



OUTER HOUSE, COURT OF SESSION

[2020] CSOH 82

CA96/19

OPINION OF LORD TYRE

In the cause

A C WHYTE & COMPANY LIMITED

Pursuer

against

RENFREWSHIRE COUNCIL

Defender

Pursuer: Lindsay QC; Gilson Gray LLP
Defender: Duthie QC; Clyde & Co LLP

4 September 2020

Introduction

[1] On 2 November 2018, the defender (“the council”) issued an invitation to tender (“ITT”) for external works to residential properties within its local authority area. The pursuer tendered for the works. On 13 February 2019, the council informed the pursuer that its tender had been unsuccessful, and that the council intended to award the contract to Procast Building Contractors Limited (“Procast”). The council subsequently entered into a contract with Procast. In this action for damages, the pursuer claims that the contract was awarded to Procast in a manner which did not comply with the terms of the ITT, and

that the council thereby breached the obligation of transparency imposed upon it by regulation 19(1) of the Public Contracts (Scotland) Regulations 2015 (“the Regulations”).

[2] The action proceeded to proof, excluding matters related to quantum of loss.

The proof was conducted remotely due to Covid-19 restrictions. Evidence on matters of fact was given on behalf of the pursuer by Mr Russell Kennedy, the pursuer’s senior estimator, and on behalf of the council by Mrs Joanna Tannock, an assistant category manager within the council’s corporate procurement department, and

Mrs Bridget Lambert, the council’s strategic procurement manager. I found all of these witnesses to be credible and, other than as noted below, reliable. Expert accountancy evidence was led on behalf of the pursuer from Mr Thomas Hughes, senior consultant with Gerber Landa & Gee, chartered accountants, and on behalf of the council from Mr David Bell, assistant director with Ernst & Young LLP. Both were well qualified to provide expert opinion on the matters on which they prepared written reports and gave oral evidence.

The invitation to tender

[3] The introduction to the ITT issued on 2 November 2018 stated *inter alia* as follows:

“...2. Renfrewshire Council wish to appoint a Contractor to manage and carry out external envelope works to residential (mixed tenure) properties throughout Renfrewshire Locale.

3. The Contract will be for 1 year with the option to extend for up to a further 12 months on 3 separate occasions, subject to satisfactory operation and performance. Any extension will be at the sole discretion of Renfrewshire Council. It is anticipated that the contract will commence on the 29 March 2019. If the contract does not commence on 29 March 2019, the contract period shall run from the actual date of commencement as stated in the Letter of Acceptance.

4. The Conditions of Contract are the core clauses of the NEC3 Term Service Short Contract April 2013 and the 'Z' clauses contained in section 2.2 of this Invitation to Tender.

5. This procurement process is being conducted in accordance with the Public Contracts Scotland Regulations 2015 and the Councils Standing Orders Relating to Contracts for above EU Threshold Works contracts..."

[4] Section 1 of the ITT contained "Instructions for completing the Tender Submission".

Tenders were to be submitted electronically. All tenderers were required to complete the European Single Procurement Document (Scotland) ("ESPD") contained in the qualification envelope of the council's e-tender system. Part 4B of the ESPD required information regarding the tenderer's economic and financial standing. The council's selection criteria in relation to part 4B were set out in the ITT. Candidates were required to have a minimum annual turnover of £15 million for the past 3 years in the business area covered by the contract. Before the deadline for submission of tenders, the minimum turnover figure was reduced to £10 million. The ITT also stated:

"...Where the Candidate is a group of organisations and particular members of the group do not meet the minimum turnover stated above in their own right, the Candidate may provide an alternative proposal to meet the minimum requirements. The Council will consider whether any alternative proposal can be considered equivalent to the minimum requirements. Acceptance of alternative proof and progress to the award stage will be at the Council's sole discretion.

Any Candidate unable to demonstrate the required annual turnover stated, or provide acceptable alternative proof of its financial standing to the satisfaction of the Council, may be assessed as a FAIL and will be excluded from the competition."

