For the Magnox Competition, these included an Outline Business Case and a Full Business Case ("FBC").

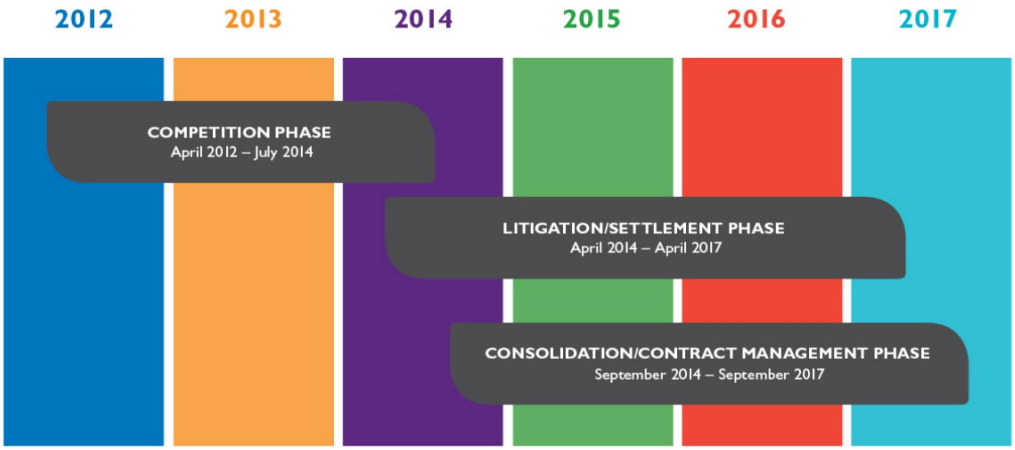
6. Overview and timeline

6.1 In the following Sections of my Report, I set out a detailed narrative of the events which led up to and followed the award of the Magnox Contract, insofar as they relate to my principal Findings and Recommendations. The following Sections also contain further findings, supportive of, and related to, my principal Findings. There were three main strands of activity:

6.1.1 **The Magnox Competition stage:** this commenced with preparatory work in 2011, followed by a procurement process using the competitive dialogue process throughout 2012 and 2013, and continued until contract award in April 2014. Please see Section 7 for a fuller explanation.

6.1.2 **The Litigation and Settlement stage:** this commenced with the proceedings brought by ES in April 2014, followed by a liability trial which ran substantively between November 2015 and January 2016 and a court Judgment issued in July 2016. In March 2017 the NDA settled with ES (and Bechtel Management Company Limited ("Bechtel")). Please see Section 8 for a fuller explanation.

6.1.3 **The Consolidation and Contract Management stage:** this started in September 2014 when CFP took over the Magnox Contract. In March 2017 the NDA announced its decision to terminate the Magnox Contract with CFP. In September 2017 the NDA and CFP reached a legal agreement to bring the Magnox Contract to an end with effect from 1 September 2019 and how it would be run up to that date. Please see Section 9 for a fuller explanation.



6.2 Given the importance of governance and assurance during each of these stages, I have included a specific section (Section 10) focussed on these matters.

7. Magnox Competition

Setting up the Magnox Competition

7.1 The NDA was required to secure services to decommission 10 Magnox sites and 2 nuclear research sites. These sites were managed and operated through two SLCs. The purpose of the Magnox Competition was to appoint a PBO to manage these existing SLCs.

7.2 Magnox Limited was the SLC for the 10 Magnox power generation sites. By 2011, with the exception of one reactor at Wylfa in Anglesey, all of the sites had stopped generating electricity. The existing PBO for Magnox Limited was ES.

7.3 The second SLC was Research Sites Restoration Limited ("RSRL"). RSRL was the SLC for the Harwell and Winfrith sites, which were former research and development sites. The PBO for RSRL was Cavendish Nuclear.

7.4 At the time of the Magnox Competition, NDA's annual expenditure for the Magnox sites was circa £600 million per annum and for the RSRL sites was circa £60 million per annum.

7.5 The NDA's agreements with ES and Cavendish Nuclear were each due to expire in June 2014. The NDA decided in 2011 to run a competition for the running of the two SLCs expecting that significant savings would be generated by combining the running of the 12 sites into a single package.

The NDA's objectives for the Magnox Competition

7.6 The NDA's objectives were stated in its procurement strategy to be "The PBO competition will be conducted with the objective of selecting a winning bidder who offers the most economically advantageous tender to optimise the SLCs' achievement in meeting the NDA mission, strategic objectives, Government targets over the term of the appointment and provides the highest confidence in the deliverability of that tender."

7.7 In addition the NDA also recognised that it was important:

7.7.1 To obtain delivery of the existing programme of work at lower cost than under the existing arrangements with the incumbent providers (described in the NDA's FBC as "*to get the same for less"*). In part, this

was to be achieved by incentivising the contractor to minimise the costs of delivering the programme of work; and

7.7.2 To avoid a legal challenge to the Magnox Competition. From the very beginning, it was recognised by the NDA team responsible for the Magnox Competition that the biggest risk to the NDA from this procurement was the risk of legal challenge. They based this on the fact that this was the last major NDA procurement and therefore any losing bidders would have no further opportunities for decommissioning contracts in the UK, and nothing to lose by making a legal challenge.

Resourcing

7.8 The Commercial Director, who was the Executive Director responsible for the Magnox Competition, selected a Core Competition Team ("CCT") to run the competition. A new team had to be appointed, as a number of individuals with significant commercial and procurement experience (including the previous Head of Competition, who had run the Dounreay PBO Competition) had left the NDA prior to the commencement of the Magnox Competition.

7.9 As Magnox was anticipated to be the last of the NDA's PBO Competitions, the NDA decided not to make significant investment in its procurement capability. The Head of Competition was recruited from within the NDA. He had been involved in prior competitions run by the NDA (including a prominent role in the Dounreay PBO Competition), but his experience was primarily in relation to the programmatic and project management aspects of those competitions, rather than the strategic procurement and commercial aspects. Magnox was his first role as Head of Competition.

7.10 In total there were seven CCT members including: competition administration and project management personnel; a representative from the operational Magnox SFT; a senior contract development manager; a competition manager; and the Head of Competition. All (with the exception of one) were drawn from within the NDA. This team had limited experience at a senior level of large complex procurements (with the exception of the senior contract development manager, whose experience lay more in contract architecture than procurement processes). It was suggested to the Inquiry that any lack of senior commercial experience or expertise within the CCT was mitigated by the availability of specialist commercial and procurement resource elsewhere within the NDA. Whilst it may have been the case that specialist commercial and procurement resource was available within the NDA more broadly, it does not appear to me that any such individuals were asked to play a sufficiently

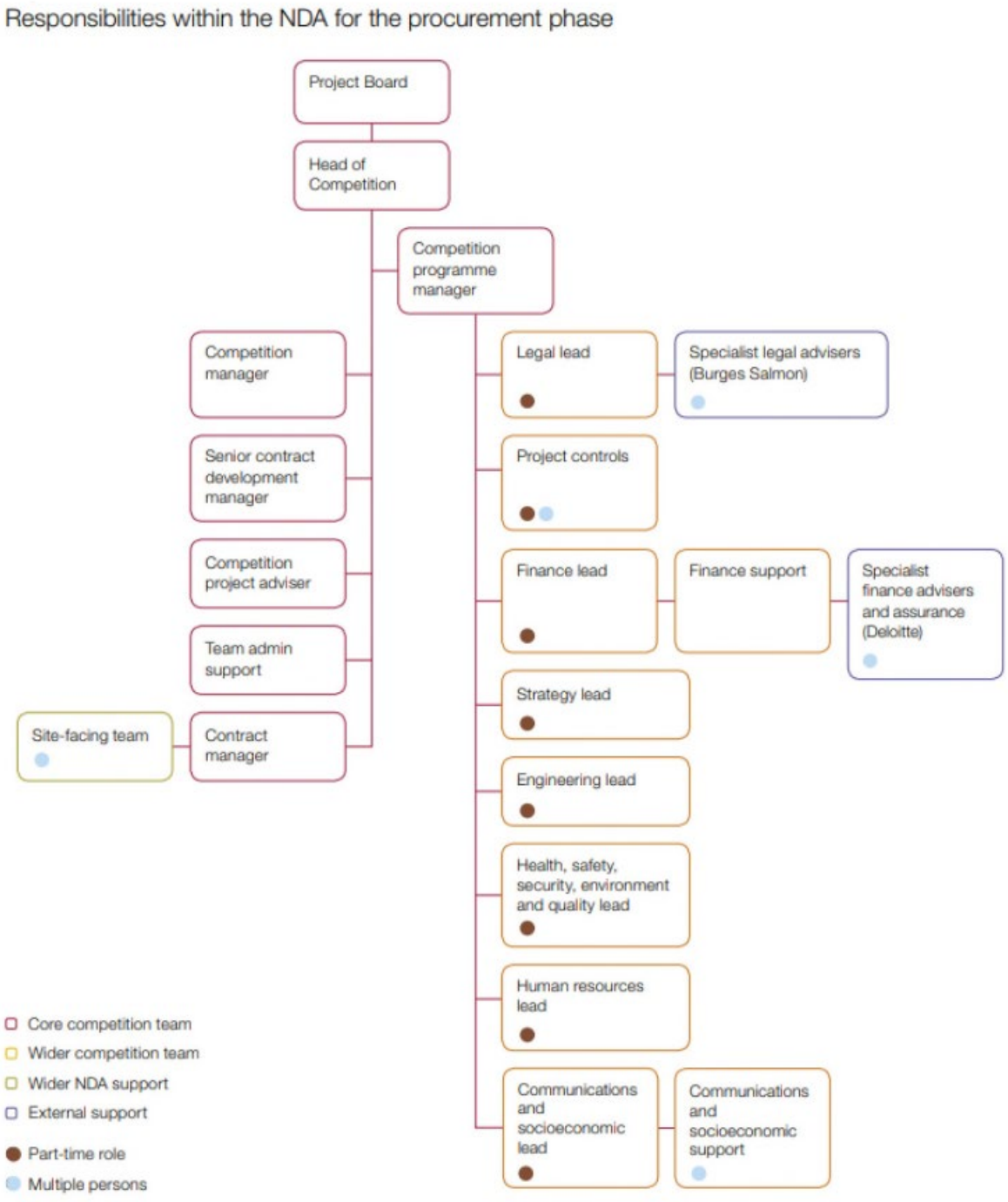
active role in the Magnox Competition. Furthermore, the manner in which the CCT operated in isolation from others within the NDA in order to protect the integrity of the competition (which I discuss at paragraphs 7.76-7.77) would necessarily have limited any meaningful contribution.

7.11 Notably, although one of the key objectives of the Magnox Competition was to reduce costs, there was no dedicated finance expertise within the CCT. Members of the NDA finance team were assigned to the wider competition team, however their responsibilities did not cover the assessment of financial risk to the NDA out of the commercial model adopted (which I discuss further below). This wider competition team consisted of NDA legal, finance, strategy, engineering, HR and other personnel. Unlike the CCT, these individuals were not all full time on the Magnox Competition and many of them retained their day to day responsibilities.

7.12 In addition, the NDA put together a team of subject matter experts ("SMEs") to participate in the Magnox Competition. There were approximately 40 SMEs, who were also not full time, but some were expected to and did dedicate a significant amount of time to the Magnox Competition. The SMEs helped to develop and build up the NDA's technical Requirements, and the majority of them participated in the dialogue and evaluation stages of the Competition.

7.13 An organisational chart of the NDA resource allocated to the Magnox Competition is set out below:

Organisation Chart Showing NDA Resource Allocated to the Magnox Competition[8]



[8] Source: National Audit Office Report - The Nuclear Decommissioning Authority's Magnox Contract - 29 September 2017

Executive Accountability

7.14 At an Executive level, responsibility for the Magnox Competition originally rested with the Commercial Director who was also the Senior Responsible Officer ("SRO") for the Competition. An SRO is appointed to all major Government projects, and is the individual formally responsible for ensuring a project meets its objectives and delivers projected benefits. An SRO must take personal responsibility and ownership for successful delivery of the project. The Head of Competition reported to the Commercial Director/SRO.

7.15 In December 2013, during the later stages of the Magnox Competition, the CEO of the NDA chose to re-organise the responsibilities of the NDA Executive, which included making the role of Commercial Director redundant. Around the same time, the Chief Operating Officer ("COO") also left the NDA.

7.16 Following the departure of the Commercial Director, it became necessary to appoint a new SRO for the Magnox Competition. The CEO appointed the NDA's Strategy and Technology Director as SRO, a role which he was expected to fulfil on top of his existing responsibilities.

7.17 Whilst the Commercial Director was responsible for the Magnox Competition, operational responsibilities for the NDA's SLC contracts rested with the COO. However, in respect of the Magnox SLCs, operational responsibility was transferred away from the COO to the NDA's Chief Financial Officer ("CFO") from mid July 2011, in order to allow the COO to focus on Sellafield. The CFO assumed these operational responsibilities in addition to his existing responsibilities.

NDA Governance of the Competition

7.18 There were three boards that were relevant to the governance of the Magnox Competition: the Magnox Project Board, the Competition Programme Board ("CPB"), and the NDA’s Board of Directors.

7.19 The Magnox Project Board was charged with providing support, direction and challenge to the CCT in relation to the Magnox Competition and reported to the CPB. The Magnox Project Board was comprised of a mix of members of the NDA Executive, CCT members and other NDA personnel. There was also one independent Non-Executive member. The SRO chaired the Magnox Project Board.

7.20 The CPB had responsibility for the whole of the NDA's PBO Competition Programme, for managing upwards to NDA, UK and Scottish Government stakeholders and providing support downwards to the Magnox Project Board. It had a broader and more strategic remit than the Magnox Project Board. The CPB had representatives from the CCT, the NDA Executive team, NDA Internal Audit, UKGI, HM Treasury, Scottish Government and Infrastructure UK (who was there to bring procurement expertise). HM Treasury attended only a few meetings instead relying upon the attendance of the representative from Infrastructure UK (which was part of HM Treasury until it merged with the MPA in 2016). As with the Magnox Project Board, the SRO also chaired the CPB.

7.21 Both of these boards had a role to play in the governance of the Magnox Competition, and in reviewing and approving certain matters, although the Magnox Project Board was merged into the CPB during the Magnox Competition. Instances of their involvement during the Competition are discussed in this section, but their overall role and involvement is described more fully at Section 10.

7.22 The NDA Board met frequently throughout the year, and was charged with oversight of all of the NDA's activities, not just the Magnox Competition. Its role in respect of the Magnox Competition included approving key features of the Competition (such as the procurement strategy and evaluation principles), key steps and documents and the decisions to proceed to preferred bidder announcement and contract award. The NDA Audit and Risk Assurance Committee, a sub-committee of the NDA Board, had no role in the formal competition governance structure.

7.23 The evidence before the Inquiry indicates that, throughout the Magnox Competition, the Chairman and the NDA Board's prime area of focus was Sellafield. This is not surprising, given the costs involved, the level of potential hazard, the political interest and the fact that, at or around this time, the NDA was looking to change the contractual PBO model by which Sellafield was operated.

External advisers

7.24 Following a competitive tender exercise, the NDA retained Burges Salmon as external legal advisers for the Magnox Competition. The scope of their retainer covered advice and support for each of the key stages of the Competition. Burges Salmon had performed a similar role on the Dounreay PBO Competition. Day to day instructions were given to Burges Salmon

generally by the Head of Competition (and, on occasions, other members of the CCT). Although there was a nominated member of the NDA's in-house legal team providing legal support on the Magnox Competition, there did not appear to be any established protocol to ensure that advice from Burges Salmon on material legal issues was copied to, or routed through, the in-house legal team.

7.25 The NDA also retained Deloitte to provide financial advice on the Magnox Competition. Deloitte's stated terms of engagement with the NDA were broad. Some NDA witnesses gave evidence that they considered that Deloitte played quite a prominent advisory role during the Magnox Competition. I have considered the available documentary and witness evidence, and I am satisfied that although Deloitte provided input and expertise, this was on a number of discrete matters, and they did not perform a general advisory role on the Competition. Deloitte was never asked by the NDA to give strategic financial advice on the Magnox Competition, or to consider how the NDA could minimise the financial risk to the NDA out of the proposed commercial model. Deloitte told the Inquiry in evidence that, typically, it would expect to have greater involvement in a competition of this size, given its experience working across UK Government and the public sector.

7.26 During the Magnox Competition the NDA did not engage any external procurement expertise and support to provide additional strategic input. In evidence witnesses explained that sufficient expertise existed in the CCT and wider NDA, and that in any event Burges Salmon would provide any additional support as necessary.

Contract Strategy and Commercial Model

7.27 Prior to the Dounreay PBO Competition, the PBO contracts awarded by the NDA (including the contract operated by ES in respect of Magnox Limited) had been cost reimbursable contracts. Under those contracts, the NDA was required to pay all genuine costs incurred by its providers, and the fees payable were not dependent on the levels of costs actually incurred.

7.28 The NDA adopted a different commercial model for the Dounreay PBO Competition, namely a TCIF model (which I describe below). The Dounreay PBO Competition was perceived, both within the NDA and beyond, to be a success. As such, the design of the Magnox Competition (including the commercial model, contract structure and the evaluation methodology) was

heavily influenced by the approach that the NDA had taken in relation to Dounreay.

7.29 The Magnox Competition again used the TCIF model. The intent was to transfer some of the risk to the contractor who would be incentivised to deliver the programme to an agreed Target Cost. The successful contractor would be paid a fee, the majority of which depended upon achieving the agreed Target Cost. If actual costs were over the Target Cost, the contractor would lose some or all of its fee. If actual costs were under the Target Cost, the contractor could share with the NDA in some of the savings. The contract would include an assumption that the baseline was accurate, which if proven incorrect, would entitle the contractor to adjust the Target Cost to protect its ability to earn its fee.

7.30 The contract for Magnox was expected to last for a period of 14 years (from September 2014 to September 2028), divided into two phases of 7 years, with the NDA having the right to terminate for convenience at any time on 2 year's notice.

The baseline

7.31 The scope of the work to be delivered under the Magnox contract was drawn from existing programmes of work known as Lifetime Performance Plans (or "LTPs"). These effectively formed the baseline for the contract. The NDA considered that it had a very strong and robust baseline.

7.32 The relevant LTPs were used to inform bidders of the expected state of the sites at the point at which the contract to be awarded under the Magnox Competition was to commence (September 2014). There was knowledge within the NDA that the LTPs did not reflect performance at some of the sites (which were behind schedule), but this was not felt to detract from the overall robustness of the LTPs used as the baseline.

7.33 Although the overall decommissioning plan from which the Magnox LTP was derived had been independently assured by third party contractors in 2011, there was no separate assurance of the LTPs for the purposes of the Magnox Competition. The CCT did not consider that the robustness of the LTPs was a risk that they were required to manage.

7.34 Following the conclusion of the Magnox Competition, it transpired that the NDA's confidence in the baseline had been misplaced, and inaccuracies in the baseline caused significant problems with the consolidation process.

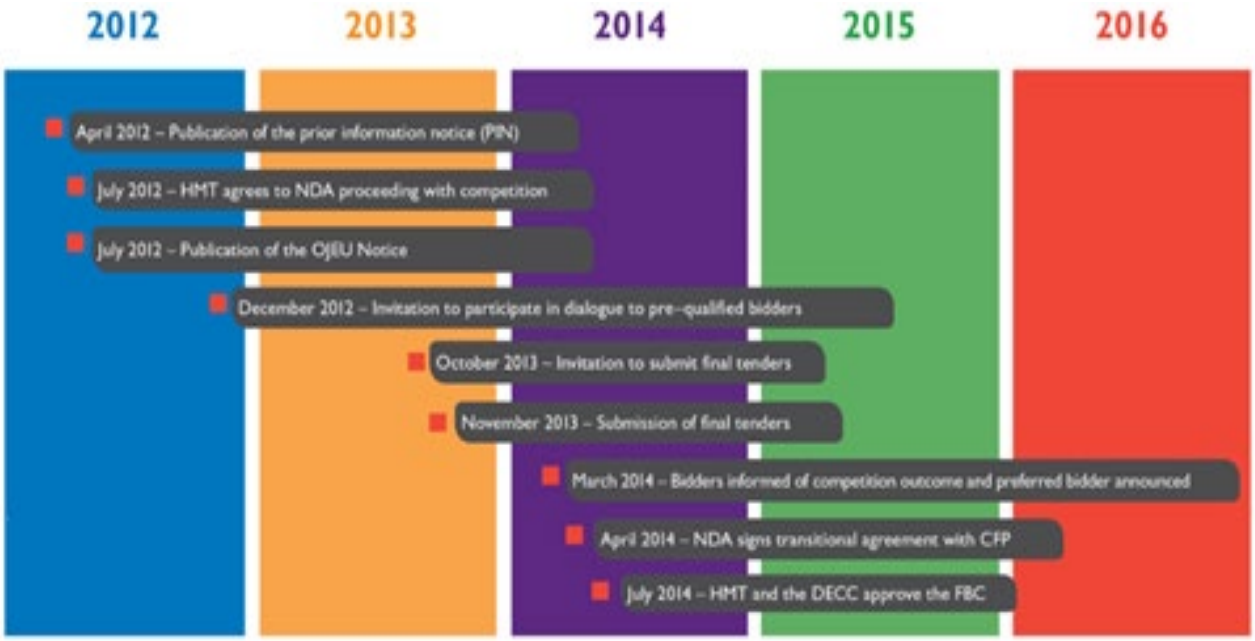
Those problems ultimately led, or significantly contributed to, the early termination of the contract awarded to CFP as a result of the Magnox Competition. I will come back to this in Section 9.

Funding

7.35 In order to obtain approval to proceed with the Magnox Competition, the NDA submitted its Outline Business Case to HM Treasury in around June/July 2012. HM Treasury granted its approval for the NDA to proceed with the Competition, on the condition that the NDA must return to HM Treasury for further approval if it became likely, during competitive dialogue, that bids would not achieve savings of at least 5% against the existing forecast costs for phase 1 (i.e. the first 7 years) of approximately £4.2 billion. This 5% target was subsequently increased to 10% during the NDA's annual spending review in 2013.

Timeline of the Magnox Competition

7.36 The Magnox Competition started in earnest on 18 July 2012 when the NDA published a notice in the Official Journal of the European Union ("OJEU Notice"). The NDA remained very disciplined in its project management of the timetable, and there was virtually no slippage in the timetable that the NDA had identified at the very outset of the Competition. The key stages in the Competition are summarised in the diagram below:



7.37 At the time of the Magnox Competition, the NDA's tendering processes were regulated by European Union derived legislation; the Public Contracts Regulations 2006 ("Procurement Regulations"). The Procurement Regulations required the Magnox Competition to be conducted in accordance with detailed rules, but also with general principles of transparency, fairness, equal treatment, consistency and proportionality. A breach of the Procurement Regulations would enable any interested party (including an unsuccessful bidder) to commence legal proceedings to prevent a contract being signed, and/or to claim damages (for example, for their wasted bid costs or their lost opportunity to make a profit).

7.38 I find in respect of the setting up of the Magnox Competition that:

7.38.1 the CCT for Magnox lacked the necessary depth of experience and expertise of running complex and large procurements, particularly in relation to commercial aspects and contract management. This shortfall in the depth of experience and expertise contributed, in part, to some of the problems which occurred during the Magnox Competition which I discuss later in this section: for example in the way in which the Statement of Response Requirements ("SORR") developed without adequate control, overview and assessment of risks; and the use of pass/fail thresholds for matters that were administrative in nature, and non-material in terms of the overall bid.

7.38.2 the CEO failed to ensure that Magnox received appropriate resourcing at an Executive level. The Executive team reduced in size and depth of capability during the Magnox Competition (one of the highest value competitions conducted by the UK public sector) and at a time when the NDA was managing other challenges including Sellafield. This required additional responsibilities, in particular the role of SRO, to be re-allocated to remaining Executives on top of existing workloads. A competition the size of Magnox demanded a greater level of senior commercial dedicated resource than was made available to it by the CEO. I note that concerns regarding the capacity of and capability within the Executive team were voiced by UKGI on several occasions in 2013 and 2014.

7.38.3 throughout the Magnox Competition, the evidence shows that the NDA did not engage with external expert resource (other than legal advisers) in a sufficiently material way to supplement their own capability and expertise with strategic input, and to

benefit from any best practice experience of such resource from other large competitions and sectors. This is more remarkable considering that in 2007 a Partnerships UK review found that the NDA tended to keep advisers at arms' length, which contributed to a degree of insularity on the part of the NDA.

Design of the SORR and Evaluation Methodology

7.39 During the course of the Competition, including through the dialogue phase, the CCT was responsible for developing a document called the Statement of Response Requirements ("SORR"). The SORR set out the NDA's Requirements relating to all elements (including strategy, programme, technical and cost) that bidders' tender responses were required to address. The SORR also contained the relevant evaluation methodologies for each set of evaluation requirements.

