OUTER HOUSE, COURT OF SESSION

[2020] CSOH 95

CA57/20

OPINION OF LADY WOLFFE

In the cause

OLM SYSTEMS LIMITED

Pursuer

against

FIFE COUNCIL

Defender

Pursuer: Lindsay QC, Lloyd; DWF LLP
Defender: Duthie QC; Anderson Strathern LLP

24 November 2020

Introduction

Background

[1] In this commercial action the pursuer ("OLM"), an unsuccessful bidder in a procurement process conducted by the defender ("the Council"), challenges the conduct of the procurement process on three grounds. The subject-matter of the procurement was the design and commissioning of a comprehensive new software system, described as a "Social Care Case Management Information System" ("the Contract"). The Contract was subject to the Public Contracts (Scotland) Regulations 2015 ("the 2015 Regulations"). The pursuer, who was the provider of the Council's current software system, came third of the three

economic operators who submitted bids. The pursuer asserts that in its conduct of the procurement process the Council failed to comply with the Council's obligations under the 2015 Regulations in three respects, namely:

1) *The disqualification challenge*: that the Council failed to disqualify the successful bidder, Liquidlogic ("Liquidlogic"), for having exceeded the mandatory figure allocated to the support and maintenance phase of the Contract;
2) *Unlawful consensus scoring challenge*: that the absence of a published or established methodology for consensus scoring, and the use of an undisclosed scoring approach, breached the Council's obligations of equal treatment, non-discrimination and transparency under the 2015 Regulations; and
3) *Inadequate reasons*: that, separately, the Council failed to provide adequate reasons for the consensus scores awarded.

There was no challenge to the assessment of the economic aspect of the different bids.

[2] The Council argues that the pursuer's inadequate reasons challenge is incompetent and barred by regulation 88(3) of the 2015 Regulations, as it was not notified to the Council in the pursuer's agents' pre-action letter ("the competency issue"). For completeness I note that while the pursuer's pre-action letter and the Summons as originally drafted contained other grounds of challenge, these were abandoned prior to the preliminary proof.

The Contract and the clarifications

The Tender

[3] The formal notice ("the Contract Notice") was published in August 2019. The deadline for submission of tenders was extended to 23 September 2019. The Council, as the contracting authority under the 2015 Regulations, provided guidance about the

requirements of the new software system in respect of which bids were sought and about the procedure to be followed. They did so in a document described as "Tender Form 1" ("the Tender"). The "estimated expenditure" was divided into two elements: the first, which was in the nature of a capital outlay, was an "initial budget" for delivery and successful implementation of the bespoke software system, capped at £1.1 million. It is the second element which gave rise to the pursuer's first challenge, the disqualification challenge, and which was described in the following terms. Under the heading "Estimated Expenditure", the Tender provided:

> "…. There will be an annual budget of a maximum of £200,000 (paid quarterly in arrears) for support and maintenance of the system, please note that the support and maintenance fee is applicable from the 'go live' date as agreed by Fife Council. Any tenders exceeding these figures will automatically be disqualified." (Emphasis added.)

The pursuer founds on the sentence underlined. The date at which the newly-commissioned software was ready for use was described as the "go live" date.

[4] The second challenge is to the Council's use of consensus scoring. In relation to the evaluation of tenders by this method, the Tender provided that the "evaluation of Tender Submissions will be undertaken by a panel representing relevant areas of expertise across Fife Council". In the evaluation of the bids 60% of the overall score was allocated to the quality of the bid and 40% to price. There were eight qualitative sub-criteria set out in the Tender. A "scoring key" was also provided. In addition to possible scores of 0, 2, 5, 8 and 10, the scoring key provided a verbal description corresponding to these figures. So, for example, a score of "0" was described as "Very Poor- nil or inadequate response. Fails to demonstrate an ability to meet the requirement" and a score of "5" was described as

> "Acceptable- response is relevant and acceptable. The response addresses a broad understanding of the requirements but may lack details on how the requirement will be fulfilled in certain areas".

The Council relies on the verbal descriptions available in the Tender's scoring key as part of its response to the pursuer's third challenge, the inadequate reasons challenge.

The clarifications provided

[5] For the purposes of the disqualification challenge reference was made to two clarifications provided by the Council during the tender process. As is common in procurement exercises, the procuring authority provides a portal for communications, including responses to queries raised by individual bidders. This was to ensure that there was a parity of information throughout the process. If a bidder had a query, it was posed and responded to via this portal (referred to in some of the materials as the "broadcast log" ("the log")). An extract was lodged of the log of the broadcast messages sent to bidders. The extract lodged contained the Council's responses but did not contain the initial query to which the Council was responding, at least in respect of the two clarifications referred to by the parties. In submissions, reference was made to two entries:

The budget clarification

1) In a reply with the subject line "The budget", on 12 September, timed at 15:05 ("the budget clarification"), the entry stated:

> "…
> We have had questions about the budget available to the Council.
> The annual support and maintenance figure of £200k includes all hosting costs and will only be paid after the system goes live.
> The £1.1 million budget must include any hosting costs during the implementation of the new solution.
> <u>The annual support costs cannot exceed £200k over the initial 7 years of the contract.</u>

The second clarification

2) In a reply with the subject line "Re: Terms and Conditions" (on 16 September 2019, timed at 08:08) ("the second clarification"), the entry stated:

> "…
> We can confirm that the 7 years plus 3 years starts from the go live and not project kick-off. The total contract length is project implementation time plus 7 plus 3.
> All costs for the full ten years plus any intimation costs will be used for the MEAT. There should be no costs from bidders that falls outside that."
> (Emphasis added.)

The pursuer relies on the passages underlined in both sub-paragraphs. The Council relied on the sentence underlined in the budget clarification. "MEAT" stands for the most economically advantageous tender, a well-understood metric applied in assessing the financial aspects of bids.

Procedural history

[6] The case first came before the commercial court on 16 October 2020 for a preliminary hearing and consideration of the defender's motion for *interim* suspension of the automatic standstill period. It was estimated that that motion would take a half-day. However, having regard to the subject-matter of the challenge and the desirability of an early resolution in such cases, the Court set the matter down for a preliminary proof on the merits, on 29 and 30 October 2020 and continued the Council's motion. In the event that the pursuer succeeded on one or more grounds, but the Court held that damages was an appropriate remedy (rather than reduction of the award in favour of the successful bidder, Liquidlogic, which was the pursuer's primary remedy) a second proof on *quantum* would be required.