[5] The council's part 4B selection criteria also required confirmation that the tenderer carried insurance to a certain level, and noted that the council would use data supplied by Dun & Bradstreet to calculate a failure score to demonstrate financial strength and stability. The information provided to tenderers regarding the ESPD concluded:

"This ESPD (Scotland) acts as a self-declaration for tenderers. By law, the recommended Tenderer at the end of the evaluation must provide all requested

certificates and documentation before being awarded the contract. However, Renfrewshire Council can ask any tenderer to submit their evidence at any point in the procurement process, if this is necessary to ensure that the process is carried out properly.”

[6] Paragraph 1.18 of the instructions for completing the tender submission stated:

“Where the Tenderer is a consortium, the Contract will be entered into with the nominated lead organisation and all members of the consortium, who will in these circumstances each be required to execute the Contract, together with all ancillary documentation, evidencing their joint and several liability in respect of their obligations and liabilities arising out of or in connection with the Contract. It will be for members of the consortium to sort out their respective duties and liabilities amongst each other.”

Mrs Lambert explained that the inclusion of paragraph 1.18 had been a mistake. It ought to have been deleted from the conditions of contract by a “Z” clause, but this had inadvertently not been done.

Procast’s tender

[7] The deadline for submission of tenders was 5 December 2018. Tenders were submitted by nine candidates, including the pursuer and Procast.

[8] A redacted version of Procast’s tender was lodged in process. In response to the question “Does the bidder rely on the capacities of other entities in order to meet the selection criteria set out under Part 4...?”, Procast answered “No”. Its tender was, however, accompanied by three ESPDs in respect of itself and two other companies, namely JR Scaffold Services Ltd and JR Specialist Services Ltd. Question 4B.1.2 of the ESPD stated “The bidder should provide its average yearly turnover for the number of years specified in the relevant Contract Notice”. Procast responded: “We confirm our average yearly turnover for the last 3 years (2018, 2017 and 2016) figures is £12,347,947”.

Post-tender correspondence

[9] The council operated an online portal to which messages, including questions and answers, could be uploaded. On 13 December 2018, the council posted the following question to Procast:

“As part of your tender submission you have confirmed you will be tendering as part of a group, can you please confirm if you are bidding as part of a consortium or if you are sub contracting with JR Group?”

Procast replied:

“This consortium is an association of our two companies Procast Building Contractors Ltd and JR Group Ltd with the objective of delivering the External Upgrade Works to Renfrewshire Council.

It allows us to pool our resources, skills and experience to achieve a common goal of successfully delivering these services to the benefit of Renfrewshire Council and its communities.

We aim to base our consortium structure on the 'Lead Provider' model. This formal structure gives our consortium a clear hierarchy, whilst supporting a collaborative partnership working model with all consortium partners operating on an equal basis. It is also one of the most common consortium models operated in the construction industry.

Please let us know if you require any further clarification.”

The council then sought confirmation of who the Lead Provider would be; the response was that Procast would be the Lead Provider.

Award of contract to Procast

[10] On 30 January 2019, a joint report by the chief executive and the director of planning, housing and planning services, was presented at a meeting of the council’s finance, resources and customer services policy board. The report, which was prepared by Mrs Tannock, sought the board’s approval of the award of the contract to Procast. It stated that all nine tender submissions complied with the minimum selection criteria of the ESPD.

On the basis of the council's evaluation of quality and price, Procast had achieved the best score and the pursuer the second best.

[11] The minutes of the board meeting included the following entry:

"20 External Upgrade Works

...

Following a procurement exercise conducted in accordance with the Council's procedures, nine tenders were submitted and after evaluation the tender submitted by Procast Building Contractors Limited was found to be the most economically advantageous.

DECIDED: That the Head of Corporate Services be authorised to award a measured term contract for external upgrade works to Procast Building Contractors Limited at a maximum cost of £40,000,000 excluding VAT (£10m annually) for a period of 12 months with the option to extend for up to a further 12 months on three separate occasions, commencing 29 March 2019 or on the date confirmed in the letter of acceptance."