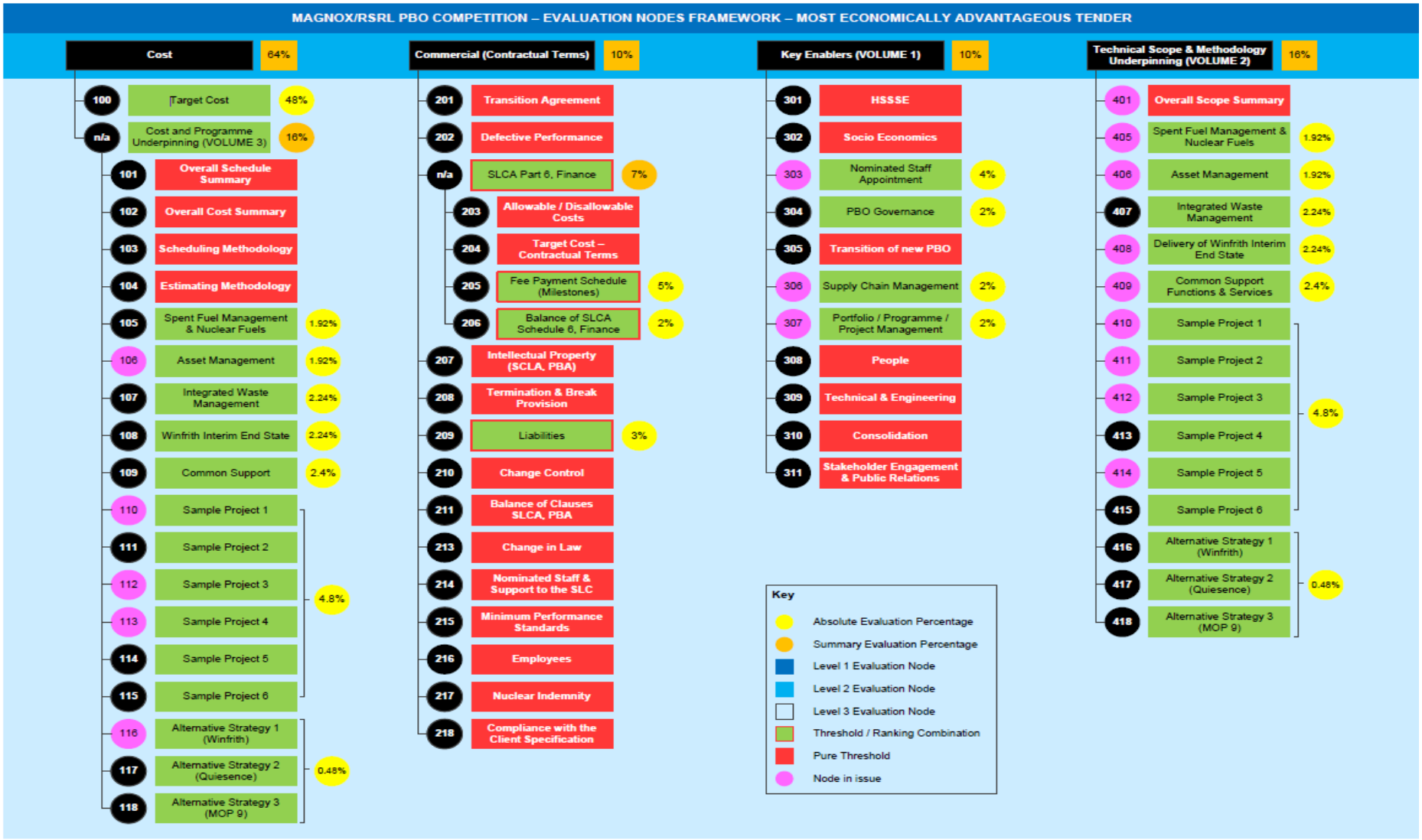
7.40 As with many other aspects of the Competition, the SORR was initially based on documentation that had been used for the Dounreay PBO Competition. Over time, the SORR was developed to reflect the specific requirements of the Magnox Competition. This exercise was primarily undertaken by the SMEs, with Burges Salmon providing legal input and drafting support (but not advising on technical matters). The SORR was also revised throughout the dialogue stage of the Competition to reflect (where appropriate) the comments of bidders.

7.41 Under the rules of the Magnox Competition, the winning contractor would be the one with the Most Economically Advantageous Tender ("MEAT"). The MEAT was determined by evaluating the different tenders against the criteria set out in the SORR. Those criteria were set out in various 'Nodes'. There were four Level 2 Evaluation Nodes, covering four broad topics (Cost, Commercial (Contractual Terms), Key Enablers and Technical Scope and Methodology Underpinning), all of which were of critical importance to the identification of the MEAT.

7.42 The four Level 2 Evaluation Nodes were each sub-divided into a number of additional Level 3 Evaluation Nodes that were effectively sub-categories of the four broad Level 2 topics: for example, Cost was further broken down into discrete items, such as target cost, cost and programme underpinning, and integrated waste management. Similarly Key Enablers divided into specific topics, such as supply chain management, nominated staff appointment and portfolio/programme/project management. In turn, each of the Level 3

Evaluation Nodes was made up of a number of more granular evaluation criteria.

7.43 The Level 2 and Level 3 Evaluation Nodes and the relevant weightings attached to them are illustrated in the diagram below:


MAGNOX/RSRL PBO COMPETITION – EVALUATION NODES FRAMEWORK – MOST ECONOMICALLY ADVANTAGEOUS TENDER
Cost
64%
100
Target Cost
48%
n/a
Cost and Programme Underpinning (VOLUME 3)
16%
101
Overall Schedule Summary
102
Overall Cost Summary
103
Scheduling Methodology
104
Estimating Methodology
105
Spent Fuel Management & Nuclear Fuels
1.92%
106
Asset Management
1.92%
107
Integrated Waste Management
2.24%
108
Winfrith Interim End State
2.24%
109
Common Support
2.4%
110
Sample Project 1
111
Sample Project 2
112
Sample Project 3
113
Sample Project 4
114
Sample Project 5
115
Sample Project 6
4.8%
116
Alternative Strategy 1 (Winfrith)
117
Alternative Strategy 2 (Quiesence)
118
Alternative Strategy 3 (MOP 9)
0.48%
Commercial (Contractual Terms)
10%
201
Transition Agreement
202
Defective Performance
n/a
SLCA Part 6, Finance
7%
203
Allowable / Disallowable Costs
204
Target Cost – Contractual Terms
205
Fee Payment Schedule (Milestones)
5%
206
Balance of SLCA Schedule 6, Finance
2%
207
Intellectual Property (SCLA, PBA)
208
Termination & Break Provision
209
Liabilities
3%
210
Change Control
211
Balance of Clauses SLCA, PBA
213
Change in Law
214
Nominated Staff & Support to the SLC
215
Minimum Performance Standards
216
Employees
217
Nuclear Indemnity
218
Compliance with the Client Specification
Key Enablers (VOLUME 1)
10%
301
HSSSE
302
Socio Economics
303
Nominated Staff Appointment
4%
304
PBO Governance
2%
305
Transition of new PBO
306
Supply Chain Management
2%
307
Portfolio / Programme / Project Management
2%
308
People
309
Technical & Engineering
310
Consolidation
311
Stakeholder Engagement & Public Relations
Key
Absolute Evaluation Percentage
Summary Evaluation Percentage
Level 1 Evaluation Node
Level 2 Evaluation Node
Level 3 Evaluation Node
Threshold / Ranking Combination
Pure Threshold
Node in issue
Technical Scope & Methodology Underpinning (VOLUME 2)
16%
401
Overall Scope Summary
405
Spent Fuel Management & Nuclear Fuels
1.92%
406
Asset Management
1.92%
407
Integrated Waste Management
2.24%
408
Delivery of Winfrith Interim End State
2.24%
409
Common Support Functions & Services
2.4%
410
Sample Project 1
411
Sample Project 2
412
Sample Project 3
413
Sample Project 4
414
Sample Project 5
415
Sample Project 6
4.8%
416
Alternative Strategy 1 (Winfrith)
417
Alternative Strategy 2 (Quiesence)
418
Alternative Strategy 3 (MOP 9)
0.48%

7.44 In my Interim Report, I stated that I considered that the SORR was overly complex in that it contained an unnecessarily detailed scoring mechanism and set of related tender requirements.

7.45 I wish to clarify that the fact that the SORR was over 350 pages long, and contained more than 700 scoring criteria, did not necessarily mean that the SORR was overly complex. The Magnox Competition was itself a very complex procurement; it involved 12 nuclear sites, two SLCs and had an estimated contract value (as stated in the OJEU Notice) of £6.2 billion. It is therefore no surprise that such a large and complex procurement would result in a complex set of response requirements and a large number of scoring criteria.

7.46 However, I do consider that there was unnecessary complexity in the fact that the 700 or so scoring criteria had at least 20 different evaluation methodologies applicable across them. How this became complex to apply in practice is illustrated by how an element of a bid was scored would depend on whether it contained an omission or inconsistency, and whether that was considered 'material' or not. What was material was defined in general terms in two pages and then further defined in the evaluation methodologies. Many of these criteria required extensive responses. With evaluators having to score over 2,800 criteria across four bids, and applying multiple different evaluation methodologies, this created a very significant risk of human error in the evaluation.

7.47 Further, there was no clear ownership within the CCT of the SORR in its totality. The SORR developed organically, and the Commercial Director (as the SRO) and the Head of Competition did not ensure that the SORR was continually assessed for cohesion and consistency, and that it remained fit for purpose. This is particularly surprising given that the evaluation methodology contained within the SORR would likely be central to any legal challenge, which the CCT had recognised was the main risk to the success of the Magnox Competition.

7.48 Although a review of an advanced draft of the SORR was conducted by a Burges Salmon litigator, the suggestions and clarifications arising from that review were fed back to the individual SMEs, who were free to address those comments as they deemed appropriate. Again, there was no individual at the NDA taking responsibility for overseeing this review and considering the SORR in its totality.

7.49 There was also an opportunity missed, in the development of the SORR, to seek input from external procurement advisers on the overall appropriateness

of the SORR, any underlying weaknesses and the extent to which it was likely to support the delivery of the objectives of the Magnox Competition.

Thresholds

7.50 Given the findings of the Court in relation to the NDA's use of threshold criteria (which is discussed in more detail at Section 8), the Inquiry has spent a considerable amount of time investigating how the NDA came to use so many threshold criteria within the evaluation criteria for the Magnox Competition. In this context, when referring to threshold criteria I am referring to scoring criteria where a fail required the bidder to be excluded from the Competition.

7.51 The evaluation criteria within the SORR included two different types of threshold Requirements, namely threshold only Requirements (i.e. simple pass/fail Requirements) and threshold/ranking Requirements (where a minimum score would need to be achieved to constitute a pass, but where additional scores were available above that minimum score).

7.52 The evidence before the Inquiry is that the NDA had used a significant number of thresholds in the Dounreay PBO Competition, and that their use was perceived to have worked well. The NDA, and in particular the Commercial Director, was keen to increase the use of thresholds in the Magnox Competition, on the basis that they could be used to simplify the evaluation process, and to set a high bar on quality and compliance which bidders would have to meet. The theory was that bids meeting all the threshold Requirements would, by definition, be compliant and of a satisfactory technical quality, and the remainder of the scoring could then be used to provide differentiation (primarily on grounds of cost and credibility of the solution) between the bids.

7.53 Small groups of SMEs were assigned to each of the 60+ evaluation nodes, and these SMEs were responsible for determining the evaluation criteria, including the use of thresholds, to apply to each node. Evidence was given to the Inquiry that SMEs each tended to consider that their particular requirements were so important that threshold Requirements were essential. This may have contributed to the high number of threshold Requirements (over 300) which were ultimately included in the final version of the SORR. Whilst each threshold Requirement introduced a minimum standard that each bidder would have to meet, each threshold also introduced a new opportunity for a bidder to fail and therefore be excluded from the Competition.

7.54 There are two points that stand out to me in respect of thresholds. First, there were a large number of thresholds. Secondly, and more importantly, the real difficulty was that thresholds were used in respect of matters that were not truly critical to the service being procured. Failure to meet any threshold would result in an otherwise compliant bid being excluded from the Competition. I need only cite by way of example Requirement 401.5.1(b)(ix), which merely required bidders to summarise certain information provided elsewhere in their bids in an A0 chart or graphic. I fail to understand why the NDA should wish to exclude a bidder from the Competition simply because they did not summarise information (which in any event was available elsewhere in the bid) in the required chart or graphic. This was not the only instance in which a non-critical requirement was made a threshold, and thresholds were used (for example) for a number of administrative or formatting Requirements in relation to the submission of bids.

7.55 Generic advice was taken both from Burges Salmon and Leading Counsel on the use of thresholds in principle at the beginning of the Competition in 2012 (which identified both the risks and benefits of using thresholds). Having taken those steps at the beginning of the Competition, it would have been prudent to then stress test the approach to the actual thresholds to be used in the SORR to determine whether such use posed any risks to the Competition. This was never done (the only advice the Inquiry is aware of is that during the Competition Burges Salmon gave advice and challenge to individual SMEs about their proposed thresholds).

Scoring & Weighting

7.56 The NDA assigned the following weightings to the four Level 2 Evaluation Nodes:

Cost - 64%

Commercial - 10%

Key Enablers - 10%

Technical Scope and Methodology Underpinning - 16%.

Scoring of the Target Cost

7.57 64% of the total available marks were allocated to cost-related elements, demonstrating the importance the NDA placed on this factor. The 64% allocated to cost was divided into two elements:

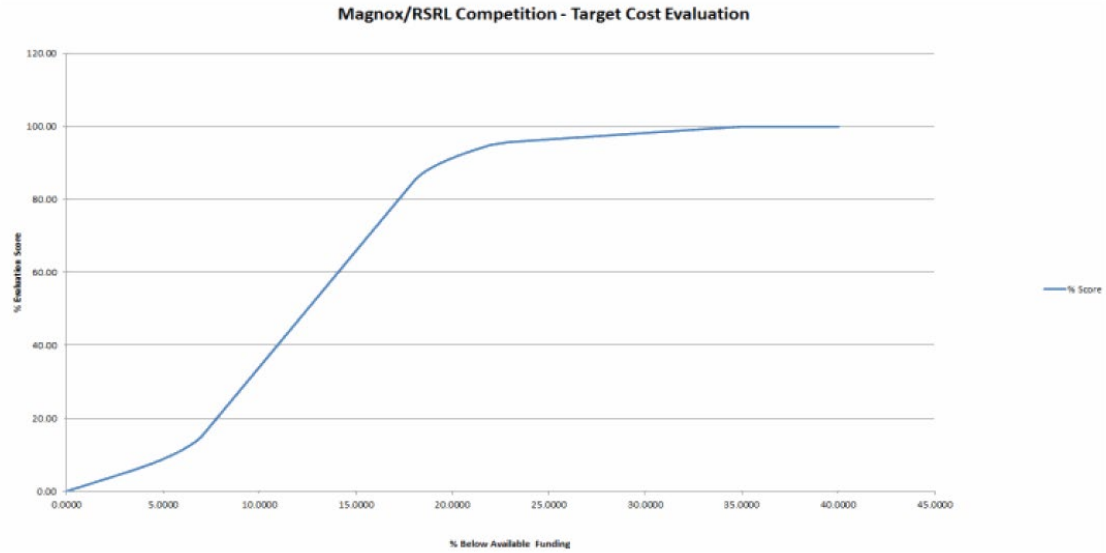
7.57.1 48% of the total overall marks were allocated to the phase 1 Target Cost, which was evaluated in accordance with a scoring matrix and 'S curve' (discussed further below); and

7.57.2 16% of the total overall marks were allocated to Cost and Programme Underpinning. In short, bidders were not required to demonstrate their solutions for the entirety of the contract scope. Instead, a 'Sample Projects' approach was used (the Inquiry was told that the 'Sample Projects' encompassed approximately 50% of the entire contract scope). As well as providing details of their technical solutions for the Sample Projects, bidders were also required to provide details of their costings for those Sample Projects (the NDA referred to this as 'cost underpinning'). The 16% of overall available marks within the Cost element related to this cost underpinning of the Sample Projects.

7.58 The rationale for this division was that the NDA wanted to get the lowest possible Target Cost (hence the 48% allocated to it), but also wanted to test that the Target Cost as bid was credible (hence the 16% allocated to the cost underpinning).

7.59 The Target Cost was evaluated by reference to a detailed scoring matrix, which identified the scores that would be awarded by reference to the percentage savings (as against the estimate for phase 1) the bidders' Target Cost proposals would represent. A pictorial representation of this matrix, taken from the ITSFT, known as the 'S curve' can be seen below[9]:

[9] Source: NDA's Invitation to Submit Final Tenders Document - October 2013, Appendix 11



7.60 The NDA received advice from Deloitte on potential scoring models, including the use of an S curve. Deloitte were not asked to (and did not) advise on the calibration of the final S curve used by the NDA. The evidence given to the Inquiry is that initially the NDA had assumed that bidders would offer Target Costs representing in the region of a 10% saving on the MODP estimate of £4.2 billion for phase 1. Relying on feedback during dialogue, the NDA concluded that a range of 10 to 20% savings was credible, and the most likely area where the bidders would land. It is for this reason that the steepest part of the curve was set in this zone, in order to provide the greatest differentiation in scoring between bidders who submitted Target Costs in this region. The NDA also concluded that savings above 35% would not be credible, which led to the flat part of the curve commencing at 35% and savings above 40% being treated as abnormally low, such that they would not receive any marks.

7.61 In the interests of transparency, with a view to ensuring compliance with the principles of procurement law, the CCT provided the S curve and the underlying matrix to bidders as part of the evaluation methodology within the SORR. This meant that bidders would know with absolute certainty what score their Target Cost proposals would achieve, and therefore bidders knew that bids representing 35% savings would receive the maximum marks available. These matters may explain why all four bidders submitted Target Costs which were clustered around the part of the curve where maximum marks were available.

7.62 In respect of the design of the SORR and evaluation methodology, I find that:

7.62.1 The evaluation methodology within the SORR was, in my opinion, unnecessarily complex. More than 700 scoring criteria,

which often required extensive responses, were then subject to over 20 different evaluation methodologies. The evaluation team therefore had to score more than 2,800 Requirements across the four bids with multiple different evaluation methodologies which created a very significant risk of human error in the evaluation.

7.62.2 The NDA was confident in its competition design. However, although the NDA recognised the biggest risk to the Competition was legal challenge, the Commercial Director and the Head of Competition did not ensure that the NDA stood back to test holistically the risk attaching to the tender documents. There was an opportunity missed to seek input from external procurement advisers to identify any underlying weaknesses in these documents and the extent to which these threatened the outcome of the Magnox Competition.

7.62.3 More importantly, the evaluation methodology also contained an excessive number of thresholds and included matters which were not truly critical to the service being procured, and for which it would not have been in the NDA's interests to exclude an otherwise compliant bid. The NDA did not adequately assess whether this approach posed any risks to the Competition.

7.63 The NDA also selected and calibrated a matrix for the scoring of target costs that reflected the NDA's expectations (based on bidder feedback) as to the level of savings the bidders were most likely to offer. In the interests of transparency, the NDA provided this matrix to bidders to explain how costs would be scored. Whilst this was advisable under procurement law, it provided bidders with a clear understanding as to what savings would secure maximum marks. Contrary to what the NDA was expecting, the costs and savings proposed in the various bid responses congregated in the same area of the matrix. Due to the way in which the matrix had been calibrated, the bids were closely scored even though the savings offered by different bidders were millions of pounds apart.

Conduct of the Competition

Dialogue

7.64 After the qualification stage and some reorganisation within the bidders, the dialogue stage of the Magnox Competition started on 14 January 2013 with four bidders:

7.64.1 CAS Restoration Partnership ("CAS"), consisting of CH2M Hill International Nuclear Services Limited, Areva NC and Serco Limited;

7.64.2 Cavendish Flour Partnership ("CFP"), consisting of Cavendish Nuclear Services Limited and Fluor Enterprises Inc;

7.64.3 United Kingdom Nuclear Restoration Limited ("UKNR"), consisting of AMEC Nuclear Holdings Limited, Atkins Limited and (from June 2013) Rolls Royce Power Engineering plc; and

7.64.4 Reactor Site Solutions ("RSS"), consisting of Bechtel Management Company Limited and EnergySolutions.

7.65 A competitive dialogue process allows the contracting authority (here the NDA) to meet with bidders for a defined period and hold discussions with them with the aim of developing one or more suitable solutions to meet its requirements. This process is used for more complex competitions - which Magnox was.

7.66 The dialogue period lasted 9 months until September 2013. The CCT managed the overall activity and chaired meetings with bidders, and teams of SMEs participated in those dialogue sessions. Bidders were asked to submit interim submissions during dialogue (covering some of the scope of the final tenders but not costs), and received feedback on these.

7.67 When dialogue closed the SMEs and CCT expected that the bidders would be in a good position to submit final tenders which would be compliant, and which would be unlikely to fail any of the thresholds.

7.68 The NDA Executive team was not directly involved in the dialogue and was therefore reliant on the upward reporting by the CCT.

7.69 In my Interim Report I indicated that the Inquiry would give further consideration to the NDA's approach to record-keeping. This is particularly

relevant in light of the observations made by the Court (in the ES litigation) that the NDA personnel kept no records of the dialogue.

7.70 The evidence before the Inquiry is that the relevant NDA personnel (SMEs and CCT members) did in fact take notes during the dialogue, and that each NDA individual participating in the dialogue was issued with designated notebooks (one for each bidder) specifically for that purpose. Although the extent to which each notebook was used tended to vary between each individual, the notebooks were centrally stored and could have been made available to SMEs at a later stage (during evaluation for instance) if necessary. The evidence also shows that these notebooks (or at least some of them) were disclosed in the ES litigation.

7.71 The NDA issued 'bidder bulletins' during the dialogue, which included issues or actions arising out of dialogue. However, beyond these bulletins there was no formal record of the dialogue meetings so there was no common record of agreements reached, assurances given or statements made by the NDA to bidders.

Evaluation of the Final Tenders

7.72 Following the closure of the dialogue phase, on 2 October 2013 the NDA issued the formal ITSFT to the four bidders, which required them to submit their final tenders by no later than 1 November 2013. Final tenders were submitted by all four bidders by that date.

7.73 For each node the NDA had identified (with a few exceptions) three evaluators - of whom one would be a lead. That person was responsible for ensuring the evaluators reached a consensus, and for escalating any points to the CCT as necessary.

7.74 Evaluators were expected first to read and assess the responses to the node(s) for which they were responsible - but without formally scoring them. The scoring for a node was to take place during meetings of the evaluators for that node called consensus meetings. As the name suggests, the purpose of consensus meetings was for the evaluators to collectively agree a score, which was to be entered into an electronic system called AWARD. There was also a process for AWARD to be re-opened, and scores or comments changed where the evaluators considered it necessary. The expectation was that each set of evaluators would reach their own decisions. However, they were free to seek guidance from one or more of the CCT if they had a problem they could not resolve. As mentioned below there was no further independent moderation step.

7.75 Evaluators were given a pack including a hard copy of the materials they were expected to score. Evaluators were asked not to annotate the hard copy materials; instead they were instructed that all comments were to be recorded in AWARD, which was to be an exclusive record of the evaluation. The evaluators were discouraged from making any comments that were not strictly to do with evaluation.

7.76 In procurements it is standard practice for evaluations to be conducted in isolation from the contracting authority's organisation, referred to by the NDA as a 'black box'. This avoids any possibility or inference of undue influence on the outcome. It is also important to ensure that the pricing or financial evaluation is conducted in isolation from any technical evaluation for similar reasons.

7.77 However, in the case of Magnox, not only was the evaluation team in a 'black box', the different sub teams of technical evaluators evaluating different nodes were operating within their own 'black boxes'. This meant there was limited ability to share common understanding among the technical evaluators and identify common issues to ensure consistency of approach across their nodes.

7.78 Further, the evaluation process did not include a moderation step. In many procurements it is common to have a process of 'moderation' where a senior person reviews and challenges the scores arrived at by the evaluators, and where scores are moderated against each other to ensure that evaluation standards were applied equally across all elements of the evaluation.

Burges Salmon Review

7.79 During evaluation, the Head of Competition sample-checked some of the emerging scores and rationales on AWARD (this check had been expected from the outset). Having identified a number of inconsistencies from his initial sample check, the Head of Competition instructed Burges Salmon to conduct a further review of the totality of the scoring (which was over and above what was expected at the outset, and which became known as the Burges Salmon Review).

7.80 The Burges Salmon Review consisted of a review of printouts of AWARD to examine the consistency of the scoring of all of the Requirements against the accompanying rationale in AWARD. Where inconsistencies were identified, Burges Salmon invited the lead evaluator to consider changing the rationale and/or the score as the evaluator saw fit. It is important to note that Burges Salmon was not carrying out any scoring (it would not have been possible for

them to do so, not least because they were not provided with the tender responses).