Proof papers

[7] Parties submitted affidavits, full notes of arguments, a joint chronology, a joint bundle of core documents and a bundle of authorities. At the outset of the preliminary proof, parties indicated that they were content to proceed on the affidavits and did not require to cross-examine each other's witnesses. There was no need for witnesses to speak to the documentation, as this was agreed by Joint Minute. I have had regard to all of these materials and do not propose to repeat them in this Opinion.

[8] It was acknowledged in submissions that much of what was contained in the affidavits was not relevant to the issues to be determined by the Court (eg the commercial origins of the pursuer, the Council's dissatisfaction with the services provided by the pursuer for the existing software package, the reasons why the software system the pursuer inherited from their commercial predecessors was inadequate, the many updates of the same, the pursuer's offer to extend the support for a further period etc) or is only of potential relevance to the question of remedy. I propose only to summarise those parts of the evidence directly relevant to the merits under consideration at the preliminary proof.

[9] For completeness I record that the pursuer produced an affidavit from Peter O'Hara, the pursuer's founder and chief executive. The Council produced affidavits from Roderick Wallace (a technical specialist within the health and social services department of the Council), Kevin Barr (the Council's IT project manager), Alan Ross (the Council's procurement officer) and Shirley Miller (the Council's services manager for the project to replace the existing SWIFT software).

Affidavit evidence

Alan Ross

[10] Alan Ross, the Council's Corporate Procurement Office, had been involved for the last 10 to 15 years in IT procurement projects for the Council. Mr Ross was involved in the preparation of the procurement strategy document, the drafting of the Tender, and he was involved in the requests for information ("RFI") meetings held with potential bidders in the months preceding the issue of the Tender. Once the three bids were received, these were sent out to the Council's team of evaluators, but without the confidential pricing information. The Council's evaluators, 12 in number, were specialists in the particular areas covered by the Tender. He was also responsible for training and supporting the evaluators in the procurement process. This included a face-to-face session early in the process to explain how the scoring and evaluation of bids would work. He also held weekly open sessions over four successive weeks once the bids were received and the evaluators' process of evaluation was underway, at which the evaluators could seek clarification about the process.

[11] Once the individual scores were received, these were tabulated into one spreadsheet ("the spreadsheet"). The spreadsheet was used as the basis for discussions at the moderation sessions. In total there were about 14 or 15 moderation sessions, at which the different technical sections or criteria of the Tender was gone over in turn, with input from those evaluators with the relative expertise for the particular section under discussion. In relation to the conduct of these moderation meetings, he explained:

> "Once all the individual scores were received from the team we tabulated these in one spreadsheet. We then had a series of moderating meetings, from memory about 14 or 15 of those meetings. In those meetings we went through section by section each part of the tender. All the evaluators attended the meetings with copies of their scoresheets that they had provided and then, there was an open forum where each

> score was discussed. Where all the scores were similar and close to one another there was less need for detailed discussion and consensus was reached more quickly. In other cases however the scores were very different and each person attending the meeting had the opportunity to express their views and we tried to find common ground on a particular score. Generally an evaluator would explain they had given a certain score because of a particular aspect of the answer that the respective supplier had given. I can say that there were no especially strong views in favour of any particular supplier and it was done fairly and objectively. The meetings were not dominated by any one individual or any one section department or group. It was my role to lead the discussion around moderation and Kevin Barr, the IT Project Manager involved with the tender, also attended the meetings, and kept a tally of the notes and scores as well as helping to keep the conversation going around each particular score and answers."

He emphasised that the evaluators only scored those areas within their expertise and that the evaluators were involved only in scoring the qualitative element of each bid, not the financial element.

Kevin Barr

[12] Kevin Barr is the IT Project Manager for the Council. Much of his affidavit was taken up with the deficiencies, as the Council saw it, with the existing software. This is potentially relevant to the issue of remedy but is of no relevance to the substantive issues to be determined at the preliminary proof. He was involved in all parts of the tender scoring process. He was not involved in any of the actual scoring, rather his role was to make sure that all of the evaluators had the information, guidance and support that they required. He coordinated the breakdown of the bids into the different technical sections so as to enable the persons with the relevant expertise to respond. He was involved in the weekly open sessions held by Alan Ross in the 4 weeks following receipt of the bids but he stressed that the evaluators were making their own individual assessments.

[13] In relation to the moderation meetings, there were 14 or 15 of these in total. He attended these as an independent facilitator. He is the one who maintained the spreadsheet

and added the consensus scores, once reached, and short entries relating to the consensus scores. As he explained:

> "11. We then moved on to consensus meetings to moderate the scoring. These were led by Alan Ross our Corporate Procurement Officer. I was an independent facilitator at those meetings and I maintained the spreadsheet with the individual scores and then the consensus score at each session. It was my job to make sure that there was a consensus on the score in relation to each of our requirements. Each point took time and there were many meetings and many discussions. Everyone had the opportunity to express their view as to why a particular score was justified or not. I believe we went through that process as thoroughly as we could, always using the scoring key as a reference when necessary for justifying the agreed consensus score. No one team or individual dominated these meetings. There were representatives from Social Care, IT, Finance, and Workforce Development on the Evaluation Group. In all of the meetings none of the group knew the current final scores. ... We anonymised the tender responses by referring to them as supplier 1, 2 or 3 so no one could really have a sense of how the scores were looking at any given time and we did that deliberately to avoid any sense of unfairness. I know that Alan gave a presentation and guidance to the evaluators on how to score and it was made clear to everyone that we had to follow the process on both the individual scoring and the consensus scoring and that if we followed the process then the winning tender would emerge from that. I know that we all did the best that we could.
>
> 12. In the group discussions, I would say that there was a fairly robust debate about the scoring as some individuals had missed certain elements of a supplier's response. The robust debate helped clarify the elements of each response and enabled the group to come to an agreement for each of the consensus scores before moving on to the next response. Additionally, there were some clarifications required and questions were sent back to the suppliers after which we had additional sessions before the final scores were reached. There was no minute of any of these consensus meetings other than the record that I kept on the spreadsheets of the consensus score. I would say that everyone was happy with the scores at the end of the process. We took the time to discuss everything and, the debate amongst the Services Managers or Heads of Service who were those doing the evaluating was robust and fair. Everyone got their say and everyone took account of what the others had to say before the consensus score was arrived at although sometimes it didn't take very long to arrive at a consensus score, other times it took quite a while." (Emphasis added.)