[12] On 4 February 2019, Mrs Tannock uploaded to the portal a further request to Procast:

"As per the minimum requirements, candidates were required to have a minimum 'general' yearly turnover of at least £ 10m for the past three years.

Your ESPD submission confirmed that you met this minimum requirement, could you please submit evidence to show that your turnover for the last three years is a minimum of £10m."

This request may have been prompted by an expression of concern by Mr Kennedy, at a meeting with the council relating to a different project, that he had heard that the contract was to be awarded to Procast even though they did not have the required level of turnover.

The following day, Procast responded:

"We have pleasure in returning our Joint Venture Combined Accounts as documentary evidence that our Joint Venture meets with the minimum 'general' yearly turnover of at least £10m for the past 3 years as requested. The combined yearly annual turnover stands at 2018 - £16,070,587, 2017 - £12,180,113 and 2016 - £10,151,403 which differs slightly from the 'average' turnover figures submitted in the ESPD due to anticipated account figures..."

The accounts provided by Procast were unaudited financial statements for itself, JR Scaffold Services Ltd and JR Specialist Services Ltd respectively, for each of the 3 years requested. In each year the aggregate turnover of the three companies, as disclosed in the financial statements, exceeded £10 million. The council confirmed that this was the evidence that it was looking for. In none of the years did the turnover of any of the three companies, taken alone, exceed £10 million.

[13] By letter dated 13 February 2019, the council informed Procast that the board had decided to award the contract to it. On the same day the council advised the pursuer that its tender had been unsuccessful. The standstill period in terms of regulation 86 began to run.

[14] On 15 February 2019, Mrs Tannock posted another entry on the portal seeking information, as follows:

“I refer to your tender for the Council's external Upgrade Works dated 5 December 2018. In your message to the Council sent via the messaging system dated 13 December 2018 at 14:39 you affirmed that you were acting as part of a consortium (consisting of Procast Building Contractors Limited, JR Specialist Services Ltd SC385973 and JR Scaffold Services limited SC187329) and that the Lead provider is Procast. Reference is made to the arrangements made with North Lanarkshire council, however as this is an open tender we need Procast to explain for the purpose of this contract how the consortium arrangements would work rather than seek that information from a third party as to how it specifically operates in another area.

As part of this responses [sic], can you specifically address the following (1) who would this Council be contracting directly with? (2) How would instructions and orders be issued? (3) Who would be responsible for any works provided? (4) Whose insurance would be engaged for works provided? and (5) Can you confirm whether the intention is to create a formal company/joint venture vehicle to perform the contract, to contract with one consortium member or some other arrangement?”

[15] Procast provided answers to these questions in a letter to the council dated 18 February 2019. The letter stated *inter alia* that the process for formally creating the consortium would be through developing a partnership agreement, and that the agreement would provide for Procast, JR Scaffold Services Ltd and JR Specialist Services Ltd to assume

joint and several responsibility for performance of the contract. The letter was accompanied by letters signed on behalf of JR Scaffold Services Ltd and JR Specialist Services Ltd confirming agreement to the formation of a consortium and to the assumption of joint and several liability.

[16] The standstill period ended on 25 February 2019. On the following day the council accepted Procast's offer to carry out the works in accordance with the terms of its tender, and thereby concluded the contract with Procast alone.

The pursuer's challenge

[17] In the meantime, the pursuer's agents had written to the council on 20 February 2019, asserting that it was in breach of its obligations under the Regulations. Three alleged breaches were identified, including a failure to exclude Procast's tender from the competition on the ground that Procast failed to meet the minimum annual turnover requirement. The council's solicitor responded, explaining that Procast's tender had been submitted on behalf of a consortium which met the minimum turnover requirement. Following further correspondence, the pursuer raised an action in this court. That action was dismissed on 30 May 2019 on the ground that the pursuer had not complied with the pre-action notice requirements of the Regulations. Prior to dismissal, however, the council had on 17 May 2019 produced documentation including redacted accounts of the three consortium companies. The present action was raised on 13 June 2019. One of the issues between the parties is whether it was raised timeously in terms of the Regulations. I deal with that matter later in this opinion.