7.81 The Burges Salmon Review was originally intended to cover just a limited number of the Requirements (namely those that had been completed by a particular point in time), but the scope was subsequently extended to encompass every single Requirement. The Head of Competition told the Inquiry that the reason for the expansion was the level of inconsistency found by Burges Salmon in their initial review.

7.82 However, the Head of Competition did not put in place any system to ensure there was an understanding of the full extent of the inconsistencies found or to monitor how (if at all) the evaluators were implementing the recommendations of the Burges Salmon Review. Evidence from witnesses described that many evaluators were not aware of any process for considering the inconsistencies/queries raised by Burges Salmon and were unclear as to how these were to be captured and reported back (if at all). Evaluators therefore tended to act independently (continuing the 'black box' approach) and there was no-one within the CCT who was receiving an overview of the extent of any inconsistencies in order to consider whether, for example, they flagged any possible systemic issues with the manner in which the evaluation had been conducted and/or the evaluation methodology applied. At the conclusion of the evaluation, the extent to which the inconsistencies identified by Burges Salmon had been addressed or were outstanding was also not known to the Head of Competition (or to anyone else either within the NDA or within Burges Salmon). To the extent that this Burges Salmon Review was intended to be and was relied upon as assurance of the process, I consider there was no clear understanding of whether any of the issues identified by the review posed a risk to the robustness of the scoring.

7.83 As explained further below, the NDA Board was not given further detail about the Burges Salmon Review or its context when approving the decision to proceed to preferred bidder.

Possible Causes of Errors in Evaluation

7.84 Section 8 of this Report discusses in more detail what occurred during the preparation for trial, as well as what the Court found went wrong with aspects of the evaluation of bids. Overall, the Court found a number of scoring errors as well as two instances where thresholds were not applied properly. The scale of the errors found in the scoring can be seen from the changes in the final scores of CFP and RSS as determined by the Court. The score for CFP

was revised downwards from 86.48% to 85.56%, whilst RSS's overall score was increased from 85.42% to 91.48%.

7.85 It is important to understand that the Court was not directly concerned with considering why the NDA made the mistakes that it did. The Court was simply concerned as to whether mistakes had been made and the impact of those on the outcome of the evaluation. I should also add that the issues investigated by the Court and the evidence before it were related to, but different from, the set of issues and evidence base that is the subject of this Inquiry.

7.86 The Inquiry has not sought to re-examine the scoring errors and has not attempted to re-score the Requirements that were the subject of the litigation or any other Requirements. However, my Terms of Reference ask me to consider *'the course of events that led to the flaws in the contract award identified by the court'*, and in particular to identify any lessons that can be learned from what went wrong. Accordingly, the Inquiry has sought to identify and understand, where possible, the root causes of any errors made during evaluation and any lessons to be learned from this.

7.87 It seems to me that possible reasons for these errors are as follows:

7.88 The NDA wanted to run a successful competition without disqualifying one or more bidders as an unintended consequence. Large procurements are expensive, resource-intensive and time consuming for both the public body seeking tenders and bidders. Contracting authorities want to receive a range of competitive bids to maximise the competitive environment. Excluding otherwise competent bids particularly for immaterial points is usually seen as undesirable.

7.89 I should say for completeness that I have seen no evidence of bias by the NDA towards CFP. In the litigation itself ES did not allege bias nor did the Court find bias. Whilst it may be easy to jump to a conclusion of bias in these matters, my conclusion is that the NDA was not 'biased' in favour of CFP, but rather wished to avoid disqualifying any of the bidders in order to preserve the best possible competition.

7.90 I discuss earlier in this Section that the SORR contained a highly detailed marking system which a large number of evaluators (approximately 40) were asked to operate. Some evaluators were responsible for as many as 12 nodes and had to read several thousands of pages of tender responses and evaluate them with pinpoint accuracy. It would be very difficult to operate a scheme of this complexity without making a mistake.

7.91 Out of a sense of probity evaluation teams were encouraged to work in isolation in mini-black boxes, so there was no formal contact across the evaluation teams or with the CCT, unless at the evaluators' request. There was also no moderation exercise. Although the evaluators had been given evaluation training, there was no system of checks and balance - such as moderation - to help reduce the prospects of errors being made.

7.92 On the evidence available to me, I consider that these factors were then compounded by the way in which the NDA managed the procurement.

7.93 The NDA had a large degree of focus on process and timetable management within the Magnox Competition. For example, the internal audit review conducted during evaluation was limited simply to assuring that the evaluation had followed the process described, not that the process had been conducted robustly or accurately. When the Burges Salmon Review started raising issues, there was no pause to consider the issues fully and critically assess any impact on the quality and outcome of the evaluation, as the NDA should have done. As a result, the NDA never took a step back to reflect on whether it was getting the evaluation right, so heavily was it focused on the end goal of achieving the timetable and proceeding to contract award.

7.94 As an organisation handling sensitive nuclear and other information, the NDA operates very strict policies around information sharing and management. It was also conscious of keeping an audit trail for the Magnox Competition that could be readily shared with bidders as part of its requirements under procurement law. This manifested itself during evaluation by, for example, evaluators only being allowed to keep notes on the AWARD system, and being discouraged from making any personal notes which were not strictly to do with the evaluation. With such a large volume of material to evaluate and a limited ability to keep notes, the risk of human error was again increased.

Final scores and Tender Evaluation Report

7.95 The final scores awarded to each of the four bidders were set out in the NDA's Tender Evaluation Report ("TER") as follows (the names of the bidders were anonymised in this report)[10]:

[10] NDA Magnox/RSRL Parent Body Organisation Competition Tender Evaluation Report - 24 March 2014, page 4.

	Available %	Preferred	Secondary	Tertiary	Quaternary
Target Cost	48.00	48.00	46.63	46.82	47.28
Commercial	10.00	10.00	10.00	9.88	10.00
Key Enablers	10.00	6.71	7.30	5.80	6.20
Technical Underpinning	16.00	11.28	10.81	10.79	9.81
Programme/Cost Underpinning	16.00	10.49	10.68	10.75	9.64
TOTAL SCORE	100.00	86.48	85.42	84.04	82.94

7.96 CFP was the winning bidder, with a score of 86.48%. RSS finished second with 85.42% (only 1.06% behind CFP). The spread of scores between the four bidders was only 3.54%.

7.97 As can be seen from the above table, the Target Costs submitted by the four bidders were all clustered near the value (35% savings) that gave full marks. Between CFP and RSS there was almost a £300 million differential in cost, but due to the calibration of the scoring matrix/S curve, this large monetary difference resulted in a scoring differentiation of less than 1.5% between these two bidders. Accordingly, the scoring criteria adopted by the NDA did not result in cost being a significant differentiator between the bidders. As a result, the scores of the non-Target Cost requirements became important. These requirements would ultimately determine the outcome of the Competition. They would also be the scores which would be subject to most challenge by bidders.

7.98 I find in relation to the conduct of the evaluation that:

7.98.1 the Head of Competition did not put in place any system to understand the full extent of the inconsistencies identified by the Burges Salmon Review, to ensure these were adequately addressed, and to understand the extent of any risk attaching to the action taken, or not taken, by the evaluators in response.

7.98.2 In common with the Court's subsequent clarification that it had made no findings of bad faith or deliberate intention to infringe the procurement rules on the part of the NDA, I take the same view on the evidence before my Inquiry. In my view the changes made to scores on pass/fail threshold points resulted from a well-intentioned desire to keep the competition alive, and were not made in order to favour a specific bidder.

Governance and Assurance of the decision to award the contract

7.99 The TER was presented for approval to the CPB at a meeting on 12 March 2014. Neither at that meeting, nor at any CPB meetings that preceded it, was there a discussion of the Burges Salmon Review, the issues that it raised, or any outstanding risks or concerns arising from that. The TER itself stated that assurances had been received by a number of external bodies naming Burges Salmon, the MPA and Deloitte but the limitations of the scope of the work undertaken by these bodies were not highlighted.

7.99.1 For example, the MPA review considered the procurement process and not the actual evaluation or whether the competition had been conducted in line with procurement law. It therefore could not be relied upon as assurance that the right outcome had been achieved. Importantly the TER referred to the RAG ratings provided by the MPA reports during the Competition, but without also providing the underlying narrative and comments from those reports. These limitations and underlying rationale were not drawn out in the TER.

7.99.2 Given its involvement in aspects of the evaluation process, Burges Salmon was asked by the NDA to produce what is referred to as a 'comfort letter', which included a paragraph stating that *"On the basis of the work we have carried out and the evaluators completing their final sentencing of the outputs referred to above [emphasis added], we are not aware of any reason for NDA not to issue the Preferred Bidder Report and to proceed to Preferred Bidder appointment".* Based on witness evidence, the Inquiry understands the words underlined to mean that Burges Salmon considered that it would be necessary for the evaluators to appropriately act on the recommendations made during the Burges Salmon Review before the NDA could proceed to preferred bidder announcement. In order for any reader of the comfort letter to have understood its meaning they would need to be aware of the Burges Salmon Review, its scope and outputs and, importantly, how specific issues were addressed. A number of key Executives gave evidence that they did not understand the meaning of the underlined sentence quoted above. The CPB was provided with a copy of the Burges Salmon comfort letter (as an appendix to the TER), but was not informed of the Burges Salmon Review and the

correlation between the actions outstanding from this and the caveats set out in the Burges Salmon comfort letter.

7.99.3 The NDA's Internal Audit team also prepared an interim internal audit report, based on its involvement in aspects of the evaluation process, which gave the Competition a green rating, concluding that the approved procedures had been complied with. This conclusion can be easily misunderstood. This was not a conclusion that the rules of the Competition had been complied with or that evaluation had been conducted robustly and the scores correctly awarded. This was simply a confirmation that the evaluation processes had been followed in the manner described in the NDA's procedures. The Internal Audit team did not have the technical understanding to spot the mistakes which were later found to have occurred. My concern is that the interim internal audit report was used as yet further proof by the CCT that the Competition had been robustly run and the outcome was sound when this assurance was and ought to have been treated as very limited in nature.

7.100 I observe that none of these assurers were invited to the CPB to express their opinion, explain the purpose or outcome of their assurance and the risks as they saw them. The CPB appeared to take the assurance provided at face value.

7.101 On 26 March 2014, the NDA Board was asked to approve the decision to announce the selection of the preferred bidder. The NDA Board had been provided with a paper by the Head of Competition bringing them up to date on the status of the Magnox Competition, an executive summary of the TER, the letter of comfort from Burges Salmon and the interim internal audit report on the competition evaluation. The full TER was not provided but made available on request. The Head of Competition reported in a covering paper prepared for the NDA Board that "*Challenge (successful or unsuccessful) by Bidder/judicial review or stakeholder at any stage of the competition*" had been "*Mitigated by a robust procurement process, strict compliance with the regulations, and strong internal and external legal advice.*" As with the CPB, the NDA Board was not told of the need to extend the Burges Salmon Review following concerns about inconsistency of scores and the rationale recorded in AWARD. Had this information been provided, the NDA Board may have asked more challenging questions prior to approving the decision to announce the preferred bidder, particularly in light of the closeness of scores.

7.102 During the NDA Board meeting, the Chairman asked Board members if they were satisfied that the process was satisfactory and robust or if there were any concerns. Board members had to depend upon the assurances from the Head of Competition and the additional assurances that the NDA had obtained from Internal Audit and Burges Salmon, the limitations of which I set out above, but which again were not fully explained to or discussed by the NDA Board. The MPA reports were referred to as further positive assurance in general terms although the NDA Board did not have sight of these Reports, the rationale for any RAG ratings or an understanding of their inherent limitations. Once again, none of these assurers were invited to the NDA Board to express their opinion, explain the purpose or outcome of their assurance and the risks as they saw them. The NDA Board then approved the decision to proceed with the preferred bidder announcement.

7.103 The relevant Minister was asked to 'endorse' the announcement of the preferred bidder of the Magnox Competition on 26 March 2014. Based on positive reporting in relevant submissions from UKGI of the process conducted, the Minister endorsed the announcement.

7.104 In June 2014, the NDA sought and received approval from HM Treasury of its FBC. The FBC was a request for approval to proceed to contract award with CFP on the basis of its bid. Prior to being submitted to HM Treasury, the FBC was discussed by the CPB and the NDA Board. The NDA Board did not receive a copy of the FBC, only an executive summary with the full document available on request. A later NDA internal audit report found that the executive summary did not give the same prominence, when compared to the full FBC itself, as to the risks of the headline savings not being achieved arising from factors such as optimism bias and the adjustments to the Target Cost that could be made through the consolidation process.

Standstill

Debrief letters

7.105 On 31 March 2014 the NDA announced that CFP was the preferred bidder and, as required under the Procurement Regulations, sent debrief letters to each of the bidders providing certain information as to how their bids had been evaluated. The NDA decided to include a significant amount of detail within the debrief letters, going beyond the statutory requirements. The NDA obtained this detailed information by extracting the final scores and rationales from the AWARD system. Such an approach was transparent but carried risk: if the scores and rationale appeared robust, then a challenging bidder might

be dissuaded from proceeding. Conversely, if there were obvious errors, the NDA would be giving ammunition to challengers.

7.106 With the sending of the debrief letters on 31 March 2014, the NDA had started the 'standstill period' (also known as the 'Alcatel Period'). This is a statutory period of a minimum of 10 days (the NDA allowed 15) to allow bidders to decide whether to challenge the intended award decision. If a bidder issues court proceedings during the standstill period, then the procuring authority (in this case the NDA) is prohibited from entering into the underlying contract until the proceedings have been resolved.

Preparation for standstill period

7.107 As I mention above, from the very outset the NDA had anticipated that there was a high possibility of a challenge to the outcome of the Competition. In preparation for the possibility of a challenge, the NDA had retained the services of two specialist procurement barristers (including a Leading Counsel), and had started to engage with procurement litigators from Burges Salmon. The NDA had also set up a special Steering Group to take decisions during the standstill period upon the advice of the Head of Competition and the NDA's Head of Legal (who, from 1 April 2014, also held the role of Director of Business Services). This Steering Group consisted of the CEO, CFO, and Strategy and Technology Director.

7.108 The evaluation period had been very intensive for the evaluators. Some returned to their day jobs; others took leave during the standstill period. Despite all the preparations and the acknowledged likelihood of a challenge, a number of the key people who would be needed to respond to any challenge in the standstill phase were not available.

7.109 One of the key decisions to be taken in any standstill period is whether to extend the duration of that period if challenges or correspondence is received from disappointed bidders. Extending a standstill period increases the time available to investigate and respond to any challenges, but it also obviously delays the entering into of the new contract. The evidence before the Inquiry is that the NDA went into the standstill period with a base position that it would not extend the standstill period unless it was absolutely necessary to do so.

Bidder complaints and NDA response

7.110 In addition to the factors that the NDA had always envisaged might increase the risk of a challenge, there were two elements of the evaluation methodology/scoring that further increased that risk:

7.110.1 the scores were very close (there was only a 3.54% gap between the winning bidder and the lowest place bidder). This meant that, in any challenge, a bidder would only have to show that a relatively small number of requirements had been scored incorrectly in order to overturn the result; and

7.110.2 a bidder could overturn the Competition result if it could prove that the winning bidder (CFP) had been incorrectly scored as passing any single threshold requirement (of which there were more than 300).

7.111 Within a short period of time of their receipt of the debrief letters, the three unsuccessful bidders began sending very detailed challenge letters to the NDA. The most significant of these was a 70 page letter from RSS dated 6 April 2014 which identified a significant number of what RSS maintained were flaws in the evaluation process. By 10 April 2014 (four days before the scheduled expiry of the standstill period at 12 noon on 14 April 2014), the NDA had received a total of 9 substantive challenge letters from the three unsuccessful bidders (which had also included requests for extensions to the standstill period). The NDA's Leading Counsel advised that in his opinion the scale of the challenges was unprecedented.

7.112 On the evening of 10 April 2014, three members of the CCT (including the Head of Competition) participated in a conference call with Burges Salmon and the NDA's Counsel team. The purpose of that call was to discuss the NDA's response to RSS's 70 page letter of 6 April 2014 (which the NDA was planning to send on the following day, 11 April 2014) and the related question of whether the NDA should extend the standstill period. The NDA's Leading Counsel advised in robust terms against continuing with the plan to send that response out the following day. Burges Salmon also advised of the risks of sending out letters to the original standstill timescales.

7.113 No members of the NDA Executive, or its in-house legal team, were present on the conference call. From the investigations undertaken by the Inquiry, it appears that the in-house legal team and the NDA's key decision makers (including the Steering Group set up for the specific purpose of making decisions during standstill) were not told of the strength of Leading Counsel's advice (although they may have been told that Leading Counsel considered that the NDA needed more time to work on its response to RSS). I would particularly have expected the Head of Competition to have taken greater steps to ensure that the strength of that advice was communicated adequately to the NDA's appointed decision-makers.

7.114 Following a series of calls between the NDA and Burges Salmon (but not Leading Counsel) on 11 April 2014, the NDA decided to send out the response to RSS and not to extend the standstill period. Burges Salmon continued to point out the challenges and risks with sending out the letters. Contemporaneous documents suggest that the NDA's desire to award on time was driven by their view of the savings to be made by transitioning to the new contract with CFP.

7.115 The NDA's response to RSS was sent out in the afternoon of 11 April 2014. The NDA had been advised by Burges Salmon that such response would be a key focus in any subsequent litigation. This proved to be the case, with the Court being very critical of that response, and noting that the NDA's witnesses had tried to distance themselves from it as much as possible.

7.116 As can be seen above during this period there were a number of calls between Burges Salmon, Leading Counsel and the Head of Competition plus others from the CCT. Calls also included members of the Executive team including the CEO. But I observe that there was no one fulfilling the role of a General Counsel during this time. It is possible that, had the NDA had a General Counsel who was independent of the Competition and charged with managing legal risk on behalf of the NDA, he/she may have advised the CEO to pause at this stage.

7.117 Although bidders sent in further correspondence to the NDA, the standstill period expired on 14 April 2014 without any bidder issuing proceedings to stop the award of the contract.

7.118 The NDA proceeded to award the contract to CFP on 15 April 2014. This contract was a transition agreement. It set out detailed conditions for what would happen in the transition period before shares were transferred to CFP, on 1 September 2014 when the new PBO Agreement and SLC Agreement would take effect.

7.119 In summary, before the contract with CFP was signed, the NDA received comprehensive written complaints from all three losing bidders. The NDA's Leading Counsel had provided robust advice to the Head of Competition against rushing out a response to a 70 page letter containing grounds of challenge from one of the losing bidders, RSS, in the limited time remaining under the standstill period. I would particularly have expected the Head of Competition to have taken greater steps to ensure that the strength of that advice was communicated adequately to the NDA’s appointed decision-makers.

8. Litigation and settlement

Legal Proceedings Brought by EnergySolutions

8.1 ES, part of the bidder RSS, issued a claim in the High Court of England and Wales on 28 April 2014. By then it was too late to seek an order from the Court preventing the NDA from contracting with CFP. ES was the only party to bring formal legal proceedings against the NDA at this stage, although Bechtel (the other partner in the bidder RSS) subsequently issued a claim (as I will explain later).

8.2 ES was a minority partner (holding 40%) in the RSS consortium with Bechtel. ES claimed damages for its 40% share of the profits (fees) that RSS would have earned over the duration of the PBO Agreement, as well as recovery of its other alleged losses (including its bid costs), amounting in total to approximately £118 million.

Basis of ES Claim

8.3 The basis of ES's claim was that RSS's and CFP's tender responses to the Magnox Competition had not been evaluated by the NDA in accordance with either the rules of the Competition, or the obligations of transparency and equal treatment to which the NDA was subject under the relevant procurement law.

8.4 ES alleged that in scoring the RSS and CFP tender responses, the NDA evaluators had made "*manifest errors*", and that had the scoring been done correctly in accordance with the NDA's evaluation criteria, CFP should in fact have been disqualified from the Magnox Competition. ES also claimed that RSS should have been scored higher overall than CFP, and that RSS should therefore have been declared the rightful winner.

8.5 The SORR was of central importance in carrying out the extensive scoring exercise, and hence was a document of great significance in the litigation. Of the 2,800 plus evaluation Requirements, ES's legal challenge was confined to the evaluation and scoring of 40 Requirements only. In evidence a number of NDA witnesses suggested that because only a small number of Requirements were challenged that indicated that the NDA had indeed run an excellent procurement, and that challenges to a small proportion of scores did not detract from the overall quality of the procurement. I do not consider that any

conclusions can be drawn (either way) from how many or how few Requirements ES elected to challenge.

8.6 In bringing its initial claim against the NDA, ES relied heavily upon documents (notably extracts from the AWARD system) provided by the NDA to RSS during the standstill period, which contained a record of the various consensus scores for each Requirement awarded by the NDA evaluators in respect of both the RSS and CFP bids, together with the evaluators' associated comments.

8.7 ES issued a second claim against the NDA on 29 August 2014 relying on certain matters set out in the NDA Defence to the first claim. As is standard in legal proceedings, both parties were required by the applicable court rules to disclose to each other documents in their possession relevant to the issues in dispute. On the basis of the information contained in the documents disclosed by the NDA, ES issued a third claim against the NDA on 16 March 2015. Although the third claim was issued on that date, ES did not provide full details of the claim to the NDA until late July 2015.

8.8 The legal basis of challenge was the same in all three claims, which were heard together at the liability trial in the High Court that began on 16 November 2015. At an early stage in the legal proceedings, it had been determined by the Court that issues of liability (whether ES had a valid claim against the NDA) would be determined separately from issues of quantum (in other words the amount of damages payable by the NDA to ES in the event that liability was established).

NDA Conduct/Resourcing of the Litigation

8.9 Burges Salmon took instructions from, and provided advice to, a core team of individuals within the NDA managing the preparation for the litigation, led by the Director of Business Services (who was appointed the executive lead for the litigation), and which included the Head of Competition (until his departure from the NDA in December 2014), the Head of Procurement and a representative from the NDA in-house legal team ("core NDA team"). There was also a Governance Group created in order to manage the litigation at a senior level. This comprised the CEO (as Head), the CFO and the Director of Business Services.

8.10 The NDA retained Burges Salmon and the same Leading and Junior Counsel (who had advised in relation to the standstill period) to represent it in the legal proceedings.

8.11 I understand that it is not uncommon for law firms providing non-contentious procurement advice to act for the same client if the matter subsequently turns litigious. It seems to me the choice of legal representation in any follow on litigation should be decided on a case-by-case basis.

8.12 I can appreciate that the build-up of knowledge on the transactional side could be usefully called on by those conducting the procurement litigation within the same firm to inform the background to, and subject matter of, the dispute. It seems to me, however, that this understandable benefit needs to be weighed against other potentially important considerations.

8.13 In this case, in addition to providing procurement advice, Burges Salmon conducted, at the NDA's request, a review of the consistency of the scoring of all of the Requirements against the accompanying rationale (i.e. the Burges Salmon Review as referred to above). They raised queries if the two did not appear to be consistent, and made recommendations on which the relevant NDA evaluators had absolute discretion whether or not to act. The review was legally privileged, which meant that it did not need to be disclosed in the litigation. The Court observed in its Judgment that it therefore did not have the benefit of the content of the review when considering the reasons for changes in the final scoring.

8.14 I wish to emphasise that I do not conclude from this that Burges Salmon should not have acted for the NDA in the Magnox litigation, or that it was in any way improper to do so. I think it right, however, that I have regard to the Court's observation.

8.15 It seems to me in cases of this kind, where the procurement lawyers are instructed to carry out a review of the type undertaken by Burges Salmon, that heightened consideration should be given as to whether the same firm should be further involved in any subsequent litigation.

Approach to Litigation Investigation

8.16 The Inquiry has used the Judgment in setting the scene against which to conduct its investigation into the handling of the litigation brought against the NDA, inclusive of its defence to ES's claims, including the circumstances relating to the NDA's evaluation and scoring of CFP's and RSS's bids on the relevant Requirements.

8.17 A useful starting point for the Inquiry's investigation, and basic to the proper handling of commercial disputes (especially of this magnitude), was to

establish (i) what legal advice the NDA had received on the merits of its case, (ii) what litigation strategy it was following, and (iii) the extent to which it had considered whether or not the litigation ought to be settled, and if so what steps had been taken towards that end.

8.18 Legal advice on merits and litigation strategy closely interrelate. An organisation will often set its litigation strategy based on the strength of its case (i.e. merits advice). Sometimes cases which are weak still end up in court for one reason or another, but the strategy in the majority of weak cases is effectively to settle out of court.