Shirley Miller

[14] Shirley Miller was the only evaluator who scored every section of the Tender. She was also involved in the moderation stage when all of the individual evaluators' scores were collated and discussed. She also spoke to the training provided by Alan Ross and to Kevin Barr's role in recording the consensus scores and the views of the meeting on these in the spreadsheet. She commented on the conduct of those meetings:

> "9. …. I was also involved in the moderation of the scores. This was done by way of work group meetings per section of tender. The number of people involved varied depending on the particular section but I can say there were about 14 meetings to go through the matrix. These meetings took the form of discussions around why each individual score was given, with a view to reaching consensus around the final moderated score. Obviously if everyone scored the same or nearly the same then the need for discussion was that bit less. The Procurement Officer, Alan Ross led the meetings and took us through the questions and issues. The dedicated IT Project Manager, Kevin Barr recorded the meeting views. No individual or group particularly dominated or sought to impose their views on scoring on others. Some sections had for example 7 or 8 evaluators others perhaps only 3. It might be that one individual had scored high and the other had perhaps scored harshly but these were never just set aside and there was a full discussion on each and every point. I can say that I was confident that there was a consistent and robustness in the approach to each and every question and each and every mark. Consensus was reached on the scores eventually. Most of these were straightforward to arrive at but some issues took a while to reach consensus and Alan Ross, the Procurement Officer who chaired the meetings, wouldn't let us move on until we had addressed the issue fully." (Emphasis added.)

[15] Ms Miller explained that the moderation stage applied only to the qualitative aspects of the bids. She also explained the reference to and application of the Score Key:

> "11. I don't believe there were any minutes or verbatim notes taken on the consensus meetings. Everyone who attended arrived with their own scores and their own note of how they had arrived at that to assist them in their discussions, but I think the view was taken that those notes became irrelevant once consensus on the final moderated score had been reached. Prior to receiving the bids all evaluators attended a training presentation given by the Procurement Officer, Alan Ross. The scoring key from the presentation was included for reference on the heading of each evaluation sheet. The key provided the possible scores available for use with a clear definition for each. The same scoring key and definitions was available to bidders and referred to

> on Pages 4-6 of TN Part 2 providing clear information on how bidder responses would be evaluated. Throughout the consensus meetings the key scores and definitions were referred to for clarity of explanation. Throughout the meetings there was constant explanations as to why a particular score was given. As I say we had about 14 meetings most of which lasted 2 to 3 hours but some 4 hours when dealing with the bigger sections of the tender. Generally, accord was reached and I would say that in the main the group accepted the consensus. On occasion clarification was asked for from the companies on a few technical points and training and there was then further meetings to consider their answers. On a handful of occasion *[sic]* this occurred but the scores were nevertheless finally agreed after the clarification had been given. To make clear a consensus score was not given on the point until the clarification had been received and considered."

[16] She also explained the few instances in which an evaluator had not given a score. This was either because the evaluator did not have the requisite expertise, in which case they abstained from the discussion at the moderation stage on that item, or where some were simply missed (5 out of 212 possible raw scores of the Tender). For these instances, these were addressed in the moderation discussions and under reference to the scoring key.

Legal principles

Duties incumbent on a contracting authority

[17] The legal duties applicable were not in dispute and may be summarised as follows. The Council was under a duty to the Pursuer (and all tenderers) to comply with the provisions of the 2015 Regulations. Regulation 19(1) of the 2015 Regulations provides as follows:

> "**19.— Principles of procurement**
>
> (1) A contracting authority must, in carrying out any procurement or design contest which is subject to the application of these Regulations—
> (a) treat economic operators equally and without discrimination; and
> (b) act in a transparent and proportionate manner."

Contracts should be awarded on the basis of objective criteria which ensure compliance with the principles of transparency, non-discrimination and equal treatment and which guarantee that tenders are assessed in conditions of effective competition. The procedure for awarding a public contract must comply, at every stage, with both the principle of the equal treatment of potential tenderers and the principle of transparency so as to afford all parties equality of opportunity in formulating the terms of their tenders.

[18] The principle of equal treatment also requires all potential bidders to be given access to substantially the same information and to be given the same opportunities (for example, to clarify or amend bids) and to be subject to the same rules (such as the same qualification requirements and time limits). The question of whether or not there has been a breach of the equal treatment principle is to be considered in context and having regard to the general purpose of ensuring the development of effective competition. The contracting authority must apply the principle of non-discrimination when it chooses the criteria on which it proposes to base the award of a contract. The principle of non-discrimination also obliges the contracting authority to apply the award criteria objectively and uniformly to all tenderers.

[19] The obligation of transparency requires the contracting authority to formulate the award criteria in the contract documents in such a way that potential tenderers are in a position to be aware, when preparing their tenders, of the existence and scope (or relative importance) of the elements which the contracting authority will take into account in identifying the most economically advantageous offer.

[20] Award criteria must be formulated in such a way as to allow all reasonably well-informed and normally diligent tenderers ("RWIND tenderers") to interpret them in the same way. The RWIND tenderer is an objective standard applied by the court. The

objective standard of the RWIND tenderer ensures equality of treatment. The application of the objective standard of the RWIND tenderer involves the making of a factual assessment by the court, taking account of all the circumstances of the particular case. Evidence may be relevant to the question of how a document would be understood by the RWIND tenderer. The court has to be able to put itself into the position of the RWIND tenderer, and evidence may be necessary for that purpose: for example, so as to understand any technical terms, and the context in which the document has to be construed. But the question cannot be determined by evidence, as it depends on the application of a legal test, rather than being a purely empirical enquiry.

[21] The obligation of transparency also means that the contracting authority must interpret the award criteria in the same way throughout the procedure. A breach of the transparency obligation does not allow for any margin of appreciation. A distinction is drawn between the criteria for assessing the suitability of a tenderer (the "qualitative selection criteria") and the criteria for evaluating which tender is most economically advantageous (the "award criteria"). Criteria which evaluate the tenderer's suitability to perform the contract in question, such as its economic and financial standing or its technical ability, are qualitative selection criteria and are separate from the award criteria which relate to the subject matter of the proposed contract, such as the quality and reliability of the service which the tenderer offers to provide.