[18] The pursuer's case is founded on regulation 19(1), which states:

"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."

[19] The pursuer claims that the council breached its obligation to act in a transparent manner in the following respects:

- (i) The council failed to enquire into, and take account of, any inter-company trading between or among Procast and the two JR companies, with the consequence that when the council awarded the contract to Procast it did so without the information necessary to satisfy it that the minimum turnover requirement specified in the ITT had been met.
- (ii) The award of the contract to Procast was not made in accordance with the terms of the ITT.
- (iii) At the time when the contract was awarded to Procast, the council was not in possession of information and documentation that was essential in order for a properly informed decision to be made.

Expert evidence

[20] The expert evidence was focused on the question whether it was possible, on the basis of the documentation disclosed by the council, to determine whether Procast (taking account of the contribution of the two JR companies) met the minimum annual turnover requirement in the ITT and, in particular, what adjustment, if any, could or ought to be made to the figures in the respective companies' accounts to allow for any inter-company trading.

[21] Mr Hughes, in his initial report, expressed the opinion that in order to fully consider the combined turnover of the three companies, the council would have required to identify and deduct inter-company transactions between or among any of the three companies during the years ended 2016, 2017 and 2018. Without details of inter-company transactions, it was not possible properly to assess the combined turnover figure. In a supplementary report he commented on Mr Bell's report and expressed doubt regarding the relevance of the exercise carried out by Mr Bell in relation to Procast's contract with North Lanarkshire Council.

[22] In the course of his oral evidence, Mr Hughes agreed that there was no statutory obligation on a consortium to produce consolidated accounts; nor were such accounts required by standard accountancy practice. He accepted that there had been no requirement in the ITT to make an allowance for inter-company trading among companies bidding as a consortium, but without that information it was not possible to know whether or not the minimum turnover requirement had been met because the extent of any double-counting was not known. It had therefore been incumbent upon the council to obtain the information. He had seen nothing to indicate that the council had done so.

[23] Mr Bell noted that the ITT was silent on the need for consortium bids to prepare and submit consolidated accounts with regard to turnover, and that there was no Companies Act or accountancy practice requirement for consortium companies to prepare consolidated accounts. He was therefore of the view that there was no requirement for the three companies to prepare consolidated accounts for the purposes of quantifying their aggregate annual turnover. Mr Bell's attention had been drawn to the fact that Procast had carried out work in 2018 for North Lanarkshire Council, but it was unclear from the publicly available information whether Procast had been acting on its own or in a consortium with the two JR

companies. In any event, even if the whole of Procast's turnover from the North Lanarkshire Council contracts were to be deducted from the 2018 total, the balance still exceeded the £10 million minimum requirement.

[24] In his oral evidence, Mr Bell explained that he had not ignored 2016 and 2017, but there was nothing in the publicly available information to indicate that Procast had carried out work for North Lanarkshire Council in either of those years. He reiterated that, in his opinion, where a consortium (as opposed to a group) was tendering, there was no need to make any adjustment for inter-company trading in order to ascertain the combined turnover of the consortium companies.

Argument for the pursuer

[25] On behalf of the pursuer it was submitted that the council had breached the obligation of transparency because it had failed to adhere to the terms of the ITT in three respects. Firstly, it was in breach of an implicit obligation to take into account inter-company trading between or among the members of Procast's consortium. That was the only way to ensure that Procast met the minimum annual turnover requirement specified in the ITT. Failure to make an adjustment was unfair to single company tenderers such as the pursuer who could not benefit from the inflated turnover created by inter-company trading. Alternatively, if there had been no implicit obligation to identify and discount inter-company trading, it had been a manifest error for the council to fail to do so because it had been necessary in order to manage financial risk and meet the statutory requirements of equal treatment and non-discrimination. It was a matter of admission that the council had given no consideration to inter-company trading. It had not therefore exercised a discretion to disregard the turnover requirement, and no question therefore

arose of whether there had been a reasonable exercise of a discretion. If it were to be argued that the council's failure to investigate inter-company trading had made no difference to the outcome of the procurement, the onus of proof of this rested upon the council and had not been discharged.