Legal Advice on Merits

8.19 The NDA sought and obtained from Leading Counsel legal advice on the merits of its case at various key stages in the 18 months between the commencement of the proceedings by ES in April 2014 and the commencement of the liability trial in November 2015, as each party's legal cases and supporting evidence were progressively developed. Those key stages were as follows:

8.19.1 31 October 2014 - following receipt of the first and second claims and when significant work had been undertaken on the NDA's defence and potential witness statements;

8.19.2 4 June 2015 - shortly before finalisation of the NDA's first round of witness statements;

8.19.3 20 July 2015 - shortly after exchange of the NDA's first round of witness statements and receipt of ES' first round witness statements;

8.19.4 11 September 2015 - shortly after receipt of the details of ES' third claim;

8.19.5 30 September 2015 - in advance of a meeting of the NDA Executive on 13 October 2015; and

8.19.6 13 October 2015 - at an NDA Executive meeting attended by Leading Counsel and Burges Salmon.

8.20 I set out the nature of the merits advice at each of these key stages below. In summary, Leading Counsel was initially cautiously optimistic as to the NDA's prospects of successfully defending the claim, but his optimism decreased

over time to the point where (6 weeks before the commencement of the liability trial) he advised that the case could go either way but that, if asked, he considered that the NDA was more likely to lose than win.

31 October 2014

8.21 Leading Counsel advised in conference that he was "*cautiously optimistic*" about the prospects of the NDA successfully defending the case. He also identified his reasons for caution, including that (a) several of the Requirements were so called cliff edges (i.e. thresholds), in relation to which a single change in the scoring would have eliminated CFP from the Competition; and (b) the NDA's defence relied heavily on witness evidence of the evaluation itself, and therefore much would depend on the performance of the NDA's witnesses at trial.

4 June 2015

8.22 Leading Counsel updated his merits advice at a further conference with Burges Salmon and the core NDA team on 4 June 2015. The approved note records his view that there had been no major shocks since October 2014, but he referenced several key issues impacting on the NDA's prospects of success in the following ways.

8.23 First, would be the attitude taken by the trial judge who could be anywhere from being reluctant to be drawn beyond a high-level review of the scores awarded, to becoming fully engaged with the detail of whether the correct score had been reached. Secondly, losing on any one of the cliff edges (8 of the then 29 Requirements being challenged) would necessarily mean the NDA would lose the case. Thirdly, there were concerns over the evidence of one of the NDA's key witnesses (who was giving evidence on 15 of the 29 Requirements, of which five were cliff edges).

8.24 In summary, Leading Counsel's advice on 4 June 2015 was that assuming the trial judge was somewhere in the middle of the two positions referred to above, the NDA was "*more likely to win than lose but only by a small margin in terms of probabilities.*" In his view, "*the case could go either way.*" Leading Counsel also made clear that his merits advice would need to be reassessed following receipt by the NDA of the details of ES' third claim.

20 July 2015

8.25 During a further conference call between the core NDA team and Burges Salmon on 20 July 2015, Leading Counsel advised on the effect of the latest NDA witness evidence, and the recently received ES witness evidence on the

merits of the NDA's defence. He remained of the view that the case could go either way, but was more pessimistic than he had been on 4 June 2015, primarily due to growing concerns over the evidence of the NDA's key witness, and the ability of that witness to withstand cross-examination at trial.

11 September 2015

8.26 On 11 September 2015, Leading Counsel was asked to update his view on the merits by conference call (again with the core NDA team and Burges Salmon), in light of the details of the third claim (received by the NDA after the 20 July 2015 call) and the preliminary draft statements of the NDA witnesses prepared by Burges Salmon in response to the third claim.

8.27 According to contemporaneous documents, although some of the new allegations made by ES in the third claim were of concern to Leading Counsel, he did not think any looked "*unanswerable"*, and said his perception of the merits had not really changed from 20 July 2015, save to the extent that the further cliff edge allegations added to the number of arguments that the NDA had to win. These allegations included the two threshold Requirements, the evaluation of which the Court subsequently found had been "*fudged*" by the NDA, with the result that CFP should have been eliminated from the Magnox Competition.

30 September 2015

8.28 There was no further formal conference with Leading Counsel on the merits of the NDA's case. However, following the conference call with him on 11 September 2015, the NDA's in-house legal team (assisted by Burges Salmon) prepared a draft briefing note to the NDA Executive for their meeting on 13 October 2015. The draft note stated that the NDA had been advised that it was "*more likely to win the case than to lose it*", but there remained a real risk that the trial judge might decide against the NDA. Elsewhere it stated that the case "*could go either way.*" Although it was an NDA in-house legal team note, the Director of Business Services wanted Leading Counsel to be "*comfortable*" with its contents.

8.29 By email to Burges Salmon dated 30 September 2015 in relation to the briefing note, Leading Counsel said that some of his earlier concerns about the NDA's case had been "*enhanced*" by the ongoing work on the NDA's witness statements responding to the third claim, and he could <u>not</u> endorse any assessment of the NDA's prospects as being that it was "*more likely to win than lose*."

8.30 Leading Counsel continued: *"I remain of the view that the case could go either way, and that putting an exact percentage number on the prospects is probably not the best way to approach the difficult question of whether to seek settlement. However, if I was asked to say whether I thought we were more likely to win or lose, I would say lose, albeit only by a narrow margin."*

8.31 Although not given by Leading Counsel in formal conference, his email to Burges Salmon effectively updated his earlier merits advice. The contents of the email were initially communicated by Burges Salmon to the Head of Procurement and the Director of Business Services by telephone, and the email itself was later sent by Burges Salmon to the Director of Business Services and the Head of Procurement ahead of a meeting of the NDA Executive on 13 October 2015.

13 October 2015

8.32 A meeting of the NDA Executive took place on 13 October 2015. This was shortly before a mediation with ES (on 15 October 2015) and the start of the liability trial (in mid-November 2015). Leading Counsel and Burges Salmon were asked to attend the Executive Meeting in order to give their view on the merits to the NDA Executive in person. There is no comprehensive contemporaneous note of what was said at that meeting, and the Inquiry received somewhat inconsistent accounts from those in attendance.

8.33 My conclusion on that evidence is that the message to the meeting from Leading Counsel and Burges Salmon was downbeat, with the key risks (NDA witness performance and potential judicial intervention) being explained. Leading Counsel painted a somewhat dismal picture of the NDA's prospects, and I have concluded that what was said at the meeting did not convey anything more optimistic than that the NDA's prospects were at best in the balance, and probably more likely to be on the wrong side of the line.

Summary of the Legal Advice on Merits

8.34 Defining precisely how much above or below the line the prospects of successfully defending litigation lie when expressed as "*more likely to win than lose*" and vice versa, is not an exact science and clearly open to interpretation, as was borne out by the differing views of those questioned on the point before the Inquiry.

8.35 However, what is clear from the evidence is that from the outset the effect of Leading Counsel's advice to the NDA on the merits of its defence was that there was a significant risk that it would lose the claim. Indeed, as from the end of September 2015, in the crucial period leading up to the liability trial in

mid-November 2015 (which included the potential opportunity to resolve the dispute at a mediation in mid-October 2015) Leading Counsel's advice was that the NDA's prospects of success were marginal either way, and on the wrong side of the line if he had been asked to commit to a more definitive position.

Adequacy of Communication of Legal Advice to Key Decision-Makers

8.36 The Inquiry has uncovered a lack of reporting, and unacceptable errors in the presentation, of the legal advice on the merits of the NDA's case to key decision makers at senior levels, both within the NDA and within DECC.

To the NDA Board

8.37 When the legal proceedings were first issued by ES the NDA's Non-Executive Directors were informed of that fact by the CEO outside of a formal NDA Board meeting. At the first NDA Board meeting following this, on 5 June 2014, the Board were told by the Strategy and Technology Director that "*The full particulars of EnergySolutions' claim had been received and did not contain any allegations not previously made in correspondence. NDA remained of the view that the evaluation process and the competition as a whole was robust, had been correctly conducted and the challenge had no validity.*"

8.38 There appears to be no further formal updates to the NDA Board according to the minutes until the trial started in November 2015.

8.39 The Chairman of the NDA Board told the Inquiry that the Board had never been provided with, and was not aware of, any of Leading Counsel's advice on the merits of the claim against the NDA. It would seem that the extent of the NDA Board's understanding of the litigation, including the substance of the legal advice on the merits of the NDA's case, came from briefings by the CEO outside the NDA Board meetings. The Chairman described the CEO as having a very confident view that the NDA had run a good procurement process, and that the merits of the NDA's case would be seen in Court. Non-Executive Directors variously said in evidence that the impression they were given was that ES's claim had little to no merit, that it was without substance and that the chances of it being successful were very slim.

8.40 Given the profile, importance and potential financial implications of the litigation for the NDA, the CEO ought to have informed the NDA Board of

Leading Counsel's advice on the merits. In particular, the CEO gave evidence to the Inquiry that he had understood from the Executive meeting on 13 October 2015 (a month before trial), attended by Leading Counsel, that the NDA was more likely than not to lose the case. The NDA Board was not made privy to the downbeat way that Leading Counsel had explained the litigation risks to the Executive at that meeting.

8.41 For reasons set out in the next part of this Section 8 (dealing with the NDA's litigation strategy), I am driven to the conclusion that the CEO was so wedded to the view that the NDA had run a good procurement, and that to settle the litigation would create an unacceptably bad precedent, that the deteriorating legal advice on the merits, and its implications for the ongoing conduct of the case, including the possibility of early settlement, were lost sight of. The legal advice had gone from cautious optimism about the NDA's prospects of success (October 2014), to the case could go either way, but the NDA was more likely to win than lose (June 2015), to the case could go either way, and if pressed the NDA was more likely to lose than win (September 2015). Not only was that advice, and the very real risk of the NDA losing the case, not escalated through to the Board, it was not given the prominence in the NDA's key decision making regarding the conduct of the litigation that it plainly deserved, whether at Board level or otherwise.

8.42 I also find it surprising that the Chairman of the NDA Board did not challenge the CEO on the basis for his confidence in the NDA's prospects of successfully defending the claim, or ensure that the NDA Board received regular, reliable, independent and objective assessment of the merits of the NDA's case. Perhaps the simplest way to have achieved this would have been to invite Leading Counsel and/or Burges Salmon to attend the NDA Board to give their advice first hand. At the very least, I would have expected the Chairman to have required that the NDA Board be provided with the underlying merits advice that had been received from Burges Salmon and Leading Counsel, which also did not happen.

8.43 In fact, Burges Salmon and the Counsel team's contact with the top management of the NDA (in particular the CEO) was exceedingly limited, and they never dealt directly with the NDA Board, nor were they invited to any Board meeting.

To DECC

8.44 The Inquiry has also seen evidence that the merits advice received by the NDA was not accurately reported to DECC. On 12 November 2015, ShEx sent a submission to the Permanent Secretary of DECC providing an update

on the current status of the litigation. This was a crucial time, very shortly before the start of the trial. The submission stated that the NDA's Counsel "*continues to be cautiously optimistic that the NDA is more like to win than to lose, but only by a small margin in terms of probabilities*." That wrongly represented the legal advice which, by that stage, was that Leading Counsel considered that the case could go either way but that, if asked, the NDA was more likely to lose the case than win.

8.45 I do not suggest that ShEx is responsible for the erroneous presentation of the legal advice in the submission to DECC's Permanent Secretary. ShEx had sent an earlier draft of the submission (containing the same wording as quoted above) to the NDA's Director of Business Services, specifically asking for his comments on the drafting on the risk of the NDA losing the claim. The Director of Business Services provided his comments on the draft submission, but did not correct the inaccurate summary of the legal advice to bring it into line with Leading Counsel's then advice (as summarised in paragraph 8.44 above). In the circumstances, it seems to me that ShEx were entitled to rely on this exchange as confirmation that the NDA considered that the draft submission was accurate in this regard.

Processes around legal advice

8.46 Generally speaking, merits advice was provided by way of conferences (either in person or by telephone) with Leading Counsel. On two occasions (31 October 2014 and 4 June 2015), typed notes of those merits conferences were prepared by Burges Salmon, approved by Leading Counsel, and then provided to the NDA. On two other occasions (20 July 2015 and 11 September 2015), handwritten notes were kept by a Burges Salmon employee. The NDA does not appear to have requested or received those handwritten notes. There is evidence to suggest that, in respect of the 11 September 2015 conference, the NDA instructed Burges Salmon that an approved note of conference was not required.

8.47 The evidence also shows a clear lack of suitable internal processes and controls by which legal advice was recorded, retained and disseminated within the NDA. During the litigation these shortcomings were demonstrated most vividly in relation to Leading Counsel’s legal advice on the merits of the NDA's defence, and in my view they contributed to the failure to readily retrieve and communicate that advice effectively and accurately to key stakeholders within and outside the NDA.

The NDA's Litigation Strategy

8.48 Typically, the stronger its case (usually reflected in legal advice on the merits), the more likely a party to litigation will be willing to fight, and vice versa. In this instance, I would have expected the NDA's litigation strategy (inclusive of its approach to settlement) to reflect Leading Counsel's advice on the merits.

8.49 I have not found that to be the case. The NDA's strategy throughout the litigation until the aftermath of the adverse Judgment was to defend ES's claim come what may, and not to settle.

8.50 One of the reasons frequently expressed in evidence by the CEO and Director of Business Services for that strategy was a concern that settlement would be perceived as creating a bad precedent by encouraging unsuccessful bidders in future government procurements to bring unmeritorious claims to recover their wasted bid costs and alleged lost profits.

8.51 The clear impression I have gained from the evidence is that the NDA's litigation strategy was set by the CEO. He, in common with other Executive colleagues, considered that the NDA had run a good competition, which he was determined to defend. That belief, and steadfast commitment to resist what was perceived to be an unworthy, opportunistic claim (without attaching sufficient weight to the merits advice), lay behind and drove the strategy, which was implemented in the main by the Director of Business Services, ultimately at the CEO's direction.

8.52 The Director of Business Services was a lawyer and had been the NDA's Head of Legal, but his experience in the conduct of major litigation was comparatively limited. Given his legal background and role in the NDA's conduct of the litigation, I might have expected him to have played a more influential role in the determination of the litigation strategy, in particular by ensuring that the CEO was properly informed of the associated (and evolving) legal risks of maintaining the strategy, notwithstanding the NDA's deteriorating prospects of success. However, as Director of Business Services, he had a range of wider responsibilities for the NDA, and was only expected to commit part of his time and attention to this significant litigation. This was reflected in his performance objectives set by the CEO. It is possible that this segmentation of his objectives gave a strong steer as to the time and focus to be spent on the Magnox litigation, as compared with the various other matters within the Director of Business Services' portfolio.

8.53 From time to time in discussions at conferences between the core NDA team, Burges Salmon and Leading Counsel, the subject of settlement was raised.

The message given, for the most part by the Director of Business Services, was that this was a political rather than a legal question; that the need to avoid creating a bad precedent was central to the NDA's litigation strategy which was supported by Government; and that therefore settlement was effectively not an option.

8.54 At an early stage in the proceedings, Leading Counsel advised that settling procurement disputes would not necessarily encourage future procurement challenges, and thus create a bad precedent. He repeated his view in his email advice of 30 September 2015 to Burges Salmon, which was subsequently forwarded to the Director of Business Services. I am not clear on the extent to which this advice was communicated to the CEO. Its implications for the NDA's litigation strategy, however, were not taken seriously, especially in the lead up to the liability trial in mid-November 2015 when the outlook for the NDA's prospects in the litigation was looking increasingly doubtful.

8.55 That the NDA was determined to continue to defend the litigation regardless of the merits advice is clearly evident from an email message on 12 October 2015 (just three days before a mediation with ES) which the Head of Procurement conveyed to Burges Salmon, and asked to be communicated to Leading Counsel, shortly before the Executive meeting on 13 October 2015, in the following terms:

"…*we came away from the governance group today [12 October 2015] with a very strong and uncompromising message…This isn't based on an optimistic view that we will win on liability but on a measured assessment of the long term issues at stake if claims of this sort become the norm*."

8.56 This is revealing. It shows the extent of disconnect in the strategic mindset of the Governance Group (headed by the CEO) between the primacy given to the bad precedent point, as against the legal advice on the NDA's declining prospects of success.

Mediation on 15 October 2015

8.57 ES appears to have actively pursued possible settlement in the second part of 2015 as the liability hearing (fixed to begin on 16 November 2015) approached. It requested a mediation with the NDA as a potential way of resolving their differences. The mediation took place on 15 October 2015. The NDA's team was led by the Director of Business Services, and included Burges Salmon.

8.58 The negotiating remit for those attending the mediation on behalf of the NDA had been decided at a meeting of the Governance Group on 12 October 2015. In a further email to Burges Salmon dated 13 October 2015 (also for onward transmission to Leading Counsel), the Head of Procurement reproduced a note of that meeting, which recorded the Group's overwhelming view that the "*NDA could not, for policy reasons, agree to any outcome which could be interpreted as NDA 'paying off' the Claimant* [ES]." The Group's instruction was therefore that the NDA would "*not agree to … making any payment to ES*", and that "*[E]ven if the liability case were lost, this might be the better outcome.*" The Head of Procurement described the Governance Group's approach as "*ridiculously 'uncommercial', but it is the way it is.*" The NDA thus remained firmly opposed to settling the dispute, and strongly favoured maintaining its defence strategy, and the CEO instructed the Director of Business Services that he had no authority to agree any payment to ES by way of settlement at the mediation.

8.59 A contemporaneous note of the mediation records that ES was prepared to make an offer to settle the case, provided the NDA indicated that it would be prepared to pay something to ES by way of settlement. That indication was not given, (as had been dictated in advance by the Governance Group), and the mediator is recorded as informing the NDA that absent such an indication, no offer would be forthcoming from ES, and there would therefore be no point in continuing the mediation which therefore ended.

8.60 That the NDA was unwilling to give the indication requested by ES is corroborated in an email from Burges Salmon to the Director of Business Services and the Head of Procurement on the day after the mediation which recorded that: "*Clearly they* [ES] *hoped to get a concession that NDA would pay them something but they did not receive that.*"

8.61 In the same exchange of emails Burges Salmon recorded that in terms of quantum ES "*conceded that the bid costs represented a double recovery (reducing their claim by £10 million).*" Burges Salmon also stated that it seemed from discussions with the mediator that ES "*were not confident of the claim for redundancy costs (reducing the claim by £20 million)*", nor had ES put up convincing arguments for the loss of their unquantified reputation claim. Burges Salmon concluded that: "*In effect they* [ES] *were left with the claim for loss of profits (put at £100 million…)*".

Missed Settlement Opportunity

8.62 I have concluded that ES was prepared to make an offer of settlement at the mediation below its claim for £118 million, but did not do so because the NDA

had made abundantly clear its unwillingness to make any payment at all. I regard that as a serious missed opportunity, especially at a time when ES was willing to engage to resolve the dispute, and there was a very real risk that the NDA would lose the case.

8.63 I do not understand why it made any sense for the NDA to forego the opportunity in a without prejudice mediation to explore the potential for settlement, and the level of compensation at which a resolution with ES might be achieved. Indeed, a note prepared by the Head of Procurement that had been sent to the CPB in early October 2015 concluded that the NDA would attend the mediation "*to explore ES' expectations of the quantum in more detail.*" I would have thought that would include testing how much ES might have been willing to accept by way of settlement.

8.64 There was no obligation on the NDA to settle at the mediation, and indeed the Director of Business Services had been instructed by the CEO that he did not have the authority to do so. But even if wedded to its defence strategy, I cannot see how the NDA would have been disadvantaged by engaging in meaningful, non-binding settlement discussions. This is all the more so when the legal advice was not encouraging, with the very real prospect of damage to its reputation (and the wider reputation of government procurements), exposure to substantial damages and adverse cost consequences from losing the litigation, none of which seem to have featured with any prominence in formulating and maintaining the strategy.

8.65 I conclude that:

8.65.1 the NDA's strategy of steadfastly defending the litigation, with a closed mind to settlement, was fundamentally flawed. It failed to take the legal advice, and the serious downsides of losing, properly into account. I cannot say for certain that settlement would have been achieved had the NDA been willing to explore the possibility constructively, but my strong impression is that there would have been a good chance of doing so in the lead up to trial on terms acceptable to the Government that would very likely have been more attractive than those later agreed.

8.65.2 I do not say this with the benefit of hindsight. The distinct possibility of settlement was there for the taking as the trial approached. It was rigid adherence to the NDA's misguided, and I would concur "*ridiculously uncommercial*" litigation strategy that stood implacably in the way.

Government and DECC support

8.66 Witnesses from the NDA told the Inquiry that the Government supported the NDA's strategy to defend and not settle. Precisely when and by whom within Government this message was conveyed to the NDA is not entirely clear. It is said to have been given orally, and did not amount to a direction from Government that the NDA should defend the case.

8.67 The evidence before the Inquiry suggests that insofar as it went, the Government's support for the NDA's strategy was only given orally and 'in principle', soon after the litigation had been commenced. Whilst I am prepared to accept that at some stage ahead of the liability trial, the Government informally expressed its support in principle for the strategy, I am not persuaded that it was in any sense behind the strategy, or that the Government dictated that the NDA should in any way follow it.

8.68 It is apparent from exchanges between ShEx and DECC in late October and early November 2015 that the NDA wanted DECC's written support to resist further attempts by ES to settle the dispute, following the unsuccessful mediation. They record that ES had been lobbying hard to get the Government to pressure NDA to settle, and that the NDA believed that the written support would "*demonstrate to ES that there is no backdoor route to get them to settle.*"

8.69 DECC Finance considered that from the outside looking in the NDA's reasoning remained heavily skewed by concerns about protecting the wider public interest, which DECC Finance was finding it hard to substantiate. They considered it would be hard to argue that a settlement at less than the full value of the claim would set a precedent, and that if the NDA lost the case (particularly if that involved a finding that the NDA's procurement processes were inadequate) the signals about the rewards of litigation would be stronger than if the NDA had settled the claim.

8.70 An official from DECC Finance succinctly conveyed their thinking to ShEx in early November 2015 as follows:

"*Put another way, if settlement was the best way to avoid precedent and protect the tax pay*[11] *I wouldn't want ES to come through the back door. I*

[11] I assume that the original quote contained a typographical error and “tax pay” is intended to read “tax payer”.

would invite them in through the front. I don't see that the NDA can conceive of a world where that is even an option."

Submission to DECC Permanent Secretary

8.71 The NDA did not pursue its request for DECC's written support for its strategy. Instead, with the NDA's agreement, ShEx sent a submission to the DECC Permanent Secretary on 12 November 2015, which was limited to an update on the current status of the litigation. I have discussed this submission above in relation to its inaccurate statement of the merits advice received by the NDA.

8.72 The Director of Business Services provided ShEx with a note for the Permanent Secretary to be attached to the submission, which it was. It was an updated version of a note provided a month earlier to the CPB by the Head of Procurement, and contained additions relating to the mediation made by the Director of Business Services in the following terms:

8.72.1 *"ES has indicated in pre-trial negotiations that it is not willing to reduce its claim below the £118m contained in its claim documents.";* and

8.72.2 *"NDA has attempted to reach a negotiated settlement with ES via mediation but ES was unwilling to reduce its expectation of recovery below £118m."*

8.73 I do not regard either of these statements as an accurate reflection of what had happened at the mediation, which I have already described. I consider they gave a misleading impression of the prospects of settlement at a key time in the immediate run up to the liability trial.

8.74 I consider it unacceptable that in its final form the submission to the Permanent Secretary should contain an out of date, inaccurate account of the legal advice (Leading Counsel was "cautiously optimistic" and the NDA was more likely to win than lose), and should also indicate (through the attached NDA note) that at the mediation ES was unwilling to reduce its claim below £118 million, in circumstances where in both instances the reverse was true. I make no criticism of ShEx in this regard, relying as it was on information provided to it by the NDA, which it was in no position to verify independently.

The Liability Trial

8.75 The liability trial started on 16 November 2015 and continued until March 2016. There was a further hearing in July 2016 on some issues which are not relevant to my Inquiry. By December 2015 Burges Salmon was communicating to the NDA representatives that because of the way the trial had unfolded, it would be extremely difficult to win on a number of Requirements, and that the NDA was unlikely to be successful in its defence.

8.76 I have seen no evidence that this development of the prospects of successfully defending the claim during the trial was communicated to key decision-makers in the NDA, including the NDA Board, nor to other stakeholders, in particular, UKGI and DECC, neither of which had representatives in attendance at the trial.

8.77 I consider that, once again, a key opportunity was lost - even at this later stage - to explore potential settlement. Submissions were made to me that approaching ES to settle during the liability trial would have been tactically disastrous, and that carrying on with the trial and taking the chance of winning was necessarily the more attractive option. I do not agree. I accept that the timing would have been far from ideal, but nothing ventured nothing gained. Confronted with the very serious prospect of losing the case in light of events as they had transpired in Court, I am not persuaded that there was no utility in the NDA sounding out ES on the possibility of settlement during the trial.