[22] An award criterion which gives the contracting authority an unrestricted freedom of choice as regards the award of the contract to a tenderer is unlawful.

Duties incumbent on the contracting authority at the stage of assessment of bids

[23] In its consideration of the tenders the contracting authority cannot alter the criteria for the award which it has disclosed. The contracting authority's award decision cannot include elements which, if they had been known at the time the tenders were prepared, could have affected that preparation. The principle of equal treatment requires that the tenderers must be in a position of equality both when they formulate their tenders and also when the contracting authority assesses those tenders. The contracting authority has a wide margin of appreciation in relation to matters of judgment or assessment and the court will intervene in those areas only where it has been a manifest error of assessment or misuse of powers.

[24] The contracting authority must not adopt a method of assessment on the basis of matters which are likely to give rise to discrimination against one of the tenderers. The equal treatment principle requires that comparable situations must not be treated differently and that different situations must not be treated in the same way, unless such treatment is objectively justified. Contracting authorities are required by the principle of equal treatment to adopt the same approach to similar bids unless there is an objective justification for a difference in approach.

Duty to give reasons

[25] When an unsuccessful tenderer requests in writing for the authority to inform it (a) why it was unsuccessful and (b) of the characteristics and relative advantages of the successful tender; the contracting authority must disclose its reasoning in a clear and unequivocal manner in order to (i) make the unsuccessful tenderer aware of the reasons for

the decision and thereby enable it to defend its rights and (ii) enable the court to exercise its supervisory jurisdiction.

The role of the court

[26] The role of the court in reviewing the acts of a contracting authority in a procurement process is a limited one. The court's jurisdiction is to supervise the way in which the process has been carried out, and to review whether proper procedures and basic principles underlying the 2015 Regulations have been respected, for example, those concerning equality of treatment, non-discrimination and transparency. It is reviewing the decision solely to see whether or not there is a manifest error and/or whether the process was in some way unfair. The court is not undertaking a comprehensive review of the tender evaluation process; neither is it substituting its own view as to the merits or otherwise of the rival bids for that already reached by the public body.

[27] The term "manifest error" means an error which is clear and obvious beyond reasonable contradiction. There will be a manifest error where there has been a manifest and serious disregard of the limits of the contracting authority's discretion. The concept of manifest error is very similar to, if not the same as, the *Wednesbury* test of irrationality in domestic judicial review proceedings.

[28] The onus is on the pursuer to aver and then prove a breach of the Regulations.

Grounds of challenge

The disqualification challenge

The factor in the Liquidlogic bid which gave rise to the disqualification challenge

[29] The successful bidder, Liquidlogic, applied an inflationary increase to the £200,000 annual maintenance costs in years 8, 9 and 10 of its bid.

Pursuer's submission

[30] Under reference to the financial criteria of the Tender (quoted above, at para [3]), the pursuer argues that, properly construed, the £200,000 annual budget applied to all 10 years. The £200,000 limit was unqualified; it was not restricted in anyway and it applied to the full 10-year period of the Contract and not just to the initial 7-year period. Under reference to the observations of O'Farrell J in *MLS (Overseas) Limited* v *The Secretary of State for Defence* [2017] EWHC 3389 (TCC), at paragraph 62 of her judgment, the pursuer submitted that, having set the rules, the Council was obliged to follow them. Given the terms of the Tender, any bid exceeding this annual budget was automatically disqualified: see sentence underlined in para [3], above. In light of these observations, as applied to the terms of the Tender just noted, the pursuer argued that the Council had no discretion to continue to evaluate any bid which exceeded this maximum annual budget.

[31] In relation to the budget clarification, the pursuer submitted that this merely stated that the annual support costs could not exceed £200,000 over the initial 7 years of the Contract. It did not state that the annual support could exceed £200,000 over the final 3 years of the Contract. The pursuer submitted that when read with the disqualification criteria in the Tender, the meaning and effect of this clarification was that the maximum

annual budget of £200,000 applied to the full 10-year period of the Contract and not just to the initial 7-year period.

[32] In respect of the second clarification, the pursuer submitted that this clarification in effect superseded the budget clarification and it made clear that the total contract length encompassed (i) the development of the software (ie up to the point of go live), (ii) the 7-year period, and (iii) the optional 3-year period; and, further, that all costs for the full 10-years (plus any implementation costs) would be used for the MEAT. This, it submitted, was consistent with the maximum annual budget of £200,000 applying to the full 10-year period of the Contract and not just to the initial 7-year period. The reference at the end of this clarification, that no costs from bidders should fall outwith that, was, it submitted, a restatement of the automatic disqualification criterion.

[33] The pursuer argues that, as a consequence Liquidlogic fell to be automatically disqualified and that the Council erred in failing to disqualify Liquidlogic. The Court required to apply an objective approach. The RWIND bidder would have understood the £200k cap to apply to the full 10-year period. No reasonably well-informed and normally diligent bidder would have understood the £200k cap to apply only to the first 7 years of the contract. Accordingly, the Council was obliged to disqualify any bidder, such a Liquidlogic, who exceeded this maximum annual budget. Its failure to do so was a breach of the obligations of non-discrimination, equal treatment and transparency.

The Council's reply

[34] The Council argued that the terms of the Tender were clear and that, in any event, the budget clarification put the matter beyond doubt. No RWIND tenderer would have had any doubt that the £200k cap applied only to the initial 7-year period of the Contract.

Further, the pursuer's reference to the second clarification was misconceived, as that was dealing with the wholly separate issue of capital costs as they informed the MEAT.

Determination of the disqualification challenge

[35] In determining this issue it is important to note that the "estimated expenditure" in the Tender had two elements:

(i) the capital costs (capped at £1.1M) for the development and commissioning of the bespoke software before it went live, and

(ii) an annual payment thereafter, ie after the go live date and capped at £200,000, for support and maintenance.