[26] Secondly, the contract had been awarded contrary to the terms of the ITT in three respects:

- (i) Contrary to paragraph 1.18 (above), the contract had been entered into with Procast alone and not with all of the members of the consortium.
- (ii) Contrary to its own part 4B selection criteria, the council had entered into a contract with Procast despite the fact that none of the members of the consortium met the minimum turnover requirement in its own right. The council appeared to have failed to understand the terms of its own document and could not therefore validly exercise any discretion to disapply them.
- (iii) The council had failed to secure joint and several liability in accordance with paragraph 1.18. Reference had been made to a partnership agreement but no such agreement had been produced. The letters from the JR companies went no further than indicating a willingness to undertake joint and several liability.

[27] Thirdly, the council awarded the contract at a time when it had inadequate information to enable it to assess whether or not Procast met the conditions in the ITT.

Timing had been important: for reasons connected with funding, the work had to commence on 29 March 2019 and there would not have been another meeting of the board before then. At the time when the board decision was taken and, in any event, at the time when the letter awarding the contract to Procast was sent, the council was not in possession of the critical information sought by Mrs Tannock on 15 February (see above), including the

identity of the person with whom the council would be contracting. Information previously supplied by Procast had been incomplete and self-contradictory. For example, in its ESPD Procast had stated that it was not relying on the capacity of any other entity to meet the minimum conditions. In the post-tender correspondence reference had been made to an entity called “JR Group Ltd” as opposed to the two companies subsequently named. Fairness had required that these critical matters be clarified before and not after the contract was awarded.

Argument for the council

[28] On behalf of the council it was submitted that no breach of the terms of the ITT, and hence no breach of the obligation of transparency, had been demonstrated. A distinction fell to be drawn between breach of the terms of the ITT on the one hand and the exercise of judgement as to how to apply criteria on the other. The council enjoyed a margin of appreciation in relation to the latter, and the pursuer’s case amounted to no more than disagreement as to how the council’s judgement had been exercised.

[29] There had been no obligation incumbent on the council to inquire whether the turnover disclosed by Procast and the JR companies included inter-company trading. Terms could not be implied into the ITT in the manner suggested by the pursuer; that would constitute an undisclosed criterion which could itself have been open to challenge if applied. The fact that the ITT made no mention of allowing for inter-company trading was determinative of the matter. Mr Bell’s opinion that there was no need to inquire should be accepted. Mr Hughes’ opinion was properly to be regarded as a criticism of the terms of the ITT and not an indication of a failure to comply with it. In any event there was nothing to suggest that inquiry would have disclosed any inter-company trading between Procast and

the JR companies. Moreover, annual turnover was only one indicator of financial standing; the ITT also provided for adequate insurance and the obtaining of a Dun & Bradstreet report.

[30] As the ITT made clear, the ESPD operated as a self-certification of annual turnover for the years in question. The council was entitled, if it wished, to rely on Procast's self-certification when making the decision to award the contract, and to seek verification thereafter. Despite the answer given by Procast in its ESPD, the council was fully aware when making its decision that this was a consortium bid. When it became apparent that Procast alone did not meet the minimum annual turnover requirement, the council was entitled in terms of the ITT to consider an alternative proposal, ie to have regard to the combined turnover of the three companies. It was a matter of admission on record that this was what the council had done, and this had been confirmed by Mrs Tannock.

[31] As regards the contention that the award had been contrary to the terms of the ITT, the fact that the contract was entered into with Procast alone did not raise any issue of unfairness. There was no substance to the suggestion that the council had misunderstood the terms of the ITT; it was expressly within the council's discretion to award the contract even if the minimum turnover requirement was not met. The letters from the JR companies were sufficient to create joint and several liability, but even if they had been insufficient, that was a matter separate from compliance with the terms of the ITT.

[32] As regards adequacy of information, the pursuer over-emphasised the importance of the letter of 13 February 2019 intimating the award of the contract. The contract was not entered into until 26 February, and the council was entitled to continue to pursue inquiries during the standstill period. In any event, by 13 February the council was in possession of

all critical information. Mrs Tannock's queries on 15 February merely sought confirmation in more formal terms of matters of which the council was already aware.