Outcome of the Liability Trial

8.78 I provided a summary of the Court's Judgment on liability (delivered in July 2016) as an Appendix to my Interim Report, which is attached as Appendix 2 to this Report for ready reference.

8.79 In summary, the Court identified a number of scoring errors, as well as issues with the manner in which thresholds were applied by the NDA during evaluation. In considering the individual scoring issues, the Court found that the NDA had committed "*manifest errors*" in its evaluation of both the RSS and CFP bids, such that RSS's overall score should have been increased from 85.42% to 91.48%, and that of CFP revised very slightly downwards from 86.48 to 85.56%. Of the 40 Requirements challenged, the Court found that the NDA had made manifest errors in the evaluation of 24 Requirements. On this basis, the NDA should therefore have declared RSS to be the preferred bidder.

8.80 The Court also considered a number of threshold scores which were 'cliff edge challenges', and agreed with ES that CFP should have been disqualified on two separate grounds had the NDA applied its scoring system as published in the SORR. The Court said that once the NDA had set and published its scoring scheme, it had to apply it without leniency, even if this had some unintended consequences.

8.81 This 'threshold' aspect of the Judgment is important for two very different reasons. First of all, the result of this was that the CFP bid should have been knocked out of the Competition, irrespective of its other scores.

8.82 Secondly, it was this aspect of the NDA's evaluation which attracted most criticism from the Court. The Court found that the NDA had sought to avoid the consequence of disqualifying CFP by 'fudging' the evaluation of certain Requirements. Although the Judge later made clear that he was not alleging bad faith on the part of the NDA, this is one of the Court's findings which I consider most troubling, and on which the Inquiry has closely focussed.

The Threshold issues

Requirement 306.5.1(j)

8.83 This required bidders to demonstrate how they would maintain the SLCs' requirements to contribute, support and develop the NDA's National Programmes initiative.

8.84 The evaluation methodology for this 306 Node required that any material omission in a response to this particular Requirement would attract a score of 1 (below threshold) but that a non-material omission could be awarded an 'above threshold' score of 4.

8.85 Initially the evaluators for this Requirement awarded CFP's response a score of 1, on the basis that "…*no **process**, or **evidence** appears to have been offered for NDA National Programmes*…" (original emphasis). Subsequently, and following discussion between the evaluators and the Head of Competition, the score was changed to a score of 4, the stated rationale being that "*procurement activities to support the NDA National Programmes can be inferred from engagement with the SSA* [Shared Service Alliance] *and its work to facilitate the National Programmes… but more explicit detail is not provided: this is therefore considered an omission*". (Underlining added for emphasis).

8.86 The Court found that CFP's bid contained a "*material omission*", and that it was manifestly erroneous for the evaluators to give CFP a score of 4. It concluded that the three 306 evaluators were correct in their original judgement that CFP's bid response failed to address the specific elements of the Requirement, and that the necessary content for the response could not properly or sensibly be "*inferred*" from other entries in CFP's bid. It followed that the score of 4 was not lawfully awarded, and the correct score should have been 1. CFP should therefore have been disqualified from the Competition.

8.87 During the liability trial the Court heard from only one of the three 306 evaluators and the Head of Competition. The Inquiry has taken evidence from all three 306 evaluators and the Head of Competition on the discussion that took place between them shortly before the change of the score. There was conflicting evidence before the Inquiry concerning whether in that discussion the Head of Competition put pressure on the evaluators to score CFP's bid in a way that would avoid disqualification. One of the witnesses considered that the tone of the Head of Competition's comments did place the evaluators under pressure to change the score, whilst the other witnesses either did not feel such pressure, or could not recall the discussion.

8.88 It seems to me that the differences in the accounts of the discussion with the Head of Competition are not so much as to what was said, but how it was said, and how it was interpreted. That is not altogether surprising. Different people can interpret the spoken word, and how it is uttered, in different ways. The background context of the discussion was plainly the evaluators' joint concern that a bidder might be disqualified from the Competition.

8.89 I express no preference for the competing accounts of how what was said by the Head of Competition came across to the 306 evaluators.

8.90 During preparation for the liability trial, the 306 evaluator who considered that the tone of the Head of Competition's comments placed them under pressure was not approached to give evidence in relation to the scoring of this Requirement. The conflicting account of events was therefore not discovered.

8.91 For the avoidance of any doubt, I do not intend any criticism of anyone in this regard. The NDA had chosen, for understandable reasons and in consultation with its external legal advisers, a different witness to address this Requirement, and that witness had given a credible and comprehensive account of the events in question. In such circumstances, it seems to me reasonable for those with conduct of the litigation to decide it was not necessary to take further evidence on the scoring of this Requirement.

8.92 Nevertheless, the Inquiry has considered whether, if discovered at the time, the conflicting account of events may have influenced the NDA's conduct of the litigation. The Inquiry was told by Leading Counsel that had he been aware of the inconsistent accounts at the time, he would want to have spoken to the others involved in the particular discussion. It would not have been possible to put a one sided version of the discussion before the Court, and the inconsistency may well have had significant implications for his assessment of the merits of the NDA's defence.

8.93 Although hypothetical, had the conflicting account of events been known at the time, it would potentially have had profound consequences for the future conduct of the litigation. The NDA would have been confronted with a material conflict of evidence on the scoring of a crucial cliff edge Requirement that would have imperilled its ability to present to the Court the same line of defence, and further worsened its prospects of success. I consider that situation would have had serious implications for the NDA's litigation strategy, and almost certainly would have heightened the need to reach a settlement with ES.

Requirement 401.5.1(b)(ix)

8.94 This Requirement required bidders to provide, in A0 page format, a *"resource profile graphic for each year of the contract as a percentage of the Phase 1 Target Cost or Phase 2 Target Cost (as applicable), representing the total resource cost split down by employed, agency supplied worker and contract supplied worker and supply chain"*. The bidders had to provide an A0 chart or graphic summarising information that was contained elsewhere within their bids. This was a pass/fail threshold Requirement, with the evaluation methodology requiring that a response would be below threshold if it failed to address the Requirement, failed to address it "*clearly communicated in the A0 format*" or contained material omissions or material inconsistencies.

8.95 The evaluators for this Requirement originally determined that CFP's response did not meet the Requirement in that the graphic supplied by CFP made no reference to supply chain resource. The 401 evaluation team sought advice from a member of the CCT, following which the evaluators issued a Bidder Clarification Request ("BCR") to CFP seeking clarification of where they had responded to the Requirement to include the supply chain split out from the resource profile.

8.96 CFP provided a response to the BCR, which stated that they had not broken out the specific supply chain resource costs. That BCR response was reviewed by the Head of Competition, who decided not to pass it on to the

401 evaluation team, but instead to issue a second "*more pointed*" BCR to CFP. CFP's response to the second BCR effectively stated that the supply chain costs were split out in a different graphic (the 'Spend Profile') provided in response to a different Requirement, namely 401.5.1(b)(viii). This response was again reviewed by the Head of Competition, and this time he did pass it on to the 401 evaluation team.

8.97 In evidence to the Court and to the Inquiry, the Head of Competition said that he could not recall why he did not pass the first response to the 401 evaluators, but assumed that he must have felt at the time that it did not answer the question that had been asked in the first BCR.

8.98 Following receipt of CFP's response to the second BCR, the evaluation score was amended, after reopening of the AWARD system, to a pass. The rationale for the score was also changed to refer to the (second) BCR response, and to state that inclusion of supply chain in the Spend Profile was considered to have "*vicariously*" met the requirement. This rationale was subsequently changed again, following the Burges Salmon Review, to remove references to the BCR response and to the Requirement having been "*vicariously"* met.

8.99 The Court did not accept that Requirement 401.5.1(b)(ix) could be satisfied by material elsewhere in the bid response. The judge also criticised the NDA for breaching the obligations of transparency and equal treatment of bidders, both through the issuing of two BCRs, and by later removing the reference to the second BCR in the scoring rationale. The Judge held that the correct score should have been a Fail, which would have resulted in CFP's disqualification from the Competition.

8.100 Having heard from relevant witnesses to the Inquiry (who after all this time had incomplete recollection of the events), I see no reason to depart from the findings of the Court that the evaluators were correct in their original assessment that CFP's bid had not met the Requirement, and that the use of BCRs by the Head of Competition was inappropriate in the context of the NDA's obligations of transparency and equal treatment of bidders.

Fudging

8.101 In its Judgment (delivered in July 2016), the Court concluded:

> *"CFP should also have been disqualified from the competition, by application of the very rules contained in the SORR that the NDA itself drew up that governed the competition. The SMEs themselves realised during the evaluation process the draconian effects of the NDA's own rules upon the*

CFP bid, so far as the Threshold Requirements were concerned. They sought guidance from the Core Competition Team and a way was found to avoid disqualification of CFP. In my judgment the NDA sought to avoid the consequence of disqualification by "fudging" the evaluation of those Requirements to avoid reaching the situation where CFP would be given a "Fail" or "Below Threshold" score. By the word "fudging" I mean choosing an outcome, and manipulating the evaluation to reach that outcome. This was by choosing a score high enough to avoid that undesirable outcome, rather than by arriving at a score by properly considering the content of the tender against the scoring criteria."

8.102 In a later related judgment, the same Judge stated:

"There were no allegations of bad faith against the NDA generally, or any of the SMEs specifically. I made certain criticisms of some of the NDA witnesses, which were interpreted (at least initially) by the NDA's legal advisers as amounting to bad faith, but were not intended to do so. Whether in law they amounted to such findings was a point relied upon by the NDA in its application for permission to appeal, ... and in my written reasons for refusal of permission I make clear that no such findings are included in Judgment No.2 (Liability) nor its appendices. There are therefore no findings that there was any deliberate intention to infringe in this case."

8.103 I share the Court's view that there was no bad faith on the part of those involved in the evaluation and scoring of the Magnox bids. The fact that, as the Court found, and as only realised during the evaluation itself, strict application of the SORR could lead to bidders being disqualified explains why evaluators wrestled with scoring certain Requirements, and sought assistance. Ultimately, they did what they thought was best in challenging circumstances.

8.104 I should make clear, and for the avoidance of doubt, that the Inquiry has found no evidence of any bias on the part of the NDA in favour of keeping CFP in the Magnox Competition.

From Judgment to Settlement with ES and Bechtel

8.105 Although the NDA knew that there was a prospect it could lose the claim, it was not prepared for a judgment that was so critical of the conduct of its staff and the organisation. Initial consideration of the Judgment tended to focus on the aspects which the NDA considered to be unfairly critical of individuals and/or out of kilter with what it perceived to be good procurement practice.

8.106 Having up to then had minimal involvement, the NDA Board was briefed, as were Ministers and senior officials at BEIS.

8.107 The next step was for the NDA and its lawyers to consider the Judgment in detail, and the options available to it. These would be to continue to fight liability through an appeal, to prepare for the next step in the process which would be the quantum proceedings on the amount of damages to be paid by the NDA having lost the liability trial, or to seek a settlement with ES.

8.108 Given the outcome of the Judgment, BEIS' legal team took a more active interest, as did the wider Government Legal Department. Steps were taken to allow individuals from BEIS and the Government Legal Department access to the confidential parts of the Judgment, and to the NDA's legal advice.

8.109 Meetings were convened across Government by the Permanent Secretary for the Cabinet Office, involving, among others, BEIS and Cabinet Office officials and lawyers. Catalysed by the outcome of the liability trial, these meetings considered the wider issues with the NDA. These included emerging concerns regarding the scale of cost escalation of the consolidation changes, and the potential impact on the overall cost of the CFP Contract (which I discuss in Section 9 below). It was recognised, as part of the process leading up to the quantum trial, that disclosure of the rising costs of consolidation might increase any claims for damages by ES and Bechtel.

8.110 In September 2016 the NDA hired a second law firm, Simmons & Simmons, to provide additional advice on the litigation strategy going forward, and the merits of appeal. That role later extended to advising in relation to consolidation and the ultimate settlement with ES.

8.111 Recognising the need for dedicated senior legal support, the NDA (with support from UKGI) brought in an in-house temporary legal adviser who was an experienced former senior partner at a leading law firm who had also held a very senior General Counsel role. This individual offered a fresh perspective on the issues the NDA was facing and, within a short period of time, made a material and positive contribution to their resolution.

Bechtel claim

8.112 To make matters more complicated, Bechtel (the other member, alongside ES, of the losing bidder consortia RSS) belatedly brought a claim in August 2016. Although a claim based on the original conduct of the procurement would have been well out of time, Bechtel claimed that the Judgment brought to light new facts, and so set the clock ticking again. Although Bechtel might have had difficulties with its claim because of its lateness, if successful on the

back of the Judgment involving ES, its claim as a 60% shareholder in RSS could have been for a significantly greater value than that of ES.

Appeal of the Judgment

8.113 The NDA was minded to appeal, firstly because it took issue with certain of the Court's findings which it found extreme (some factual findings which it considered to be incorrect and some criticisms it felt were undue), and secondly, because this could help in the subsequent quantum hearing, or be a negotiating factor in any potential settlement. There were also broader concerns about the implications of the Judgment on good procurement practice, which were thought capable of being resolved through an appeal.

8.114 With the support of Government, the NDA lodged an application for permission to appeal with the Court of Appeal against a number of the findings in the Judgment in October 2016. A hearing was set down to hear this application in or around March 2017, but for the reasons set out below, this was not required.

8.115 On 21 October 2016, ES made a formal offer to settle, which was not accepted by the NDA at the time. However, by November 2016, the clear legal advice to the NDA (including from Burges Salmon, Simmons & Simmons, the NDA Counsel team and First Treasury Counsel appointed to advise NDA and BEIS jointly) was that it should settle ES' claim if it could.

8.116 Whilst all this was up in the air, the NDA still had to begin preparing for the quantum proceedings. The quantum proceedings were to be heard by the Court in late 2017 and would be significant proceedings in their own right. A separate Leading Counsel with specialist expertise in this area was appointed to advise. Around this time came an emerging concern among the NDA in-house legal team and the external legal advisers that disclosure (as part of the procedural process leading up to the quantum trial) of the NDA's handling of consolidation could potentially lead to further criticism of the NDA's conduct.

Eventual Settlements

8.117 In January and February 2017, the NDA worked with Government to reach a formal decision to settle, and to work out what it should settle for. UKGI provided additional financial expertise to provide increased visibility and assurance for the Government on the numerical analysis sitting behind any settlement. Simmons & Simmons provided advice on settlement, in terms of timing and quantum.

8.118 In the case of ES a total settlement amount of £85 million (inclusive of £8.5 million legal costs) was arrived at against an initial amount claimed by ES of £118 million. The NDA also agreed settlement payments with Bechtel of $14.8 million, plus costs of around £462,000 (approximately £12.5 million in total). The settlement terms were approved by the NDA Board, and were within the terms of the mandates granted by BEIS Ministers and HM Treasury.

8.119 At the same time the NDA announced that it had decided to terminate its contract with CFP. This amounted to a clean break by the NDA with the whole of the Magnox Competition. In the next Section of this Report, I will explain how and why the NDA reached this decision, and what happened next.

9. Consolidation and contract management

What is consolidation?

9.1 Consolidation was the process by which CFP (as the winning bidder) could request changes to the contract to reflect any differences between what it had been told to assume during the Magnox Competition as to the state of the sites in September 2014 (when it would take on responsibility for those sites) and the actual state of the sites at that date. The NDA assumed liability for any additional scope required as a result of these differences. This meant that in those circumstances CFP would be entitled to increases to the Target Cost in order to protect (and potentially increase) the Target Fee it could earn under the contract.

9.2 This Section considers the various issues that contributed to the problems on consolidation, in particular the fact that many more changes were submitted by CFP than was expected during the consolidation process, due to a much greater difference between the expected as compared to the actual state of the sites. This level of change impacted the contract and Target Cost so significantly that it gave rise to legal concerns that it would become a materially different contract (a concept known in procurement law as 'material variation' which I discuss later). This Section sets out how and why this occurred, and the events that led to decisions on contract termination.

Resourcing of consolidation

9.3 Until July 2016, the NDA's SFT was responsible for managing the consolidation process which would, for example, include scrutinising and then accepting or rejecting the changes submitted by CFP as part of this process. This responsibility was in addition to the SFT's responsibilities for day to day management of the Magnox Contract. The NDA at the outset of consolidation assumed it would be business as usual with a manageable level of change controls to process. This was influenced by the fact that it considered the baseline to be robust. As discussed in Section 5, the SFT - which was the NDA interface with the CFP team managing the Magnox SLCs - was a relatively small team (fewer than 20 people). In contrast, CFP had in the region of 3,500 staff.

9.4 The SFT reported to the NDA's CFO, who also had overall operational responsibility for the delivery of the Magnox Contract. Although the CFO had held overall operational responsibility for the Magnox sites since July 2011, in my view the operational responsibilities for a process such as consolidation would not typically fall within the remit of an organisation's CFO. They were the kind of responsibilities that, at an Executive level, I would expect to see sitting with a Commercial Director or a COO.

9.5 An MPA review in June 2014 recommended that the existing SRO (the Strategy and Technology Director) remain in place until the conclusion of consolidation for consistency. The NDA followed that recommendation. However, the SFT was managing the consolidation process and reporting on this to the CFO. With formal SRO accountability sitting with another Executive - the Strategy and Technology Director (to whom the CFO would then have to report regarding consolidation) - this created split lines of accountability.

9.6 Burges Salmon continued to provide legal advice to the NDA during the consolidation process. However, they had a much reduced role when compared to the procurement and litigation phases. Generally speaking, their advice was only sought on specific issues and at particular points in time, and Burges Salmon were not privy to much of the day to day progress of consolidation. The NDA also sought legal advice from external lawyers Simmons & Simmons on consolidation issues from the autumn of 2016.

The contract baseline

9.7 In order to explain how the problems with consolidation arose, it is necessary to revisit some crucial decisions taken by the NDA prior to the contract being awarded to CFP. These decisions related to how the scope of the work to be conducted under the contract was to be identified: what is commonly known as identifying the contractual baseline.

9.8 The scope of the work to be conducted under the CFP Contract was defined by two points:

9.8.1 the start point, being the state of the sites at September 2014 when CFP took over responsibility for those sites. During the Magnox Competition, bidders had been provided with the LTPs that the SLCs had been working to as at April 2013. These plans were known as LTP 48 (48 denoting that April 2013 was period 48 of the plans). LTP 48 set out the work that had been undertaken as at April 2013, and the remaining work that would need to be undertaken to reach the various

end states set out in the plans. Bidders were told to assume that in September 2014 the sites would be in the state forecast in LTP 48; and

9.8.2 the end point, which was defined in a document called the Client Specification, which had been produced for the purposes of the Magnox Competition. This set out the outcomes the NDA wished to achieve by 2028 (the end of the 14 year term of the contract to be awarded through the Magnox Competition). In summary, the outcomes were for the various sites to be decommissioned to defined 'interim states' or 'interim end states' by 2028.

9.9 As I mention above, the NDA assumed liability for any additional scope of work required as a result of any differences between the LTP 48 forecasted state of the sites in September 2014, and the actual state of the sites as at that date. There were two main factors which could cause such differences to arise:

9.9.1 any inaccuracies (either as to the work already carried out or as to the remaining work required) within LTP 48 when it was issued in April 2013; and

9.9.2 the performance of the incumbent contractor between April 2013 and September 2014.

9.10 The accuracy of LTP 48 was crucial to the success of the Magnox Competition. The Inquiry has therefore examined the extent to which LTP 48 had been tested and investigated by the NDA, and the extent to which the financial impact of any uncertainty in that baseline had been understood by the NDA.

9.11 It is important to remember that LTP 48 was not created for the purposes of the Magnox Competition; it was an operational document, used and updated by the incumbent Magnox contractor and the NDA to detail the programmes of work that were being undertaken at the sites. LTP 48 had been derived from detailed decommissioning plans. For the Magnox sites, this plan was called the Magnox Optimised Decommissioning Programme ("MODP"). The NDA also had an equivalent plan for the RSRL sites.

9.12 Prior to the commencement of the Magnox Competition, the MODP had been independently assured (by external consultants) in July 2011. In summary this assurance was focussed on the question of whether the programme of work in the MODP was achievable, not on whether the actual progress on the delivery of the plan was on schedule or would remain on schedule. This assurance found that a number of milestones for key sites would be later than

indicated in the plan, but considered overall that the end state expected was achievable by 2028. The NDA's SFT also undertook its own internal assurances of the MODP in 2011 and 2012.

9.13 Crucially however, there was no separate assurance (or investigation) of the reliability of the MODP or LTP 48 for the purposes of the Magnox Competition itself prior to the Competition starting. The evidence given to the Inquiry suggests that the CCT considered that the MODP (and the LTPs derived from it) was owned by the SFT, who had informed the CCT that the baseline was robust and reliable. Similarly, the NDA Board was told that the level of understanding of the baseline plans mitigated against the risk of increases in costs, and the loss of the savings hoped to be achieved from the Magnox Competition. I consider that failure to undertake assurance for the MODP and LTP 48 for the Magnox Competition was an unnecessary risk to take in light of the high value of this contract.

9.14 In fact, the reality that performance at a number of sites (Bradwell, Trawsfynydd and Berkeley in particular) was behind schedule was known within the NDA. The SFT were aware of a number of significant issues, and there was some awareness of those issues within the CCT and the Executive team.

9.15 Bidders were not asked to take the known performance delays (which were not reflected in LTP 48) into account when preparing their bids, and instead the issues were left to be resolved through the consolidation process.

9.16 Shortly before the finalisation of the NDA's FBC in June 2014, the SFT were asked to provide an estimate of the likely value of the changes that would be required during consolidation as a result of differences between the forecast in LTP 48 and the actual state of the sites. This resulted in a contingency of £397 million being included within the FBC in respect of the first 7 years of the contract. Witnesses provided evidence to the Inquiry that, when other figures are taken into account and extrapolated across the full 14 year team, there was contingency of £997 million within the FBC.

9.17 By March 2017, when the NDA announced its intention to terminate the CFP Contract, the value of consolidation related changes submitted by CFP was greater than £1.8 billion. The NDA attributed just over £1.1 billion of those changes to variances between the baseline and the actual state of the sites. However, the NDA was unable to identify how much of those changes were attributable to inaccuracies in the baseline when it was issued (April 2013), and how much was attributable to under performance by the incumbent

contractor between April 2013 and the start of the CFP Contract in September 2014.

Progress of consolidation

9.18 As can be seen from what I set out below, there were two key features to the actual progress of consolidation that the NDA was required to manage:

9.18.1 the volume and value of the changes submitted by CFP was far greater than the NDA anticipated. In total, CFP submitted in the region of 130 change requests which sought to increase the Target Cost by approximately £1.8 billion; and

9.18.2 the submission and consideration of change requests was much more drawn out and complex than had been envisioned. The contract required CFP to complete consolidation within a 12 month period, from 1 September 2014 to 31 August 2015. However, the consolidation process was still outstanding at the time when the NDA announced it was terminating the CFP Contract in March 2017.

9.19 Although CFP ultimately submitted in the region of 130 change requests, by June 2015 (just three months before the end of the contractual deadline for the conclusion of consolidation) fewer than 10 requests had been submitted. The Inquiry was told that the main reasons for this lack of progress were CFP's focus on operational delivery on the ground (where it was generally felt that they had made a positive start, for example in delivering workforce restructuring and IT systems rationalisation), and a mutual recognition on the parts of both the NDA and CFP that the scale of the changes required during consolidation was greater than expected.

9.20 On the evidence before the Inquiry, it appears that the NDA Board was not formally updated on the progress of consolidation until June 2015. The minutes of the NDA Board meeting of June 2015 record that difficulties were being experienced in the development of a consolidation plan, that consolidation may not complete until April 2016 (seven months later than the deadline required under the CFP Contract), and that the NDA was estimating an increase of £600 million (£200 million lower than CFP's own estimate at that time).

9.21 A further update was given to the NDA Board in July 2015. The accompanying paper recorded that that the NDA was under no obligation to

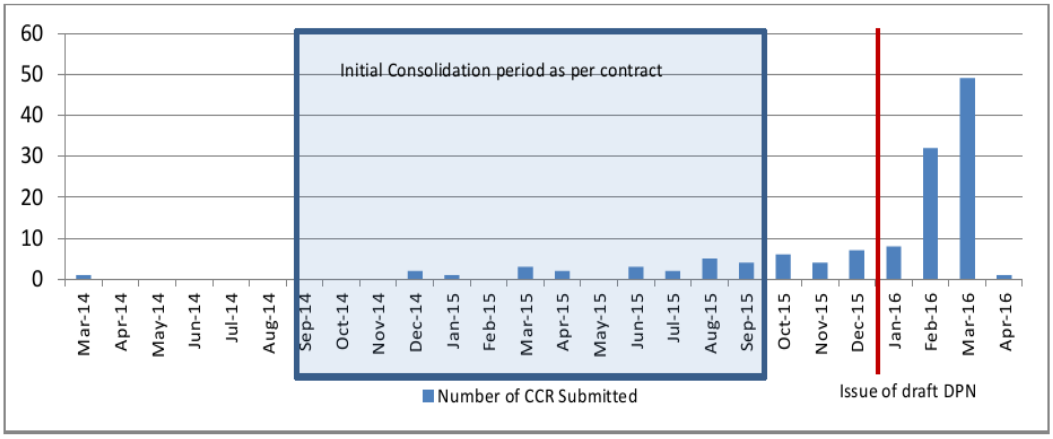
accept completion of consolidation beyond the contractual deadline and that, in principle, the NDA could terminate the CFP Contract for default by CFP. The paper recorded that, in practice, termination would cause considerable detriment to the NDA's objectives, and that instead the NDA would extract maximum value from CFP in return for the NDA's concession that consolidation could extend beyond the original contractual deadline. The paper also reported on positive actions and outcomes taken by CFP on the ground in relation to the day to day performance of the contract.