I accept the Council's submission that the budget clarification related to the second element of the estimated expenditure, the annual support and maintenance costs, and that the second clarification related to the first or capital element of the budget. Tenders were invited for a contract whose intended duration was 7 years with an option to extend for up to 3 years. The reference to an "option" invites the possibility that there might be a distinction drawn between known and agreed costs for the definite 7-year term of the Contract and the costs in respect of any extension of up to 3 years beyond that.

[36] In response to a query about the duration of the cap on the annual figure for support and maintenance, the answer the Council provided was that the "annual support costs cannot exceed £200k over the <u>initial</u> 7 years of the contract" (emphasis added). In my view, this was an unambiguous statement that the cap applied only to the definite (ie 7-year) term of the Contract. It referred specifically to the "7 years of the contract". Further, the use of the word "initial" indicates a distinction was being drawn between that definite term and any extension. In my view, those features made it clear beyond peradventure that the £200k

cap on the annual payment for support and maintenance applied only to the first 7 years. In my view, that was sufficiently clear. It was not necessary for the Council expressly to stipulate that the cap did not apply to any extension of the term beyond the initial 7-year period. I also accept as correct the Council's submission that the subject-matter of the second clarification related to the other type of expenditure, being the capital costs of designing and commissioning the software, and that the pursuer's conflation of these two is a misreading. For these reasons, the pursuer's disqualification challenge fails.

The inadequate reasons challenge

The competency issue

[37] The Council submits that the pursuer's reasons challenge is precluded by reason of the pursuer's failure to comply with regulation 88(3) of the 2015 Regulations.

[38] In reply, the pursuer relies on the pre-action letter of 30 July 2020 ("the pre-action letter"). The pre-action letter identifies three heads of challenge: (1) "Misapplication of disqualification criteria", (2) "Moderation" and (3) "Manifest error in individual criteria". Under "Moderation" it states:

> "We understand that the Council conducted a consensus scoring approach in this process, whereby those involved in the evaluation came together to agree the final 'consensus' score.
>
> This method of consensus scoring was not addressed within the 'Form of Tender-Part 1' or 'Form of Tender – Part 2'. Our client understands that the Council does not have a standard policy in respect of this scoring approach. No objective criteria [were] provided by the Council in respect of the scoring approach. The Council have not disclosed any notes relating to this exercise.
>
> There is a clear absence of any methodology or transparent procedure for the 'consensus scoring approach' adopted by the Council in this process. Any details provided by the Council with regard to the scoring approach have been deficient. In failing to disclose either the mechanism by which the moderation consensus scoring approach would be conducted or any notes of the consensus scoring meeting the

> evaluators exercised either individually or collectively an unrestricted freedom of choice in the matter they considered. This was in breach of the obligation of transparency." (Emphasis added.)

The pursuer relies on the three passages underlined as capable of instructing the inadequate reasons challenge. It also argues that the provision of adequate reason is part of the over-arching obligation of transparency, referred to in the last sentence of the passage just quoted.

[39] Regulation 88(3) provides that proceedings may not be brought unless

> (a) The economic operator bringing the proceedings has informed the contracting authority of-
>
> (i) The breach or apprehended breach of the duty owed to it in accordance with regulation 87 (duty owed to economic operators); and
>
> (ii) Of its intention to bring proceedings under this Part in respect of that breach or apprehended breach;…"

The Council contend that the pre-action letter failed to comply with regulation 88(3)(a)(i): there was no (or insufficient) notice of any challenge based on the inadequacy of the Council's reasons.

Consideration of the competency issue

[40] The purpose of a notice under regulation 88(3) is to give the contracting authority clear notice that a claim is to be made and the basis for that claim: see, eg *Luck t/a G Luck Arboricultural & Horticultural* v *London Borough Tower Hamlets* [2003] 2 CMLR 12; [2003] EWCA Civ 52. What little case law there is on the sufficiency of notice a prospective challenger required to give was helpfully reviewed by Coulson J (as he then was) in *Amaryllis Limited* v *HM Treasury sued as OGC Buying Solutions* [2009] EWHC 962 (TCC)

("*Amaryllis*") at paragraph 37, a reference the Court drew to parties' attention at start of the second day of the preliminary proof. After reviewing the few cases available (some drawn from contexts other than procurement or to which different regulations applied), Coulson J summarised the requirements of a notice letter, as follows:

> "In my judgment, these authorities are clear. A general reference to an alleged breach of the Regulations is not enough; the notice must identify the actual breach complained of. That did not happen in either *Portsmouth* or *Luck*. However in *Keymed*, where the notice was found to be sufficient, detailed or lengthy particulars are not required. What mattered was a clear statement of the alleged breach by reference to the regulations, and a stated intention to commence proceedings." (Emphasis added.)

[41] While Counsel's researches produced several other cases at the start of the second day of the preliminary proof, this passage in *Amaryllis* was agreed to contain a convenient summary of the cases, including some drawn from different contexts. Indeed, in the most recent case cited, *Serco Ltd* v *Secretary of State for Defence* 2019 EWHC 549 (TCC) (at paragraph 35), Fraser J adopted Coulson J's summary as a correct statement of the law. In *Gillen* v *Inverclyde Council* 2010 SLT 513, Lord Woolman held that the notice letter in that case was deficient, as it failed to identify the breach of a specific regulation or to put the contracting authority on notice that it was going to be sued. In my view, the notification requirement in regulation 88(3) is simple and straightforward. I agree with Lord Woolman's observation in *Gillen* (at paragraph 20) that "it is not a matter which should be left to inference or construction".

[42] Applying the foregoing observations to the pre-action letter, I accept the Council's submissions that the pursuer failed to give notice that inadequate reasons was one of the grounds of challenge to the Council's decision. The criticism made in the pre-action letter under the heading "Moderation" was a substantive one directed to the asserted deficiency of the Council's use of consensus scoring, arising (it is said) from the absence of a standard

policy or objective criteria. That, in my view, is the context for the observation at the end of the second paragraph of the pre-action letter, that the Council had not disclosed any notes relating "to this exercise" (emphasis added). The opening sentence in the next paragraph, stating the pursuer's contention that "there is a clear absence of any methodology or transparent procedure for the 'consensus scoring approach' adopted by the Council in this process" (emphasis added), is a development of that challenge. On a fair reading, it does not introduce or develop a discrete challenge on the basis of inadequate reasons. The pursuer founded strongly on the words "Any details" as, at least, inferring an inadequate reasons challenge. I do not accept that submission. In my view, the reference to "[a]ny details" is a clear reference back to the pursuer's criticism of the consensus scoring approach; namely, that "any details" *already provided* relative to the process of consensus were (in the pursuer's view) deficient. In other words, this sentence is an elaboration of the *substantive* criticism - arising from the absence of any methodology or standard policy; it is not a criticism about the failure adequately to explain the consensus scores allocated to the technical criteria. The reference to failure to produce "any notes of the consensus scoring meeting" (the third passage the pursuer relied on) is a further continuation of the same theme.