9.22 The NDA subsequently extended the contractual deadline for completion of consolidation to March 2016. In return for doing this, the NDA required CFP to submit a 'long list' of all the change requests it intended to issue. The long list was not intended by either party to limit or control the financial value of the changes which would ultimately be submitted by CFP, but it was agreed that CFP could not issue change requests for matters that were not included within the long list.

9.23 Despite the submission of the long list, and the extension to the contractual deadline for completion of consolidation, there was no immediate material increase in the volume of change requests actually submitted by CFP. As a result of growing concerns on the part of the NDA, the NDA provided CFP with a draft 'Defective Performance Notice' ("DPN") in January 2016. A DPN was a formal mechanism under the CFP Contract for notifying of performance failures. There was evidence before the Inquiry that the NDA had been reluctant to issue a DPN because of concerns that it could damage the relationship with CFP and impair the positive performance by CFP on the ground. A formal DPN was issued by the NDA in April 2016 - this was rejected by CFP.

9.24 The draft DPN appears to have caused a change in behaviours, and the NDA Board minutes of February 2016 recorded that it had "*elicited a step change in the frankness of the exchange between the parties about the reasons for the poor progress against the plan*". There had also been an increase in the volume of change requests submitted by CFP, which can be illustrated by the following graph (taken from an NDA internal audit report of March 2017):

Extract from the NDA Internal Audit Report March 2017



12

9.25 Just as significantly, CFP's estimated value of the consolidation changes had increased to between £850 million and £1.2 billion. The NDA Board was informed of this increase, and of the fact that there was real doubt over the credibility of the revised March 2016 deadline for completion of consolidation, at the February 2016 Board meeting. The minutes of the meeting record that:

"Members expressed their significant disappointment with this outcome. They were astonished that the range is so large and view this as a failure. The CEO agreed and informed the rest of the members that he accepts this is a serious failing. The Chairman felt it was necessary for two or three of the Non-Execs to undertake a deep dive exercise on this."

9.26 Evidence to the Inquiry highlights a lack of clear understanding among relevant individuals as to what this reference to a 'deep dive' was intended to mean. Witnesses explained that certain Non-Executive Directors did engage with Executive team members to better understand and discuss the progress of consolidation to that point. However certain witnesses stated that this did not amount to a 'deep dive' and I agree. Eventually, the terms of reference for an internal audit review, sponsored by a Non-Executive member of the NDA Board, were agreed and this commenced in August 2016. It does not appear to me that the concerns raised following the February Board meeting were acted upon with the urgency I would have expected.

[12] Source: NDA Internal Audit Report March 2017, page 13

A change of approach

9.27 The February 2016 board minutes also record that the NDA was considering taking an alternative approach, namely a "*top down*" approach which would involve the NDA and CFP "*agreeing the line items for change and the approximate valuation and only developing an auditable change control once the principles have been agreed*".

9.28 Witnesses told the Inquiry that this alternative approach was being considered because there had been an impasse at the operational level. Although the contract included a dispute resolution mechanism which could have been used to have the disputed changes resolved by an independent third party, the evidence is that the NDA were reluctant to engage that mechanism for fear of damaging the relationship with CFP. Accordingly, the NDA hoped that the deadlock could instead be resolved by escalating the matter to a more senior level.

9.29 The potential value of consolidation changes continued to rise. By March 2016, the value of the consolidation change requests submitted was approximately £1.8 billion. The NDA considered that it had grounds to reject approximately £550 million of those changes. CFP did not agree that the NDA was entitled to reject any of the changes. The revised deadline of March 2016 for completing consolidation was missed.

9.30 On 3 March 2016, the NDA commissioned an assurance review of the status and effectiveness of the measures it was taking in relation to consolidation. The review was conducted by an 'expert panel' consisting of NDA staff plus representatives from Burges Salmon and the Nichols Group (a third party consultant specialising in infrastructure and complex projects) (“Nichols”). The review reported on 1 April 2016, and made a number of key recommendations including that (i) the NDA should formally issue a DPN; (ii) the NDA should not pursue options for concluding consolidation outside the existing contractual provisions; and (iii) it was "*vital that the contract is brought under control*" by finalising consolidation as soon as possible.

9.31 Meetings, led by a director of the NDA and representatives of the SLC managed by CFP, commenced in April 2016 to try and resolve the consolidation deadlock. A number of alternative approaches were considered, which included an option described as agreeing "*a maximum cost not to exceed*". Under that option, the NDA and CFP would agree a maximum cost for the work to be performed under the contract, with a single change request being issued to adjust the Target Cost to that value.

9.32 In May 2016, the NDA asked Burges Salmon to provide legal advice on the "*maximum cost not to exceed*" option. Burges Salmon advised very strongly against that option, highlighting that it would be "*quite starkly opposed to the spirit of the contract in a number of ways*". Burges Salmon also advised that agreeing a resolution to consolidation that was not provided for in the contract could constitute a material variation and a breach of procurement law.

9.33 Following receipt of that advice the NDA narrowed down the options under consideration to three:

9.33.1 Option 1 - Continue to apply the existing contractual change mechanism;

9.33.2 Option 2 - Negotiate an amendment to the contract to reduce/cap CFP's ability to earn additional Target Fee by achieving savings against the Target Cost; or

9.33.3 Option 3 - Negotiate a commercial settlement on the overall value of the consolidation changes to the Target Cost.

9.34 Burges Salmon were asked to provide legal advice on each of these options, which they did by way of a paper dated 2 June 2016. Burges Salmon rated options 2 and 3 as red legal risks, with the accompanying commentary highlighting that those options could represent material variations to the contract and breaches of procurement law. Option 3 (negotiate a commercial settlement) in addition to being rated a red legal risk, was also rated a red risk for both long term practical and financial risks (the only one of the options to be rated as red for these risks).

9.35 The NDA set up a meeting with CFP for 23 June 2016 in order to seek to agree a resolution to consolidation. In advance of that meeting, on 21 June 2016 the NDA Executive discussed a paper requesting a negotiating mandate for the relevant NDA representatives to take to the meeting. The paper stated that the purpose of the meeting with CFP was to *"… reach an agreement on the level of change controls that should properly be accepted/rejected*". The paper also summarised the SFT's view as to the appropriate level of rejections, dependent on whether a strict or a liberal interpretation of the contract was taken:

9.35.1 Pragmatic interpretation = £ 309 million

9.35.2 Current interpretation = £ 546 million

9.35.3 Rigid interpretation = £ 622 million

9.36 The paper requested the NDA Executive to agree a mandate which included the following: *"To reach an agreed position under the contract and in accordance with the principles of vfm [value for money] whereby the total value of rejections of the submitted change controls are accepted by both parties at a target of £200 m and no less than £180 m this being derived as shown in appendix A"*.

9.37 The paper requesting the negotiating mandate makes no reference to the legal advice received from Burges Salmon of the risks of the NDA agreeing a resolution to consolidation that was not provided for in the contract. One witness gave evidence to the Inquiry that the legal risks were discussed but the Inquiry has been unable to confirm whether that was the case. In any event, the NDA Executive agreed to provide the negotiating mandate requested.

9.38 The meeting with CFP took place on 23 June 2016 at which the parties appeared to reach an agreement as to how consolidation would be concluded. The contemporaneous documents produced after that meeting make reference to a rejections value of £210 million. However, the Inquiry has received conflicting evidence from NDA representatives as to precisely what was agreed at that meeting. Some NDA representatives (including those who attended the meeting with CFP) gave evidence that all that was agreed was a set of principles by which the outstanding consolidation issues would be resolved, and that the £210 million figure could have been subject to further change. Other NDA witnesses told the Inquiry that they considered that the NDA and CFP had reached a commercial agreement that £210 million of the change requests would be rejected. The contemporaneous documents show that CFP considered that an agreement had been reached at this number.

9.39 An NDA Board meeting took place on 30 June 2016. The minutes of that meeting record:

"… The consolidation process had been essentially concluded with CFP where it was acknowledged that the quantity of change was much larger than expected. A summary of the outcome was discussed with the level of fee payable within the contract clarified to Board Members."

9.40 The NDA also commissioned Nichols to provide independent assurance on the options the NDA had considered for closing out consolidation, and the NDA's preferred choice of those options. That preferred option was described

within the report produced by Nichols as an "*Executive Escalation*" and a "*negotiated settlement based on a set of agreed high level principles*".

9.41 Nichols concluded that the "Executive Escalation" option offered the highest probability (when compared to the other options under consideration) of maintaining a value for money outcome and providing an operable incentive mechanism under the CFP Contract. Nichols also emphasised that the NDA should obtain independent legal advice to ensure that the option was in compliance with the contract and with the applicable procurement regulations.

Subsequent events

9.42 Following the meeting with CFP on 23 June 2016, and the NDA Board meeting of 30 June 2016, the NDA Executive scheduled a meeting for 19 August 2016 at which they intended to conclude consolidation on the basis discussed with CFP on 23 June 2016. However, two intervening events meant that this did not happen:

9.42.1 First, the Judgment was handed down on 29 July 2016. The evidence to the Inquiry was that the Judgment materially changed the NDA's attitude towards legal risk; and

9.42.2 The NDA sought and obtained legal advice from Burges Salmon on the risks of concluding consolidation on the basis discussed with CFP on 23 June 2016. Burges Salmon advised that the legal and financial risks of doing so were high (both were rated 'red' on Burges Salmon's RAG ratings), and that there was a high risk that there would be a material variation of the CFP Contract and a breach of procurement law, both because of the value of the changes, and because they had been agreed outside the mechanisms contained within the contract.

9.43 The NDA appeared to pause at this stage and to recognise that it could not proceed in the manner originally anticipated following the 23 June 2016 meeting with CFP. The NDA wrote to CFP on 12 September 2016 stating that although it was satisfied with the "*agreement reached*" on 23 June 2016, it needed to proceed "*in a way that is more self-evidently compliant with the contractual requirements*". The letter concluded by stating that the NDA saw no reason why a revised approach would not produce a "*similar answer*" to that laid out in the principles agreed on 23 June 2016.

9.44 At around the same time, the NDA appointed a new team, in place of the SFT, to manage the consolidation process. The new team was known as the Consolidation Closure Group, and consisted of NDA staff who (for the most part) had not previously been involved in the management of consolidation.

Development of Material Variation Risk

9.45 The NDA ultimately chose to terminate the CFP Contract because of the risk that the value of the changes required during consolidation would represent a material variation of the CFP Contract. Under procurement law after a public contract (such as the CFP Contract) is awarded, its nature (so matters such as cost, scope or other essential terms) should not be materially changed or varied. If they are, this may trigger a legal requirement to commence a fresh competition for that 'materially varied' contract and could expose the public authority to legal claims for breaches of procurement law.

9.46 This risk for the NDA, in principle, was recognised from a relatively early stage in the consolidation process, but it appears to me that the risk was not taken seriously by the NDA until after the Judgment was handed down in July 2016 (which, as I have observed, changed the NDA's attitude towards legal risk).

9.47 For example, the NDA received advice from Burges Salmon on material variation risk from as early as November 2014 (just three months into the consolidation period). Burges Salmon gave further advice in October 2015, at the time the NDA was agreeing to extend the consolidation deadline to 31 March 2016. On both occasions, Burges Salmon could only advise on theoretical risk as the scale of the consolidation changes were unknown at the time.

9.48 Similarly, the NDA Board was told in July 2015 that the risk of material variation would need to be taken into account when determining the approach to take to consolidation. The quantum of adjustments to the Target Cost was specifically identified as a relevant factor at this time, but again this was a theoretical risk given the uncertainty of the scale of the changes.

9.49 As I set out above, the NDA took further legal advice from Burges Salmon in May and June 2016 on the options being considered for closing out consolidation. The advice highlighted that material variation was a significant risk, but at that stage the main focus of the advice was not on the scale of the changes but of the method by which the NDA proposed to implement them (namely implementation outside of the existing contractual mechanisms, which could itself constitute material variation, independently of the scale of the changes).

9.50 Following the Judgment, and the NDA's reconsideration of how to proceed with consolidation, the NDA obtained further legal advice from Burges Salmon. This advice continued to emphasise the high risk of material variation and highlighted, for the first time, that the most risk free option would be to terminate the CFP Contract. From this time, the focus of the material variation risk became the scale of the changes (namely an increase to the Target Costs of between £1.3 billion and £1.8 billion). The advice was that, even if the NDA conducted consolidation precisely in accordance with the existing contractual mechanisms, the scale of the changes meant that a significant risk of material variation would still remain. Burges Salmon also advised that the risk of a claim being brought in respect of material variation was exacerbated by the fact that the NDA had already been found (in the litigation with ES) to have breached procurement rules in relation to the initial award of the CFP Contract.

9.51 Thereafter, the NDA explored alternative options to conclude consolidation, including an option of splitting consolidation into two stages. The NDA obtained further legal advice on these options. This included advice from Simmons & Simmons, who had originally been retained by the NDA to provide a second opinion on the merits of an appeal against the Judgment. Broadly speaking, Simmons & Simmons provided similar advice on consolidation as that provided to the NDA by Burges Salmon: the value of the changes as a result of consolidation, and implementation of those changes other than in accordance with the existing contractual mechanisms, ran high risks of constituting material variations and breaches of procurement law. The NDA also obtained equivalent advice to the same effect from two Leading Counsel in early 2017.

9.52 The NDA considered its options for avoiding the material variation risks inherent in concluding consolidation. One of the options was to refer all the disputed consolidation change requests to the contractual dispute resolution procedure to be determined by a third party. This could have reduced or eliminated the risks associated with not using the existing contractual mechanisms, but it may not have impacted the value of the changes required. The most risk averse option was to terminate the CFP Contract, which the NDA had the right to do on two years' notice.

9.53 As I set out in Section 8 of this Report (dealing with the litigation), following the Judgment, UKGI, BEIS Legal, BEIS and Cabinet Office took a much closer interest in Magnox. The problems encountered with consolidation, and the options available to the NDA, were considered in detail by those bodies alongside the related questions concerning the ES and Bechtel claims. Ultimately, those bodies supported the NDA Board's decision, taken in March

2017, to terminate the CFP Contract because of the material variation risks that would have been caused by concluding consolidation.

Findings on consolidation

9.54 In respect of consolidation, I find that:

9.55 The NDA did not independently assure the baseline issued to bidders and therefore had no real understanding of the risk posed by any inaccuracies within that baseline. As it transpired, the variances within the baseline were so great that the NDA chose to terminate the CFP Contract due to the material variation risk that it would have faced if it had completed consolidation.

9.56 The management of consolidation lacked discipline and the necessary tight schedule management. This can be seen from the fact that the NDA Board were not updated on progress until June 2015 (9 months into the original 12 month period), by which time it was already apparent that the original deadline would be missed by a significant margin. Even when the NDA extended that deadline, there is little evidence of the NDA actively managing CFP to ensure that change requests were submitted and reviewed within the extended timetable.

9.57 The NDA had contractual rights and remedies available to it in respect of CFP's failures to complete consolidation within the required contractual timetables. These could have involved not extending the deadlines available to CFP, issuing DPNs earlier and/or utilising the dispute resolution procedure. The NDA was reluctant to use these mechanisms because of a concern over damaging the relationship with CFP and potentially impacting the positive performance seen on the ground. Whilst these are valid concerns in the context of a long term contract where nuclear safety is an issue, it appears to me that the NDA did not focus on using all of its contractual rights and remedies to its best advantage. For instance, in return for extending the consolidation period, the NDA required CFP to commit to a ‘long list’ of issues in respect of which it would raise changes. However, that long list was not effective in limiting the value of changes subsequently issued, and therefore the NDA appeared to receive little in return for the concession of its contractual right to hold CFP to the deadline it had originally agreed.

9.58 In making these findings, I accept the evidence that CFP was making good progress on the ground, and that it would not have been in the NDA's best interests to take unnecessary steps which could have jeopardised that progress. However, it seems to me that the focus on positive performance on

the ground contributed to the NDA only starting to realise the significance of the problems with consolidation at a very late stage. The NDA Board did not appear to appreciate the magnitude of these problems before February 2016, and (despite clear legal advice received prior to this point) the material variation risk did not appear to have been taken seriously by the NDA until after the Judgment in 2016 (when the NDA's attitude to legal risk changed).

9.59 Throughout this time, the NDA did not have a Commercial Director (or, for much of the time, a COO with responsibility for Magnox). Operational responsibility sat with the CFO but formal SRO responsibility with the Strategy and Technology Director, resulting in split lines of accountability.

9.60 For understandable reasons, from April 2016 the NDA explored alternative options for completing consolidation. However, the option that the NDA chose to progress was not consistent with the contractual mechanisms and, if implemented, would have exposed the NDA to the risk of further legal claims for breaches of procurement law. Even though the NDA ultimately chose not to implement that option, the documents it created showing that it was willing to act outside of the contractual mechanisms prejudiced the NDA's position in relation to the ES litigation, and contributed to the necessity of reaching a settlement with ES and the decision taken to terminate the CFP Contract.

10. Governance and assurance

10.1 This Section is confined to the governance and assurance of the various stages of the Magnox process that are set out in my Terms of Reference, which specifically request me to report on these topics. I also consider the manner in which the NDA operates as an arm's length body, its accountability to the Sponsor Department (DECC and then BEIS), and the role of UKGI during the various stages of the Competition, Litigation and Consolidation.

10.2 Governance and assurance in the context of explaining how particular decisions in respect of these stages were made, governed and assured at the relevant time has already been addressed as part of my analysis of events in Sections 7, 8 and 9. There is inevitably, in this Section, a degree of duplication with those earlier Sections, which should be read in conjunction with this Section, to ensure a full understanding of the relevant background and issues involved.

10.3 When I use the term governance in this Report I am referring to the overall decision-making structure that operated within the NDA and across its stakeholders at the appropriate time. Good governance should set out clear accountability - specifically for projects - to ensure their delivery, allow stakeholders to manage their interests and provide appropriate resourcing, direction and decision-making support to the project team. It should also have clear and regular reporting and disclosure (including to stakeholders).

10.4 I use the term assurance in this Report to mean an independent assessment of whether the necessary ingredients are present and working as required for successful project delivery. Assurance is used by those who sponsor, govern and manage projects to help support informed decision-making and help reduce causes of project failure whilst increasing chances of successful delivery of the project's objectives and benefits.[13]

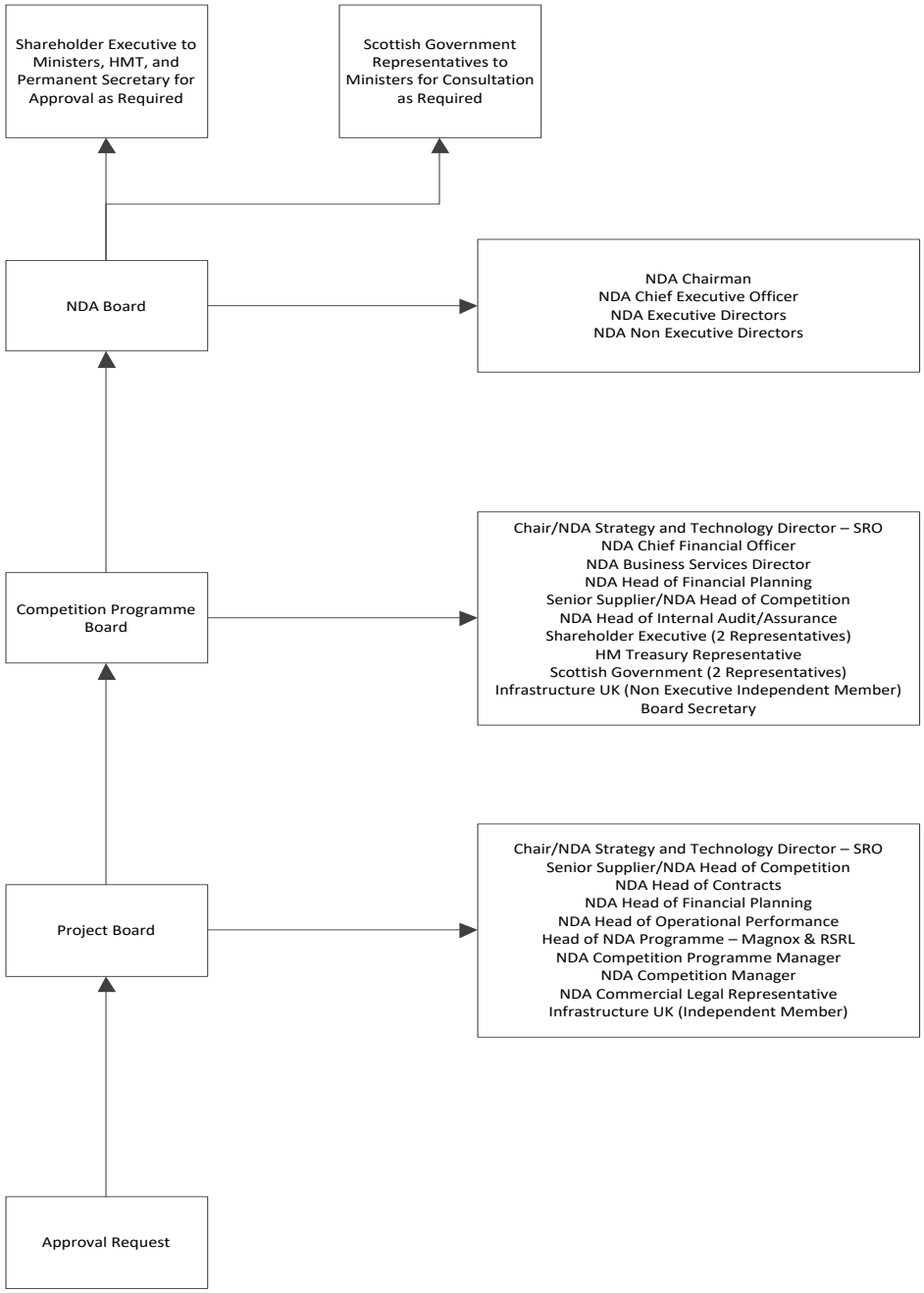
[13] NAO Report dated June 2010 Assurance for High Risk Projects provides further discussion on this.

A. During the Magnox Competition

Governance

10.5 The governance structure for the Magnox Competition can be illustrated in the following diagram.

Structure Diagram of the PBO Governance Arrangements [14]



[14] Source: Appendix A to the Governance Arrangements - PBOC - 019 document titled "PBO Governance Arrangements", Governance Structure Diagram dated 17 June 2014.

Magnox Project Board and Competition Programme Board

10.6 In general terms most key decisions relating to the Magnox Competition were to be made or approved by the Magnox Project Board and the NDA's CPB (which I have already discussed in Section 7).

10.7 This governance structure was put in place following a Partnerships UK 2007 Report which identified weaknesses in the overall approach by the NDA to its competition programme, and was intended to improve access by decision-makers within Government to key information in order to conduct decision-making in a timely manner.

10.8 The purpose of the Magnox Project Board was to support and challenge the CCT. It was accountable to the CPB and chaired by the SRO. The SRO also chaired the CPB which had a broader remit to oversee the entirety of the NDA's competition programme - not just Magnox. During the course of the Magnox Competition it was recognised that there was duplication between these two boards (as the Magnox Competition was the last and therefore only competition requiring oversight by the CPB). The Magnox Project Board and the CPB merged to become a single decision-making forum. I regard that as a reasonable decision to take in the circumstances.

10.9 With some exceptions the CPB met on a monthly basis. In practice members of the CCT would present matters for approval to the CPB as a body. At each stage of the process (market engagement, selection of shortlisted bidders, invitation to participate in dialogue and ITSFT) all documents were made available to the CPB and briefing papers were prepared explaining key points/ events and decisions to be taken. There would be a degree of constructive challenge, mainly from UKGI representatives and the representative from Infrastructure UK.