[43] In my view, these passages of the pre-action letter, which the pursuer focused on in isolation, do not provide any notice that the procurement exercise conducted by the Council was to be challenged on the ground that it had failed to provide adequate reasons for the consensus score. It does not even do so by implication, which in any event, was deprecated by Lord Woolman in *Gillen*. When these passages are construed in their context in the pre-action letter, it is patent that in these passages the challenge was one of substance - about the absence of a methodology at the stage of moderation of the scores. The pursuer's final

point was to rely on the reference, in the last sentence, to the breach of the obligation of transparency. It is of course correct that the obligation of transparency encompasses an obligation to give adequate reasons. However, in light of the cases already noted, a reference to a general obligation is not, in my view, sufficient to give notice of all of the ways in which that obligation may later said to have been breached in a specific manner. In light of *Amaryllis* and *Gillen*, a specific breach must be identified; it cannot be left to implication. A generic reference to the duty without any specification of the manner of its breach does not satisfy regulation 88(3) of the 2015 Regulations.

[44] Further, the pursuer's argument does not respect the syntax of the sentence. The definitive pronoun "this" with which that sentence starts, is a reference back to the *substantive* criticism of the consensus scoring, conducted without a "standard policy" (in the second paragraph quoted), or a "clear absence of any methodology or transparent procedure" (in the third paragraph). The assertion of a separate breach of the obligation of transparency, by reason of inadequate reasons, would have been a second breach and for which the plural form of the definitive pronoun ("*These were* breaches") would have been necessary.

[45] While that suffices to determine the competency issue, for completeness I note that as originally framed, the Summons did not include inadequate reasons as one of the headline grounds of challenge. The grounds were (i) the disqualification challenge, (ii) unlawful consensus scoring, (iii) unlawful scoring of the technical response and (iv) unlawful scoring of quality. The latter two grounds were deleted by subsequent adjustment. It was under the heading of "unlawful consensus scoring" that there was a brief averment about a failure to provide adequate reasons for the consensus scoring. It is a small point, but even in the

framing of the Summons (as adjusted), an assertion of inadequate reasons for the consensus scores was not presented clearly as a free-standing ground of challenge.

The unlawful consensus scoring

[46] The essential elements of this head of challenge were averred to be "the absence of any policy or established criteria for consensus scoring" (*per* Article 11 of Condescendence). As a consequence, it was said to be "wholly unclear… what approach was adopted by [the individual evaluators] in order to achieve the required consensus" and it was "unclear whether any moderation of the scores was carried out" (*ibid*). This ground was subject to significant adjustment in the pursuer's pleaded case (shown in italics, below). The full averments of this challenge, as adjusted, are as follows:

> "***Unlawful consensus scoring***
> 12. The Defender carried out a consensus scoring approach when scoring the tender submissions, whereby those involved in the evaluation came together to agree the final 'consensus' score. There were 12 evaluators involved in the procurement process, although not all were involved in each assessment. This consensus scoring approach was not disclosed in either Part 1 or Part 2 of the Defender's Form of Tender. The Defender has no policy or established criteria or methodology for consensus scoring. In the absence of such a published or established methodology, it is wholly unclear from the evaluators' notes what approach was adopted by them in order to achieve the required consensus. Further, it is unclear whether any moderation of the scores was carried out. The evaluators' notes produced by the Defender disclose an inconsistent and contradictory approach to scoring by the individual evaluators. Further, it is impossible to determine the relationship between the consensus score and the individual scores given by the evaluators. *The consensus scoring on a number of questions is incomprehensible. There is also clear disparity between the individual scores. For example, in question 1.7, the Pursuer was awarded individual scores of 8, 8 and 5. The consensus score awarded was 8. For question 1.9, the Pursuer was again awarded individual scores of 8, 8 and 5 with a consensus score of 5. These consensus scores fail to reflect the scores of the individual evaluators in any transparent way. The consensus score awarded to the Pursuer in question 2.1 is also incomprehensible. Individual scores of 8, 5, 8, 2, 5, 8 and 5 were awarded to the Pursuer. The consensus score awarded did not reflect this range of individual scores and merely adopted the lowest of these individual scores, 2. Evaluator 'E7' awarded two scores (2 and 5) to the Pursuer in response to question 2.22. It is not clear what impact this may have had on the overall scoring. Questions as to the quality of the marking criteria supplied to evaluators arises from certain*

> *areas of the scoring. For example, the individual scores awarded to the Pursuer on question 1.48 are 8, 8 and 0. There is no discernible reason for such a significant difference in scoring. No score was provided by evaluator 'E6' in response to question 2.31 for any supplier. The evaluator notes in the comments: 'I have left this blank as I did not understand the question…'. This demonstrates that the marking information and criteria provided to evaluators was of a substandard quality which led to inconsistencies in marking. There are various instances of the evaluator failing to provide any score in response to a question. No comments have been provided to explain the failure to provide a score: see, e.g. the lack of response to question 2.20 on the scoring sheet provided by evaluator 'E7'. Further, evaluator 'E10' has failed to record a score for the Pursuer at question 2.59. Evaluator 'E5' has failed to record a score for the Pursuer at question 2.72. The same evaluators provided a score for the other tenderers on this question. The pursuer is prejudiced by the failure of evaluators 'E10' and 'E5' to provide scores for these questions. Although Servelec did not answer question 8.4, it was inexplicably awarded 2 points for this question. All of the inconsistencies and contradictions in the consensus scoring and moderation of the scores are fully detailed in the annotated spreadsheet prepared by the Pursuer, that is produced herewith and referred to for its full terms which are incorporated herein brevitatis causa. The Defender's averments in answer are denied, except insofar as coinciding herewith.*

While Article 12 of Condescendence begins with the averment

> "The use of an undisclosed consensus scoring approach with no published methodology or published system of moderation is a breach of the Defender's obligations of equal treatment, non-discrimination and transparency",

the remainder of that article is comprised of adjustments elaborating the pursuer's inadequate reasons challenge.