10.10 The involvement of these boards was used on several occasions as a form of assurance to the NDA Board and other stakeholders as to the robustness and quality of processes, documentation and strategy for the Magnox Competition. The primary purpose of these boards was to provide strategic direction and approvals to the NDA's competition programme overall and specifically in this case the Magnox Competition - which the CPB did as discussed in Section 7 for example. It is important to appreciate that many of the documents provided to the CPB were voluminous and highly technical (such as the SORR) and those CPB members who were not more heavily involved in the Magnox Competition may not have had the time, necessary understanding or even expertise in some cases to consider and challenge the detail of the information in front of them.

10.11 Furthermore, the inclusion of representatives from parts of Government was intended to ensure that key stakeholders had visibility and an understanding of key developments to help ensure that approvals and decisions could be provided quickly and in an informed way. Evidence to the Inquiry indicates that there was a level of misunderstanding within the NDA and elsewhere that approval of matters at CPB meetings by representatives of Government stakeholders amounted in some cases to formal approval by those stakeholders. This was not the case.

10.12 In Section 7 I discuss the role of the CPB in approving that an executive summary of the TER could go forward to the NDA Board. The CPB received the full TER and the associated assurances provided by the NDA Internal Audit team and the Burges Salmon comfort letter. The TER included reference to the MPA reviews and rating and included its summary recommendations in an appendix. The CPB did not receive copies of the MPA reports or the underlying rationale and comments to that rating. According to the minutes, there was no examination at the CPB of the scope of these assurances and any limitations, and there was no discussion of the MPA reports. Instead these assurances were generally relied upon as assuring that the competition had been robust and the right outcome achieved.

10.13 There are other instances of information which was material to the conduct of the Competition not being provided to the CPB. The most obvious example of this is the lack of detail provided to the CPB regarding the bidders' letters during standstill and the extent of the issues being raised. Evidence from independent members of the CPB in particular highlighted a lack of awareness of the scale and detail of the challenges being raised. This is surprising given the CPB's role in the Competition governance structure.

10.14 My conclusion is that the creation, role and remit of these boards was in principle sensible. However, there were instances of inadequate information flows to the CPB on matters I regard as important to the Magnox Competition. There was also less clarity than there should have been that the purpose of the CPB was to act as a governance layer as opposed to it providing assurance as to the robustness of the Competition.

NDA Board

10.15 I discussed in Section 7 the role of the NDA Board during the Magnox Competition in providing approval for key decisions and documents. I have considered the evidence before the Inquiry and have come to the view that throughout the Magnox Competition, the Chairman and the NDA Board's

prime area of focus was Sellafield. This is not surprising, given the costs involved, the level of potential hazard, the political interest and the fact that, at or around this time, the NDA was looking to change the contractual PBO model by which Sellafield was operated. Sellafield accounted for the largest single proportion of the NDA's annual spend but also represented its single biggest headache. However, that understandable focus should not have been at the expense of Magnox. As I discuss below, this was then compounded by receiving only limited information on certain important strategic and risk matters arising from the Magnox Competition. In my view the Chairman did not ensure that the NDA Board gave appropriate time and attention to the Magnox Competition and its consequences at the highest levels of the NDA until it was too late.

10.16 When considering the role of the NDA Board, I am conscious that it was neither possible nor appropriate for it to have the same involvement in, or command of, the detail of the Magnox procurement as compared with those charged with running the competition. Nevertheless, the NDA Board was still required to provide strategic oversight and approval for what was a major contractual and spending commitment for the NDA. It required accurate, timely and meaningful information in order to do so.

10.17 Generally speaking, NDA Board members received briefing papers and executive summaries of documents but only underlying documents upon request (though Executive members, by virtue of their responsibilities, had additional knowledge and understanding). For example, the Board approved the ITSFT and the SORR but only had a briefing on these documents and never saw the final documents. In relation to the TER (which I have already discussed at Section 7) it only received an executive summary. It received copies of the internal audit report and the Burges Salmon comfort letter but not the MPA reports (these were not even referenced in the Executive Summary of the TER). However, I note that those providing assurance were never invited to the NDA Board to present their findings and clarify any qualifications or limitations attaching to their assurance. In other instances, information simply did not make its way to the NDA Board. For example, the NDA Board was not formally briefed on the conduct and outcome of the Burges Salmon Review, including the number of inconsistencies identified, nor was it advised of the extent of the challenges from bidders during standstill or the strength of the related legal advice to extend standstill. Whilst I am acutely aware that there are limits as to the depth of information and detail any board can interrogate, it was unfortunate that the NDA Board did not probe further and request additional information in line with other boards in similar circumstances in my experience.

Role of DECC and UKGI

10.18 As I set out at Section 5, ShEx (now UKGI) was entrusted by DECC (now BEIS) to provide oversight of the NDA and to be the primary source of advice to the Secretary of State on the discharge of his or her responsibilities in respect of the NDA. In addition to any involvement on the CPB, UKGI held various regular governance meetings with the NDA Executive (on all issues - not just Magnox). UKGI also reported on a monthly basis to the Department through a monthly dash board and risk register as well as formal submissions and briefings. UKGI's role in relation to the Magnox Competition was not specifically defined, and with hindsight I consider it must have been difficult for UKGI to identify or provide robust challenge on some of the issues that become problematic in the context of the procurement.

10.19 That said UKGI did have (and accepts this) a remit to ensure the NDA had in place robust corporate governance and sufficient depth of capability. As I have emphasised earlier, I consider that the NDA had insufficient depth of senior commercial and contract management capability in place to run a competition of this size and complexity. UKGI did in certain cases make observations regarding wider issues of Executive capability and capacity within the NDA (not specific to Magnox). For example, during 2013 and 2016, UKGI in various briefings and presentations to Government stakeholders noted concerns over certain areas of capability within the NDA Executive. UKGI also highlighted possible lack of capacity/resource at that level and the restructuring of what is described as the commercial leadership team. However, these points do not appear to have been acted upon by the NDA, nor did it appear that UKGI had any power to require them to do so.

10.20 At various stages prior to selection of the preferred bidder, DECC and the relevant Minister were kept informed through UKGI and asked by UKGI on behalf of the NDA to 'endorse' the next steps which the NDA was proposing to take. During this process UKGI remained reliant upon the NDA for the accuracy and detail of much of the information which was then communicated to senior civil servants and Ministers.

10.21 I find that UKGI's role was not to 'man mark' the NDA, during the Magnox Competition (as several witnesses have described it), which I agree would be unnecessary and inefficient. However, in carrying out its monitoring and challenge function I query whether UKGI were challenging enough of the NDA on information they were given during the Competition. I note that UKGI had to reconcile a dual role arising from the governance framework with the NDA which required it to both (i) challenge and hold the NDA to account on behalf of the Department and (ii) be the primary day to day contact between the NDA

and Government and to help the NDA navigate Government approvals. I consider that it was somewhat inevitable that this distinction would become blurred over time, and this could have led to a lessening of the rigour with which the UKGI held the NDA to account.

Governance - Conclusion

10.22 Overall, in my view, the NDA governance arrangements for the Magnox Competition were complex and failed to provide the quality of scrutiny and oversight required for a major competition of this kind. The effectiveness of the governance framework, such as it was, was undermined by a lack of clarity in the functions of the multiple bodies and the interrelationships of various boards and set meetings.

Assurance

10.23 Throughout this period considerable importance was attached by decision-makers in the NDA and beyond to internal and external assurances of the Magnox Competition. I set out below in summary the key examples of assurance that were relied upon during this period by decision-makers as evidence that the Competition had been robust.

10.24 However, and as I have already remarked upon in Section 7, I consider it a material omission that no independent assurance of the baseline was sought prior to the Magnox Competition to understand whether there was any risk of variance between the assumed state of the sites and the actual state of the sites. Given the importance of the accuracy of the baseline to the commercial strategy and contracting model and the overall high value of this contract I find this surprising and one of the key contributing factors to the problems that arose during consolidation.

10.25 I cannot say definitively what action may have been taken (strategically or otherwise) had the inaccuracies within the baseline been revealed on closer examination. However, without adequately investigating the position, the opportunity for the NDA to identify the extent of any inaccuracies, to assess their implications fully, and to take appropriate alternative action, was not taken up.

Internal Audit

10.26 The NDA's Internal Audit team was used on several occasions during the Competition to provide some independent assurance to the CCT and NDA that the Competition was being conducted properly.

10.27 I have described in Section 7 the NDA's Internal Audit team's report on evaluation which was included with the TER in March 2014 as evidence of such assurance. This internal audit report gave a green rating, concluding that the approved procedures had been complied with. As I expressed in Section 7, this conclusion was misunderstood and did not in fact provide assurance of a robust process and outcome in compliance with procurement law.

10.28 I conclude that the NDA was too ready to accept the assurance offered by this internal audit report at face value despite its limitations of scope.

Major Projects Authority

10.29 The MPA, now the IPA, has described in evidence to the Inquiry that it regards itself as the third line of defence in assurance. The MPA described itself as an 'assurer of assurers'. I understand both statements to reflect the Lines of Defence model in assurance where the first line of defence is the business or project owner, the second is the internal risk management, compliance and/or legal function and the third is internal audit or external audit/assurance who reports directly to the Board or the audit committee of the Board.

10.30 The MPA was tasked with reviewing progress of the Magnox project at key points in its lifecycle. These were not audits but checks at a moment in time of the status of the project against the terms of reference for each review. The content of some of the Reviews is dictated by the Government's Gateway Review ("Gateway Review") process. In other cases these reviews are initiated by the SRO for the project and the scope of these reviews are agreed between the MPA and the SRO. All reviews are addressed to the SRO.

10.31 Typically, the MPA conduct all interviews, review most documents provided and write up their report in a period of 3 to 5 days. These activities are undertaken by a small team, typically of 3 reviewers. The reviews undertaken by the MPA on the Magnox Competition followed this standard approach.

10.32 During the period of the Magnox Competition three such Reviews were conducted at key points in its lifecycle.

10.32.1 July 2012 Gateway Review (for HM Treasury approval point): rated Amber/Green.

10.32.2 July 2013 Gateway Review (to inform closure of the Competitive Dialogue): rated Amber/Green.

10.32.3 February 2014 Project Assessment Review (review of progress of competition and evaluation process and readiness for next phase): rated Green.

10.33 The MPA as a matter of policy does not retain interview notes or any other papers that provide the rationale for the conclusions reached in its reviews. I make no criticism of this approach but as such the Inquiry has not always been able to check why the MPA's conclusions were reached.

10.34 In evidence MPA witnesses confirmed that their focus for many of these reviews was on the governance and process as opposed to a detailed review of, for example, the procurement documentation or the commercial model adopted. Specifically these reviews did not consider whether the NDA had applied the evaluation methodology properly, or that the Magnox Competition was generally conducted in accordance with procurement law. In this regard, it is unsurprising that the Magnox Competition was rated positively - the procurement was being well managed, to a strict timetable with clear audit trails and documentation. Nor is it surprising, as I heard from senior individuals within the NDA, that these reports were mainly used by the NDA to tick the necessary boxes to progress to the next stage. The problems with the Magnox Competition existed at a deeper level, and it was unlikely that this form of MPA review would identify these matters. With a more in-depth review of the evidence, facts, figures and a more critical assessment of the evidence provided by witnesses, the MPA might have obtained a more realistic picture.

10.35 The ratings for the Reviews conducted during the Magnox Competition, taken in isolation, provide a particularly positive view of the status of the Competition at the various points. Behind those ratings the MPA reports contained far more detailed analysis, recommendations and points of improvement on various issues. In the reviews referred to above, there were some substantive points for action. In any consideration of the assurance provided by the MPA during these reviews, these underlying rationale, comments and recommendations ought to have been flagged alongside any rating to provide a more complete and balanced picture. As I have described elsewhere, for example in Section 7, this did not occur.

10.36 In addition each review had inherent scope limitations. Whilst these scope limitations are stated at the bottom of each page of the reports, they are still not sufficiently prominent to caveat the comfort which ought to be drawn from the reports, including the ratings, by relevant decision-makers and stakeholders. In any event few decision-makers and stakeholders ever

received a copy of the MPA reports, instead relying upon simple references in briefing papers to the ratings given.

10.37 In the context of assurance provided by the MPA on the Magnox Competition I find that:

10.38 The MPA reports were seen as the main independent form of assurance by the NDA and other stakeholders. However, great reliance appears to have been placed upon the assurance provided by MPA ratings given the nature of the MPA's role, its focus and the limitations of its reviews.

10.39 MPA reviews are short and sharp and only intended to be a snapshot of the project. In the context of a very substantial project such as Magnox, the MPA would have limited opportunity to get deep under the skin of the project. The problems with the Magnox Competition existed at a deeper level, and it was unlikely that this form of MPA review could have identified many of the issues.

10.40 The consideration of the assurance provided by the MPA by decision-makers lacked critical context and detail. There is no evidence that MPA reports were shared in their entirety to decision-makers, and certainly not to the NDA Board. In many instances only MPA RAG ratings were provided to the NDA Board without any of the underlying rationale, comments and recommendations which would have provided a more complete and balanced picture. This lack of visibility of the actual reports and/or the underlying narrative limited any ability to probe and question the scope and limits of any assurance, and further led to its ready acceptance and positive reliance.

Burges Salmon

10.41 At each key stage in the procurement process Burges Salmon were asked to produce assurance in the form of comfort letters to be provided to key decision-makers and stakeholders intended to inform them as to the robustness of the Competition. As I described in Section 7, the Burges Salmon comfort letter provided alongside the TER in particular was not understood - either by decision-makers or even by senior members of the Executive. The evidence reviewed by the Inquiry suggests that no decision-makers were given the appropriate context in which to read this letter, nor was there any recorded discussion of the extent of it. Burges Salmon, like the Internal Audit team and the MPA, were not invited to either the CPB or the

NDA Board to discuss their assurance or more broadly their view of the Competition.

10.42 I conclude that the assurance provided by Burges Salmon during this time - specifically the comfort letter dated March 2014 - was received at face value by the NDA apparently without important context and any real effort to probe or question it.

Deloitte

10.43 As discussed in Section 7, on the evidence available to the Inquiry I consider that Deloitte were engaged by the NDA to provide support on the Magnox Competition in specific respects. The extent of their support was represented to decision makers more broadly in certain cases providing an impression that the Competition had benefited from Deloitte's expertise and experience and lending credibility to the robustness of - in this case - the financial evaluation approach.

10.44 In the circumstances, I conclude that the impression given of Deloitte's role in advising the Magnox Competition to decision-makers appears to have led to a greater degree of comfort than was justified from their relatively limited involvement.

General Observation on Assurance

10.45 I was struck by what appeared to be an abundance of assurance during this time. However, on closer examination I found many of these assurances to be very specific in nature with clear limitations in terms of scope and methodology. The NDA may have regularly sought independent assurance but it was, in my view, principally seeking comfort or positive confirmation of its decision and actions, rather than a more rigorous identification of key risks, and possible reasons to stop or pause. I have concluded that the NDA readily interpreted the external assurance reports in an unduly positive light, partly reflecting the widely held confidence that the NDA was an effective procurer and contract manager. This was not consistent with the philosophy of assurance that it is there to provide an effective and robust check on and challenge to processes and decision-making.

B. During Litigation and Settlement

Governance

10.46 Section 8 describes the litigation, what occurred during the liability trial and then the developments leading to settlement. Here I consider the effectiveness of the governance structure that was in place during this period.

10.47 This was a large and complex litigation which would be demanding on the NDA and its employees. To respond to this challenge the NDA made its Director of Business Services the Executive lead for the dispute. The Director of Business Services was also a member of the Governance Group put in place to be a more agile decision-making forum. This Group met intermittently throughout the litigation. However on the evidence I have seen, the key decisions were taken and strategy set by the CEO and so the Group had limited impact. For clarity, the CPB had no governance or decision-making role in respect of the litigation.

NDA Board

10.48 The Director of Business Services was a member of the Executive team but not the NDA Board and was not invited to attend Board meetings to present on the litigation. No one on the NDA Board was allocated direct responsibility for oversight of the litigation despite its size, complexity and associated resourcing and financial impact. As I described in Section 8, it is not clear what attention, if any, the dispute got at NDA Board level. There were certainly few if any formal briefings on the litigation nor any NDA Board level discussion of the strategy adopted by the NDA in defending the claim. External legal advisers were never invited before the NDA Board to present on or discuss the litigation.

10.49 As I have already concluded in Section 8, I find it surprising that in the circumstances the Chairman did not require further information, including as appropriate directly from legal advisers, to enable the NDA Board to understand, and provide challenge to the (limited) information being provided as regards the litigation and prospects of success by the CEO. This lack of involvement and oversight was a weakness in governance for significant litigation with serious financial and reputational consequences.

Role of DECC and UKGI

10.50 As discussed in Section 8, DECC had no formal role in the litigation although it clearly had an interest as it remained responsible for the application of any

public funds to the NDA and so indirectly for the funding of NDA liability which might arise.

10.51 DECC remained briefed in a business as usual way by UKGI who prepared various submissions regarding the litigation, the liability trial and ultimately settlement. UKGI staff were not lawyers and importantly were not within the circle of legal privilege throughout the litigation. As a result, UKGI was heavily reliant on information provided by the NDA with no meaningful way to interrogate that information. It is not clear to me whether those in receipt of these submissions recognised the practical limitations on UKGI in assuring certain information provided. Whilst DECC lawyers may have had some visibility of legal advice at certain points in time, this was also limited. DECC lawyers had no obvious role in the litigation: as an arm's length body conduct of litigation was a matter for the NDA.

10.52 As discussed in Section 8, UKGI did provide additional financial resource to support the eventual discussion and negotiations surrounding settlement of the ES and Bechtel claims. According to witnesses this was an unusual step for UKGI and reflected that this was a unique situation. Specifically the additional input focused on the numerical analysis of any settlement to ensure value for money and appropriate visibility and assurance of this on behalf of Government. In evidence UKGI witnesses expressed the view that UKGI considered it was necessary to have deeper involvement than would normally be expected from their day to day role in order to offer this assurance and oversight on this point.

10.53 I find that UKGI was not best placed during the litigation to conduct a rigorous and effective challenge function. UKGI's necessary reliance upon the information being reported upwards by the NDA during this period compromised its ability to provide the required level of independent assurance and oversight.

Assurance

10.54 Unlike during the Competition phase, there was no specific assurance conducted during the litigation phase. This is perhaps explained at least so far as external bodies such as the MPA are concerned on the basis that they were not entitled to see certain information regarding the NDA's case due to the operation of legal privilege. In any event MPA's focus on major projects would not typically include any matter that had become litigious.

10.55 Similarly it would be unusual for an internal audit to conduct any assurance as regards an ongoing litigation - particularly one which was involving external legal advisers and a team of experienced barristers to advise on the case.

10.56 However, what I find less easy to reconcile is the absence of any assurance being sought by the NDA at Board level in particular from Burges Salmon or Leading Counsel. It was open to the NDA Board given the scale of this litigation to invite the external legal advisers to attend the Board and provide direct briefings on the litigation, including for example on how it was being managed, risks and mitigation strategies and any potential for settlement. Indeed Burges Salmon and Leading Counsel were only invited to appear once before the Executive to discuss these matters (at the 13 October 2015 meeting as Section 8 discusses in more detail). As I have considered elsewhere, I conclude this to be a weakness in the governance and processes within the NDA.

10.57 I note that, following the Judgment, and in the run up to settlement of the claims, steps were taken by the NDA to provide the NDA Board as well as Government stakeholders with additional assurance as to the handling and terms of any settlement to be reached. This included the appointment of a temporary senior legal adviser who was invited to attend NDA Board meetings and discuss these matters with the Board.

C. During Consolidation

Governance

10.58 I have focussed in Section 9, on how the problems with consolidation arose, and how this led ultimately to the decision to terminate the CFP Contract. I now address the governance structure that operated during consolidation (which was different to the procurement phase).

10.59 I discussed in Section 9 the allocation of executive responsibilities for consolidation and the fact that there were split lines of accountability with operational responsibilities for the Magnox sites and the SFT vesting in the CFO, but formal SRO accountability sitting with another Executive, the Strategy and Technology Director. I also emphasised that during this time the NDA did not have a Commercial Director (or for much of the time a COO with responsibility for Magnox).

10.60 A key element of the decision-making process on consolidation was the Change Control Board ("CCB") (comprised of NDA staff and chaired by the

SRO), which was created initially as an approvals body for the change controls to be submitted by CFP. Its remit was expanded later to have strategic oversight of consolidation. I understand that the establishment of the CCB was a recommendation from an MPA report (and a condition of HM Treasury approval) to ensure that the change controls process was properly managed and governed. Prior to this, the NDA did not appear to have a specific governance framework in place for consolidation, in contrast to the governance layers it created for the Competition. As I have surmised earlier, this is likely to have been due to the fact the NDA anticipated that consolidation and the change request process would be business as usual, and as such a bespoke governance framework was not required.

10.61 As change control requests from CFP were materially delayed the Inquiry has been told by witnesses (confirmed by the documentary evidence) that the CCB had no reason to meet. Its first meeting took place in May 2015 and its terms of reference were not agreed until August 2015, a month before the original contractual deadline to complete the consolidation. The CCB's remit was later expanded to include strategic oversight to consolidation, but there is little evidence that it took a more interventionist role to a process that was evidently in difficulty and suffering from material delay.

10.62 The CPB though still in existence, ceased to play any active role in decision-making or approvals during consolidation and performed only a limited challenge function in relation to the increasing delays and costs.

NDA Board

10.63 The NDA Board's starting point on consolidation was what had been included in the FBC of which the NDA Board only received an executive summary as I set out in Section 9. This executive summary highlighted the headline cost savings that were anticipated as a result of the Magnox Competition yet it did not sufficiently articulate the risks attached to the contract baseline and how these cost savings would be impacted if it was materially inaccurate. Board members explained in evidence that they did not understand the possible extent of the risks that the NDA faced.

10.64 As discussed earlier in Section 9, the NDA Board received briefings on the progress of consolidation but these only started in June 2015 (three months before consolidation was contractually due to complete). Evidence to the Inquiry is that the NDA Board became increasingly concerned at the delays and scale of cost increases and recorded its concern and disappointment during the February 2016 board meeting at which the Chairman requested a 'deep dive' into these matters. The evidence is not clear from witnesses as to

precisely when any such 'deep dive' was conducted and what precisely it consisted of. However, regardless of the form it was expected to take, the requested ‘deep dive’ was not acted on with the urgency I would have expected.

10.65 Although previous legal advice had been obtained from Burges Salmon to the NDA and the risk of material variation had been identified as an issue, the NDA Board were not in a position to appreciate the significance of the impact and consequences of material variation arising from the consolidation process, from the information provided to them. Indeed it was not until much later in 2016, following the Judgment, when Simmons & Simmons (in addition to Burges Salmon) were asked to advise on the material variation risk (and perhaps on the impetus of the senior legal adviser appointed to the NDA) that the extent and impact of the material variation risk was properly relayed to and discussed at Board level. As described in Section 9, it was ultimately this risk that led the NDA Board to considering options, including the eventual termination of the contract with CFP.

10.66 I conclude once again that information flows to the NDA Board - particularly as regards the significance of time slippages and potential cost escalation - were not as regular and clear as they should be. There was also limited visibility and understanding at Board level of the effect of the risk of material variation until late in the process. The NDA Board therefore did not have the full exposure to or understanding of the issues to enable it to hold the Executive to account. This instance serves as a further example of the systemic weaknesses within the NDA during this time as regards the transmission of legal advice to the leadership, and the lack of a clear senior legal lead with direct access to the Board.

Role of BEIS and UKGI

10.67 Throughout much of the consolidation period both DECC/BEIS and UKGI were kept generally informed and were aware of the delays and cost increases relating to consolidation. The NDA continued to assure UKGI that despite some challenges it was confident of concluding consolidation within the original 10% savings target as set by HM Treasury. This appeared to be the primary focus of UKGI at this time. This message was therefore reflected in the UKGI submissions and briefings that were provided to DECC/BEIS. UKGI took the view that the final arrangement with CFP would require detailed approval in a revised FBC, which would be UKGI and BEIS’ opportunity for scrutiny.

10.68 Evidence from UKGI confirmed that it did not raise any red flags regarding consolidation at this time as it did not believe this was required. UKGI was regularly reporting to DECC/BEIS (outside of formal submissions) that there were risks involving the consolidation process as included in its risk register and dashboard. However, it considered that although there were challenges, the NDA was contractually required to complete consolidation. UKGI also considered that until there was some form of agreement between the NDA and CFP as to the value of the changes proposed, any escalation would be premature.

10.69 Throughout this process I consider that although UKGI was reporting on the general risk of delay to the consolidation process it did not have sufficient visibility of the extent of the cost escalation until later in the process nor the related risk of material variation.

Assurance

Internal Audit

10.70 Dissatisfied with the information it had received up until June 2016, the Non-Executive board members insisted on a review being commissioned by the NDA's Internal Audit team, sponsored by a Non-Executive board member, to consider how robust the original contract baseline had been; how governance had worked and whether stakeholders had been provided with enough accurate and clear information in a timely manner to allow for effective decision-making; and how the consolidation process had been managed.