[47] As articulated in the pursuer's Note of Argument, the criticisms under this ground were as follows

> "8. In addition, the procedure followed in respect of the moderation of the individual scores to arrive at a consensus score:
>
> *a.* was conducted in a manner which did not apply the award criteria objectively and uniformly to all tenderers because of the lack of any criteria or other guidance <u>for carrying out the moderation</u>;
>
> *b.* was conducted in a manner which was likely to give rise to discrimination against one of the tenderers because of the lack of any criteria or other guidance <u>for carrying out the moderation</u>;
>
> *c.* resulted in the award criteria being interpreted differently at the stage of individual scores and thereafter at the stage of consensus scoring as evidenced by the divergence in scoring; and

d. failed to fulfil the obligation of transparency because the relationship between the individual scores and consensus score is incomprehensible and the limited comments provided by the Defender do not provide adequate and comprehensible reasons for the consensus scores. "

[48] The adjustments to Article 11 might be read as challenging the merits of the Council's decision, eg on the ground of manifest error. However, in his submissions, senior counsel for the pursuer clarified that this ground of challenge was not a "manifest error" challenge. There was no challenge to the qualitative assessment undertaken by the Council. He confirmed that the pursuer's complaint was a purely procedural one, arising from the absence of any published policy for carrying out the moderation. In his submission, the absence of such a policy amounted to *ad hoc* decision-making and the Council "making it up as it went along". Mr Lindsay acknowledged that this ground of challenge was interlinked with the inadequate reasons challenge.

[49] On the basis that the Council's staff who were involved in the assessment of the tenders applied the technical criteria contained in the Tender to the bidders' individual bids - a proposition that the pursuer did not dispute- a question arises as to what more is required to govern the decision-making process in which that assessment takes place. When pressed to explain what was required for a "policy" governing the *process* of decision-taking, especially at the stage of moderation, the only examples senior counsel for the pursuer provided, and said to illustrate the risks of a no-policy scenario, were (i) that there was no means to resolve a "deadlock" amongst the evaluators, and (ii) there was a risk that an individual involved in the consensus scoring might be prevailed upon or pressured to agree a score, against his or her better judgment or inclination.

[50] I am not persuaded that there is any substance to this challenge. It was accepted that the Council could employ a two-step process: the first stage involved 12 evaluators working

individually, scoring those technical elements of the bid within their respective areas of expertise. The second stage was the "moderation" stage: over a series of 14 or 15 meetings groups of evaluators met to discuss the relative sections of the tenders and to arrive at a consensus score. There is nothing in the materials placed before the Court to give any credence to the concern that pressure was being placed on the evaluators to agree a score contrary to their individual judgement. Nor was there any evidence to suggest that the evaluators were under time-pressure, and which might be the context in which a "deadlock" or pressure to agree would arise. Rather the reverse was true: an example was provided (from the broadcast log, already referred to) of an occasion where those involved in the second stage, of consensus scoring, sought further clarification from one of the bidders and deferred any decision meantime, pending receipt of that clarification. All of this betokens that the Council's approach was to allow the time it took for a full consideration of each bid and for consensus to be achieved by all of those involved in their consideration of each of the technical circumstances. This is evident from the Council's affidavits, which I have summarised above. These were not challenged in any way and Mr Lindsay fairly accepted at the outset of his submissions that he accepted the credibility and reliability of all of the Council's witnesses. All of this points to a considered and careful process governing the assessment of the qualitative criteria of the bids.

[51] Furthermore, the premise on which this challenge is based seems to me fundamentally to misunderstand the process of evaluation inherent in the assessment of the qualitative element of tenders in a procurement process. The pursuer accepted that there may be a two-stage process (as was adopted here), where raw scores are awarded by individual evaluators at the first stage, and which are then considered at the second stage with a view to reaching a single score representing the final assessment of the Council of

each element of the bids against the specified technical criteria. The pursuer also accepted (in my view, correctly) that the second stage may be conducted by a group of individuals. The merit in a collective approach is that the accumulated experience and expertise of a group is likely to be greater than that of any single individual. It also affords the opportunity for any omission or misunderstanding on the part of an individual member of the group to be addressed, just as was explained in Ms Miller's affidavit (see para [16], above). In other words, the collective approach affords the opportunity for the final decision to be enhanced by the sum of knowledge and expertise of the group.

[52] In this case, it is not contended that the Council or the evaluators misconstrued the specified technical criteria they had to apply; or that the Council or its evaluators misdirected themselves in law; or that they came to a decision that was susceptible to any challenge on the merits. There is no challenge to the Council's choice of the award criteria. Accordingly, the proposition that an award criterion which gives the contracting authority an unrestricted freedom of choice is unlawful (quoted at para [22], above), does not come into play. Nor was it suggested that the absence of a policy governing the process of "carrying out the moderation" affected the bidders differentially or put any one bidder at a disadvantage or was discriminatory in any way. This head of challenge amounted to a criticism that the evaluators were not provided with a precise decision-tree or specific directions as to how to proceed with their assessment as a group. Having regard to the way in which this challenge was articulated in paragraphs 8(a) and (b) of the pursuer's note of argument, as directed to "the *carrying out* of the moderation", this amounted to the proposition that it is necessarily unlawful not to have guidance or a policy specifically addressed to "the carrying out of the moderation" in a procedural sense. The absence of policy was asserted necessarily to mean that the Council "did not apply the award criteria

objectively and uniformly" (paragraph 8(a)) and that the procedure was "conducted in a manner which was likely to give rise to discrimination" (paragraph 8(b)). These are extreme propositions. In the first place, it does not follow that an absence of policy results in a failure to apply the award criteria objectively and uniformly or that the conduct of a collective moderation process is "likely" to give rise to discrimination. Further in my view, these propositions have no foundation in law. No authority was cited to support the proposition (inherent in this challenge) that a contracting authority was obliged to have guidance or a policy governing the *process* of assessment (as distinct from the application of the substantive criterion). As already noted, the second stage here, of consensus scoring, was an iterative process.

[53] Once it is accepted that the Council's evaluators correctly understood and applied the specified criteria correctly to the individual bidders, then what remains to be exercised is the qualitative judgement they bring to bear and to which further guidance by way of procedure is unlikely to assist. A contracting authority *may* have additional rules as part of the *process* of winnowing down the raw scores to be analysed, eg to reject an outlier score (the highest and/or the lowest), but once that is done, it remains for the contracting authority to make a qualitative assessment. Equally, a contracting authority may choose, as here, not to have any further elaboration of the how the collective deliberative phase was to be conducted. In my view, whether or not to have these kinds of detailed *procedural* guidelines is within the contracting authority's margin of appreciation. The absence of this kind of procedural guidance is not *per se* unlawful.

[54] Further, in my view the pursuer's challenge to the Council's consensus scoring is inimical with the principle, noted above (at para [25]) and accepted by the parties, that a contracting authority has a wide margin of appreciation in relation to matters of judgement

or assessment of the qualitative element of the bids. An attempt to constrain the *manner* of the application of that judgement by a collective process is, in my view, an unwarranted intrusion into that wide margin of appreciation. Once the decision-taker is lawfully within that margin of appreciation, absent any error or breach of substantive or procedural duty, and it must be noted that none of the principles or duties summarised at paras [17] to [27] above was identified by the pursuer as in play, a contracting authority must be allowed freely to makes it assessment unconstrained by the kind of further procedural dictates that the pursuer seeks to impose. This ground of challenge also fails.

Consideration of the inadequate reasons challenge as allied to the unlawful consensus scoring challenge

[55] Mr Lindsay acknowledged in his submissions that the pursuer's unlawful consensus scoring challenge was allied to, or could be viewed through the lens of, the pursuer's inadequate reasons challenge. In my view, the substance of the criticisms advanced under the head of inadequate reasons, presented in this way, springs from this same misconception as to the scope of what is within the margin of appreciation and which underpinned the pursuer's unlawful consensus scoring challenge. In substance, the pursuer's criticism amounted to no more than a complaint that the Council had not applied a mathematical formula. By this, I understood Mr Lindsay to mean, for example, taking the average of the scores. That would constitute an obvious correlation.

[56] Of course, a mathematical correlation could involve several types of calculations or algorithms: it could be to take the mean, the median or the mode of the raw scores of the evaluators for each technical criterion. Absent this, there was (it was said) no obvious relationship between the raw scores and the moderated score. This was said to inform the

inadequate reasons challenge. As Mr Lindsay put it, had there been an "obvious" correlation between the raw scores and the moderated score then little would be required in terms of reasons. Conversely, he submitted an absence of correlation imposed a greater burden to provide reasons.

[57] In my view this is too prescriptive. An absence of a mathematical correlation does not infer that the process of consensus scoring was otherwise irrational or unreasoned. If the pursuer's submission were correct, this would mean that at the second stage the Council could do no more than process or collate the raw data, applying a specified mathematical calculation, eg by the kind of calculation noted above. In my view, this would unduly constrain the contracting authority's margin of appreciation.

[58] The pursuer's approach on this branch of its case seems to me to fail fundamentally to acknowledge that, at the second stage, the Council is engaged in what was described as "moderation". As the term "moderation" suggests, this is a collective process of debate, involving a give and take of different views, as part of the qualitative assessment by a group of evaluators in order to arrive at a single consensus score. The mere fact that this is not done by a mathematical calculation does not infer that this was arbitrary, unreasoned or breached any of the applicable principles governing procurement (noted above).

The inadequate reasons challenge as a free-standing ground

[59] It is appropriate that I briefly express my views on the pursuer's inadequate reasons challenge, if I had found in its favour on the competency issue. On this matter, I accept Mr Duthie's submission that the onus is on the pursuer to establish and prove its grounds and that, in respect of the pursuer's inadequate reasons challenge, no sufficient basis had been placed before the Court where it could even begin to assess whether the reasons were

inadequate. Whether or not reasons are adequate is not generally discernible in the abstract, but assessed in the context of what was known to the parties. In the present case, the context is likely to include matters that would have been familiar to the bidders, including the Tender, their own bids, the shorthand terms used for technical criteria and other matters. While the amount of context that is necessary to assess the adequacy of reasons will vary in the individual case, there was no serious attempt to establish that context so as to enable the Court to assess whether the informed bidder would truly find the reasons provided to be inadequate. Had this ground of challenge been competent, it would nonetheless have failed.

Remedy and Decision

The question of remedy

[60] In light of my determination of the foregoing, the question of remedies is straightforward. As I indicated to parties when I advised them of my decision, on 6 November, a week after the proof concluded, even had the pursuer succeeded, in the exercise of my discretion, I would have been likely to refuse reduction of the Council's decision and its award to Liquidlogic. Among the factors that would have informed that discretion is the fact that the pursuer came third in the tender exercise. Accordingly, even if the pursuer had succeeded on the disqualification issue, that would nonetheless not justify reduction, as the pursuer's path to success was blocked by the second bidder who was ranked ahead of the pursuer. Even had the pursuer succeed on both the disqualification challenge and the inadequate reasons challenge, I would have refused reduction. Success on either of these grounds does not ineluctably lead to the conclusion that the outcome was necessarily materially flawed. I would have also taken into account additional factors, including (i) the delay in re-running the whole tender process, and (ii) the impact on the

Council of having to persist with an inadequate, aging and unsupported software system. These factors militated against a continuation of the *status quo*, which a reduction would entail. While I might have considered reduction, if the pursuer had succeeded in its unlawful consensus scoring challenge, as that might be seen as vitiating the outcome of the tender process, in my view this was the weakest of the pursuer's several grounds. In light of the other factors I have referred to, in the exercise of my discretion I would have refused reduction, with the result that the only remedy would have been damages.

Decision

[61] It follows that the pursuer's case has failed on all fronts. Insofar as insisted in, the pursuer's pleas fall to be repelled and the defender's third plea sustained. In light of my decision, the defender's motion governing the position *ad interim*, and which may have required to be considered if the period at avizandum were more than a few weeks, is no longer relevant and may be refused as unnecessary.

[62] I reserve meantime all question of expenses.