10.71 The NDA Internal Audit team produced a draft internal audit assurance report on the Magnox consolidation process in December 2016. A further draft was produced in March 2017. Among other draft findings it noted governance structures intended to oversee consolidation were not established until 8-9 months into the process and may have led to reduced oversight at this stage; and that there was a lack of quality and timeliness in reporting to the Board which limited its understanding of the issues arising and its ability to respond to those especially in the early stages of consolidation. I observe that many of the findings of the draft internal audit report appear to be discerning and chime with some of the observations I have made separately in this Report. However at this point in time consolidation was ongoing and accordingly it is not clear what if anything was undertaken as a consequence of this report. The draft findings of that internal audit report had still not been fully accepted by the NDA Executive by the time of the interviews conducted by the Inquiry, and as a result the report had at this point only an interim status.

Major Projects Authority

10.72 In June 2014 and December 2015 the MPA conducted two further reviews which are relevant to consolidation which I now wish to consider.

10.72.1 June 2014 Gateway Review (the "June 2014 Review") (readiness for service review) - Amber/green

10.72.2 December 2015 Project Assessment Review (the "December 2015 Review") (review of consolidation process and progress) - Amber

10.73 Although the June 2014 Review was conducted prior to the consolidation process commencing, it was prescient in many respects. It made recommendations to the SRO with regard to the monitoring of change controls, contract and commercial management and the monitoring of benefits realisation. It specifically called out the risk arising from the fact that, under the CFP Contract, the NDA was responsible for any inaccuracies in the contract baseline. The NDA Board was provided with an update on the positive nature of the June 2014 Review.

10.74 The December 2015 Review gave an amber rating to its confidence that consolidation would be completed by the revised contractual date of March 2016. It highlighted several of the risks with the process and recommended that steps be taken with some urgency to ensure it remained on track. This MPA review and a high level summary of its findings were communicated to the NDA Board.

10.75 During consolidation the MPA reports were relied upon less evidently as a form of assurance to the NDA Board and other stakeholders as compared to the Competition process. Nonetheless, a degree of comfort still appears to have been drawn from the mere fact that the MPA had conducted these reviews. The December 2015 Review in particular was highly pertinent in any consideration of how consolidation was progressing. Once again, important underlying rationale and comments from this December 2015 Review was not provided to the NDA Board (though a summary was) which may have provided a greater degree of insight into some of the challenges being faced at an earlier stage in the process.

Burges Salmon and Simmons & Simmons

10.76 Burges Salmon was not engaged by the NDA during consolidation to the same extent as it had been during the Competition phase. Advice was sought on a more ad hoc basis on discrete issues. However Burges Salmon did provide formal legal advice on a number of occasions as set out in Section 9.

These pieces of legal advice highlighted at different points the risk of material variation in principle and then the actual risk of it impacting the contract in light of the information being made available to Burges Salmon as to the scale of cost change. Simmons & Simmons also gave advice on material variation following instruction and on receipt of the relevant information. As described above, eventually this external legal advice reached the NDA Board and on one occasion Simmons & Simmons was asked to address the Board on its advice (the first and only occasion that this had occurred during the period relevant to my Terms of Reference). I find this lack of visibility of key legal advice and access directly to external legal advisers unsatisfactory for the reasons already provided.

Nichols Group

10.77 Nichols (an external consultancy specialising in infrastructure and complex projects) was commissioned by the NDA to contribute to an assurance review conducted by the NDA in March 2016 on the status and effectiveness of the measures it was taking in relation to consolidation. The review was conducted by an 'Expert Panel' consisting of NDA staff and representatives from Burges Salmon and Nichols. This reported in April 2016 and made a number of key recommendations. It is not clear to me from the evidence available whether the NDA acted fully upon the recommendations made.

10.78 A later report in summer 2016 conducted by Nichols alone on the options put forward by the NDA for closing out consolidation concluded that the NDA's preferred option offered the highest probability of maintaining value for money (compared to the other options) but that this option required robust legal analysis to ensure compliance with the contract and procurement law.

Concluding remarks

10.79 As previously expressed in my principal Findings, many of the events that I have considered appear to have been subject to an impressive amount of assurance. However, closer analysis suggests that much of this assurance was narrow or limited and often sought, in my opinion, to seek comfort or positive confirmation of the NDA’s decisions and actions, rather than robust and rigorous independent scrutiny. The assurance I have summarised above is consistent with that view.

10.80 I have also noted that where issues were identified, the NDA appears to have been slow to act on the advice or recommendations and, furthermore, failed to ensure that sufficient detail of the recommendations and/or advice was

communicated to the NDA Board. This was clearly unsatisfactory, and further undermined the overall effectiveness of the assurance provided.

Appendix 1: Steve Holliday roles and interests

1. I am currently Chairman of Cityfibre, a broadband infrastructure provider, and of Zenobe, a battery storage business. I am Vice Chairman of the Careers and Enterprise Company and Vice Chairman of Business in the Community. I am currently President of the Energy Institute.

2. The most relevant previous roles I have held are: from 2007 to 2016 I was Chief Executive of National Grid, from 2004 until 2014 I was a non-executive director at Marks & Spencer, from 2016 to 2017 I was a non-executive director of the Department for the Environment, Food and Rural Affairs.

3. As part of my work at National Grid, I worked closely with Alison Kay, currently its Group General Counsel & Company Secretary. For the purposes of transparency, I mention that Alison attended a number of NDA Board meetings in 2015 and 2016 as an observer as part of the Women on Boards initiative. She was not a witness to the Inquiry and I have not spoken with her about matters within the Inquiry's Terms of Reference.

4. For the same reason I mention that:

    4.1 Jeremy Pocklington is a board member of Business in the Community. He was interviewed by the Inquiry in respect of roles he held as a senior civil servant. I was not one of the interviewers.

    4.2 I was on the board of Marks & Spencer at the time Robert Swannell was Chairman (he took on the role in 2011). He is currently Chairman of UK Government Investments (and former Chairman of the Shareholder Executive). He was not interviewed by the Inquiry.

    4.3 I also know Volker Beckers, currently a non-executive director of the NDA, because we both have held senior roles in the energy field. He was interviewed by the Inquiry but I was not one of the interviewers. I have not spoken with him about matters within the Inquiry's Terms of Reference.

Appendix 2: Summary of 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. EnergySolutions EU Limited ("ES") 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 High Court of England and Wales ("the 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 ("SORR").

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 advisers 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 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 Court.

Appendix 3: Extracts of Partnership UK Report

Extracts of executive summary from The Partnerships UK Report

RESTRICTED – COMMERCIAL

Final

Nuclear Decommissioning Authority
Parent Body Organisation Competition Programme

Assurance Review conducted for BERR by Partnerships UK

Review Team:

[redacted] – PUK CEO
[redacted] – PUK Project Director
[redacted] – PUK Assistant Director

August 2007

PartnershipsUK

1. EXECUTIVE SUMMARY

1.10 In summary:

a. The engagement between Government (BERR and HMT) and the NDA, and the specific project governance arrangements for the programme and for the individual competitions, are not consistent with the magnitude of the programme and its importance to Government, and are not fit for purpose. Actions are underway to address these deficiencies.

b. The NDA have an independent, "let us get on with it" culture, and the environment within which the competitions are being conducted is (for good reason) closely controlled. This type of culture can bring undoubted benefits but, coupled with the practice of keeping external advisers at arms' length, it has also resulted in a degree of insularity. As a consequence there is a lack of trust which does not sit well with the reliance placed on the NDA to implement policy for such a vital public sector activity. The sense that the NDA is acting as BERR's agent with the wider public sector interests in mind is missing, and it can appear that the outcomes are secondary to delivering the competition process.

c. Greater use of advisers at a strategic level would help to bring in best practice and experience from other large, complex and demanding public sector projects.

d. The appetite of a limited number of world wide industry players to bid across the programme will be reduced by the scheduling and nature of the PBO competitions, concerns over bid costs and the other changes that are happening at this time such as the sale of BNFL and the new build debate. Any 'cherry-picking' of the PBO contracts by the bidders will reduce competitive tension and weakens the ability of the current strategy to deliver value for money outcomes.

e. The complexity of running competitions for contractors (the PBO) to take temporary ownership of an existing company (the SLC) is incompletely thought out. Evidence of this is the lack of detail that has been developed for key contract terms, such as those related to termination and the financial incentives to perform. This raises serious concerns over whether the competition strategy is able deliver the required outcomes.

f. Under the competitive dialogue procedure these aspects need to be fully developed prior to inviting the bidders to submit final tenders (ITSFT). It is therefore essential that it is demonstrated, prior to issuing the ITSFT for Sellafield, that the relevant contract documents are mature, commercially sound and capable of incentivising the desired contractor performance.

g. Similarly for the LLWR competition, the effectiveness and maturity of the contract needs to be demonstrated prior to announcing the preferred bidder,

h. The future funding of the decommissioning programme should be examined to weigh the benefits of moving to greater long term certainty, both for the overall programme and for individual SLCs.

i. For Magnox South and the later competitions the strategy of competing the PBO role should be revisited. It is not clear at present that the current strategy is best able to deliver the sought after long term benefits. Time should therefore be built into the Magnox South Competition Programme to implement the lessons that emerge from the LLWR and Sellafield Competitions and to allow any appropriate change to the procurement strategy. Any review should also re-consider the current bundling of the Magnox stations into two regions.

j. To provide assurance and create wider buy-in to the Government's decommissioning strategy HM Treasury should consider asking the Major Projects Review Group (MPRG) to review the Competition Programme and particularly the Sellafield competition.

Appendix 4: Glossary

Term	Definition
Arm's length body	A specific category of public body that includes: executive agencies, non-departmental public bodies and non-ministerial departments.
AWARD	A web-based software solution designed specifically to support complex and strategic procurement projects and which was used for the Magnox Competition.
Baseline	Information as to the state of a site or group of sites within the NDA estate (e.g. assets, materials and waste, nuclear and non-nuclear) at a particular point in time (or a forecast thereof). In relation to Magnox, references to the baseline are references to the relevant LTP (Life Time Plan).
BCR	A bidder clarification request which is made by a contracting authority to a bidder(s) for the purpose of clarifying aspects of its bid response.
Bechtel	Bechtel Management Company Limited, part of the RSS consortium.
BEIS	The Department for Business, Energy and Industrial Strategy. The sponsoring department for the NDA from April 2016 to present.
Black box	The procurement practice in which evaluations are conducted in isolation from the contracting authority's organisation to avoid any possibility or inference of undue influence with a pre-set process.
Burges Salmon LLP	External legal advisers appointed to advise the NDA on the Magnox Competition and related litigation from 2011 onwards.

Term	Definition
Burges Salmon Review	A review conducted by Burges Salmon of aspects of the scoring by the NDA of the bids received for the Magnox Competition as further described in Section 7.
CAS	CAS Restoration Partnership, consisting of CH2M Hill International Nuclear Services Limited, Areva NC and Serco Limited, one of four bidders in the Magnox Competition.
CCB	The Change Control Board which was established by the NDA as an approvals/oversight body for any change controls submitted by CFP during consolidation as further described at Section 10.
CCT	Core Competition Team within the NDA which was responsible for managing and overseeing the Magnox Competition.
CEO	Chief Executive Officer.
CFO	Chief Financial Officer.
CFP	Cavendish Fluor Partnership, consisting of Cavendish Nuclear Services Limited and Flour Enterprises Inc. The first placed bidder in the Magnox Competition.
CFP Contract	The PBA contract entered into between CFP and the NDA in August 2014 (and which became effective on 1 September 2014) for the Magnox sites.
Change controls	One of the mechanisms through which the consolidation process was formally conducted. Change Control forms were used by CFP to identify areas in which the LTP 48 position differed from the reality of the position at the sites once CFP were awarded the contract and

Term	Definition
	to request contractual adjustments as a result.
Consolidation	The process by which the successful bidder was required to create an integrated or consolidated plan across the combined estate, to introduce the measures it had proposed in its tender, and through which the parties were required to make contractual adjustments as a result of change controls.
COO	Chief Operating Officer.
Court	The High Court of Justice Queen's Bench Division, Technology and Construction Court, which heard the Liability Trial.
CPB	The Competition Programme Board with responsibility for the whole of the NDA's PBO Competition Programme, for managing upwards to NDA and UK and Scottish Government stakeholders and providing support downwards to the Magnox Project Board. The CPB had representatives from the CCT, the NDA Executive Team, NDA Internal Audit team, UKGI, HM Treasury, Scottish Government and Infrastructure UK.
DECC	Department of Energy and Climate Change. The sponsoring department for the NDA until July 2016 when DECC became part of BEIS.
Deloitte	Deloitte LLP appointed by the NDA to provide advice on financial aspects of the Magnox Competition
Dialogue	The competitive dialogue phase of the Magnox Competition prior to the submission of final tenders by bidders during which the NDA and each bidder discussed NDA's requirements and developed their

Term	Definition
	solutions.
The Dounreay PBO Competition	The NDA's previous PBO competition for its site at Dounreay, completed immediately prior to the Magnox PBO competition.
DPN	Defective Performance Notice.
ES	EnergySolutions EU Limited, part of the RSS consortium. ES was the claimant in the litigation commenced against the NDA in April 2014 in relation to the Magnox Competition.
Evaluation	The process by which the NDA evaluated bids submitted during the Magnox Competition to determine the winning bidder.
Executive Directors	A director of the NDA who is also a full or part-time employee of the NDA or holder of an executive office such as Chief Executive Officer, Chief Financial Officer or Chief Operating Officer.
Final Report	Magnox Inquiry Final Report.
FBC	Full Business Case prepared by the NDA which was submitted to HM Treasury and which sought approval to award the Magnox contract to CFP on the basis of its bid.
Gateway Review	An independent assurance review or series of reviews undertaken at key stages of a procurement or project and which is intended to support successful programme or project delivery. In relation to the Magnox Competition these were undertaken by the Major Projects Authority (now the IPA).

Term	Definition
Head of Competition	The head of the NDA's CCT (Core Competition Team).
HM Treasury	HM Treasury is the ministerial department for the economy and finance, maintaining control over public spending, setting the direction of the UK's economic policy and working to achieve strong and sustainable economic growth.
Infrastructure UK	Infrastructure UK existed from 2010 to 2016 and was part of HM Treasury that advised the Government on and supported major infrastructure projects involving public sector funding. On 1 January 2016 Infrastructure UK merged with the Major Projects Authority to form a new organisation, the Infrastructure and Projects Authority (IPA).
Inquiry	The Magnox or Holliday Inquiry.
Interim Report	Magnox Inquiry Interim Report dated 5 October 2017.
Interim State / Interim End State	One of the phases of the decommissioning process, under which sites are prepared for care and maintenance. The Magnox Contract required the winning bidder to deliver each of the Magnox Sites to an Interim State or an Interim End State by 2028.
Internal Audit	NDA's internal audit team.
IPA	Infrastructure Projects Authority. The IPA is the Government's centre of expertise for infrastructure and major projects. The IPA was formed in January 2016 by the merger of Infrastructure UK (IUK) and the Major Projects Authority (MPA).
ITSFT	Invitation To Submit Final Tenders issued to bidders in October

Term	Definition
	2013 for the Magnox Competition.
Leading Counsel	Senior barristers (Queens Counsel) appointed by the NDA to provide legal advice and representation at various points during the period covered by the Terms of Reference.
Liability Judgment or Judgment	The High Court judgment handed down in July 2016 in relation to the Liability Trial.
Liability Trial or Trial	The Trial in relation to the legal proceedings brought by ES which took place in the High Court between November 2015 and March 2016.
LPP	Legal Professional Privilege, an established legal principle which protects the confidentiality of communications (general legal advice and, separately, documents prepared in contemplation of or during litigation) between a lawyer and their client (or, in respect of documents prepared in contemplation of or during litigation, with a third party).
LTP	LifeTime Performance Plan, a programme of works (completed and to be carried out) in relation to the decommissioning of one or more of the NDA's sites.
LTP 48	The LTP for the Magnox Sites as at April 2013. LTP 48 was used as the baseline for the Magnox Competition, and bidders were told to base their bids on the assumption that the Magnox Sites would be in the condition forecast in LTP 48 when the Magnox Contract commenced on 1 September 2014.
Magnox Competition or Competition	The competition in which the NDA sought a PBO to take ownership of the SLCs relating to the Magnox Sites.

Term	Definition
Magnox Contract	The contract to own and operate the SLCs for the Magnox sites to be awarded by the NDA to the winning bidder at the conclusion of the Magnox Competition.
Magnox Limited	The SLC for the Magnox sites.
Magnox Project Board	Part of the governance structure created to support the Magnox Competition which comprised of a mix of NDA Executive Team members, CCT members, other NDA personnel and one non-executive member.
Magnox sites	The NDA sites at Chapelcross, Hunterston A, Oldbury, Trawsfyndd, Wylfa, Berkeley, Bradwell, Dungerness A, Hinkley Point A, Sizewell A, Harwell and Winfrith.
Material variation	A concept under the applicable public procurement law, material variation is where there are changes made to a public contract that are deemed to be of such a "material" nature (impacting for example price, scope and/or essential terms) that it triggers the requirement under procurement law to run a fresh tender process for that varied contract.
MEAT	Most Economically Advantageous Tender. One of the permissible bases on which an authority is entitled to base an award of a contract under the relevant procurement law.
MODP	The Magnox Optimised Decommissioning Programme which was the NDA's overall programme of works for the Magnox sites. The Magnox LTPs were derived from MODP.

Term	Definition
MPA	Major Projects Authority. A government body which worked with HM Treasury and other government departments to provide independent assurance on major projects. On 1 January 2016 the MPA merged with Infrastructure UK to form the Infrastructure and Projects Authority.
NDA	The Nuclear Decommissioning Authority.
NDA Board	The NDA Board, comprising Non-Executive Directors and Executive members.
NDA Executive	The NDA management and leadership team in place during the period relevant to the Terms of Reference.
Nichols	The Nichols Group. External consultants specialising in infrastructure and complex projects which were commissioned to advise the NDA on aspects of consolidation
Node	A group of evaluation criteria as set out in the SORR.
Non-departmental public body	A body which has a role in the processes of national government, but is not a government department or part of one, and which operates to a greater or lesser extent at arm's length from ministers.
Non-Executive Director	A director of the NDA who is not a full or part-time employee of the NDA or holder of an executive office.
OBC	Outline Business Case. A document produced by the NDA to seek approval from HM Treasury to proceed with the Magnox Competition.

Term	Definition
OJEU Notice	The OJEU notice is a compulsory stage in regulated public procurements through which an authority advertises its intention to let a contract to the European public.
PBO	Parent Body Organisation. In the case of the Magnox Competition, the successful tenderer would become the Parent Body Organisation for the two separate SLCs which made up the Magnox estate.
PBA or PBO Agreement	The first of two agreements which govern the PBO model. This is the contract directly between the NDA and the private sector PBO.
PBO Competition Programme	The NDA programme of procurement competitions which commenced with the competition for the NDA Low Level Waste Repository and which concluded with the Magnox Competition.
PBO model	The model through which ownership in the SLCs are held by a consortium of private sector companies that bid for ownership of the SLC through open competition. The PBO is expected to lead and manage the SLC(s) for the sites it operates.
Permanent Secretary	Permanent Secretary or Departmental Permanent Secretary is the most senior civil servant in a government department. The permanent secretary is the accounting officer for their department, reporting to Parliament. They are responsible for the day-to-day running of the department, including the budget.
Procurement Regulations	The Public Contracts Regulations 2006, SI 2006/5, implementing the Public Procurement Directive 2004/18/EC, (now updated and replaced by the Public Contracts Regulations 2015, SI 2015/102). These laws govern how public contracts (such as the Magnox

Term	Definition
	Contract) are competed and awarded.
Project Assessment Review	A flexible and bespoke review which is used to meet specific assurance needs of major projects. In relation to the Magnox Competition these were undertaken by the Major Projects Authority (now the IPA).
PUK	Partnerships UK, which existed from 2000 to 2011 and was focused on supporting the delivery of public infrastructure with private sector partnership in the UK. It was owned jointly by HM Treasury and the private sector.
Quantum trial	This trial would have determined the amount of damages payable by the NDA to ES following the NDA losing at the Liability Trial stage. The quantum trial never took place as the NDA reached a settlement with ES before the quantum trial was due to commence.
RAG ratings	A commonly used system to assess issues such as risk or compliance on a red, amber or green basis.
Requirements	The requirements set out in the SORR for the Magnox Competition for each of the key enabler, technical scope and methodology underpinning and cost evaluation Nodes which were evaluated against specified criteria.
RSRL	Research Sites Restoration Limited (RSRL). RSRL was the SLC for the Harwell and Winfrith sites within the Magnox estate.
RSS	Reactor Site Solutions, a consortium consisting of Bechtel Management Company Limited and EnergySolutions EU Limited.

Term	Definition
	The second placed bidder in the Magnox Competition.
S-Curve	A pictoral illustration of the NDA's detailed scoring matrix used to score the Target Cost pricing submitted by bidders in the Magnox Competition.
Secretary of State	The Secretary of State for Business, Energy and Industrial Strategy.
Sellafield	A major site within the NDA's portfolio, representing the largest single proportion of the NDA's annual spend. Sellafield was one of the PBO Competitions run by the NDA prior to the Magnox Competition.
Senior Non-Executive Board Member	The senior Non-Executive Director of the NDA Board.
SFT	Site Facing Team. A team of approximately 20 people within the NDA which managed the NDA's day to day relationship and contract with the Magnox SLC.
ShEx	The Shareholder Executive (replaced by UK Government Investments (UKGI) in April 2016) managed the Government's shareholder relationships with businesses owned or part-owned by the Government.
Simmons & Simmons	External legal advisers appointed to advise the NDA in relation to the litigation commenced against the NDA by ES and Bechtel and in relation to consolidation, between September 2016 and 2017.
SLCA	Site Licence Company Agreement. This is the second of two agreements which govern the PBO model. This is the main agreement which provides for the services to be delivered to the

Term	Definition
	NDA and is entered into between the NDA and the SLC.
SLC	Site Licence Company, the entity which holds a nuclear site licence, granted by the Office for Nuclear Regulation, to operate the sites for which they are responsible.
SME	Subject Matter Expert who was part of a team of around 40 individuals recruited from within the NDA to work on the dialogue and evaluation stages of the Magnox competition.
SNI	Sensitive Nuclear Information is information relating to activities carried out on or in relation to civil nuclear premises; and deemed to be of value to an adversary planning a hostile act.
SORR	Statement of Response Requirements. The final document setting out, amongst other things, the evaluation criteria for the Magnox Competition.
SRO	Senior Responsible Officer. The individual identified as the responsible person for ensuring that a major government programme or project meets its objectives and is able to deliver the projected benefits.
Standstill	Standstill (or the "Alcatel period") is the statutory period of 'pause' in a procurement between notification to bidders that they have been unsuccessful and before the contract is signed with the successful bidder(s). This allows time for unsuccessful bidders to raise issues, request more information and where necessary raise legal proceedings to prevent contract award.
Submissions	Written documents prepared by civil servants for Ministers and/or Permanent Secretaries containing formal advice, requests for

Term	Definition
	approvals and authorisations, or occasionally simply providing information or updates.
Target Cost	In the TCIF contract as used for the Magnox Competition, the Target Cost was the benchmark for a payment of a Target Fee to the SLCs and so to the PBO.
Target Fee	In the TCIF contract as used for the Magnox Competition the amount of Target Fee is dependent on whether the contractor achieves, exceeds, or falls below the Target Cost.
TCIF	Target Cost Incentive Fee. A contractual model under which the contractor is incentivised, by way of a Target Fee, to achieve or exceed a specified Target Cost. The Magnox Contract was a TCIF contract.
TER	Tender Evaluation Report. A final report on the outcome of the evaluation of the Magnox Competition, produced in March 2014.
Threshold	A mechanism used for scoring Requirements. In the Magnox Competition two different types of thresholds were used - simple 'pass/fail' and ranking (where a minimum score was required to pass but additional marks were available above the minimum). A bidder which did not 'pass' on these threshold requirements would have their bid disqualified.
UKGI	UK Government Investments. The Government's centre of expertise in corporate governance and finance which replaced ShEx in April 2016.
UKNR	United Kingdom Nuclear Restoration Limited, consisting of AMEC Nuclear Holdings Limited, Atkins Limited and (from June 2013) Rolls

Term	Definition
	Royce Power Engineering plc. One of the bidders in the Magnox Competition.

This publication is available from: www.gov.uk/government/publications/magnox-inquiry-final-report

If you need a version of this document in a more accessible format, please email enquiries@beis.gov.uk. Please tell us what format you need. It will help us if you say what assistive technology you use.

ISBN 978-1-5286-2448-0

CCS0221118266