Decision

[33] It is common ground that the role of the court in relation to a challenge of a procurement decision is a restricted one. As Coulson J put it in *BY Development Ltd v Covent Garden Market Authority* [2012] EWHC 2546 (TCC) at paragraph 8:

“...The court's function is a limited one. It is reviewing the decision solely to see whether or not there was 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.”

As Lord Malcolm emphasised in *Glasgow Rent Deposit & Support Scheme v Glasgow City Council* [2012] CSOH 199 at paragraph 15, “...the court must not trespass on the jurisdiction given to the contracting authority to exercise its own broad and discretionary judgment as to the identification of the most economically advantageous bid”. However, Lord Malcolm also observed that the contracting authority enjoys no such margin of discretion where the basic principles of public procurement have been breached. Where, for example, the contracting authority acts in breach of the obligations incumbent upon it in terms of regulation 19(1), the court will intervene.

[34] Nor is it in dispute that the principle of transparency obliges the contracting authority to assess all tenders received in accordance with the published rules of the competition: see *Easycoach Ltd v Department for Regional Development* [2012] NIQB 10, McCloskey J at paragraph 76. If it fails to do so, its decision is open to challenge and no question of having to demonstrate manifest error arises. The principal issue in the present

case is whether the pursuer has identified any material failure on the part of the council to assess the tender received from Procast in accordance with the terms of the ITT.

[35] Mrs Tannock explained that in deciding to award the contract to Procast, the council had relied upon the self-certification in Procast's ESPD that they met the minimum turnover requirement. When assessing the tenders submitted, she had noted that Procast stated in its ESPD that it was participating in the procurement procedure together with others, that it had supplied a name for the other bidders (JR Group), and that it had submitted ESPDs for JR Scaffold Services Ltd and JR Specialist Services Ltd. It was clear to her that Procast was bidding on behalf of a consortium of companies. She had also, however, noted Procast's statement that it was not relying on the capacities of other companies in order to meet the selection criteria. Because of this, she had posted the query on the portal to which Procast replied confirming the consortium arrangement. She considered that Procast's intentions had been clearly explained by the time of the board meeting on 30 January 2019. The council had had a discretion in terms of the ITT to award a contract to a tenderer who did not meet the minimum turnover requirement, but the question of exercising the discretion did not arise because of Procast's self-certification that it met the requirement. It would have made no difference if supporting documentation had been sought in advance of the board meeting. Mrs Tannock had also obtained Dun & Bradstreet reports on all three companies. She was not sure whether she had done this in advance of the board meeting but thought that it was very likely that she had.

[36] In the course of cross-examination, Mrs Tannock was referred to the provision of the ITT which stated that where members of a consortium did not meet the minimum turnover requirement in their own right, the council might consider an alternative proposal. She responded that these were matters falling within the discretion reserved by the council. I

did not find that response entirely satisfactory, because elsewhere in her evidence she emphasised that the council had relied on the self-certification and did not require to exercise any discretion. In this regard, however, I note that it is accepted by the pursuer in its pleadings that the council was satisfied that acceptable alternative proof of Procast's financial standing had been provided (subject to the argument that this conclusion was unlawful), and I do not consider that it is now open to the pursuer to raise any issue as to whether a discretion was exercised to accept a bid which did not meet the minimum turnover requirement.

[37] Mrs Tannock accepted that Procast had provided an incorrect answer in its ESPD to the question regarding reliance on the capacities of other companies. Her explanation, that the council had accepted an alternative proposal, was broadly consistent with her evidence that she had clarified this matter in post-tender correspondence. She was also asked about the discrepancy between the reference in Procast's clarification to "JR Group Ltd" - apparently a single company - and the ESPDs submitted on behalf of two separate JR companies. She considered that it had been clear that the bid was being submitted on behalf of Procast and another two companies.

[38] My impression was that some of Mrs Tannock's reasoning was being applied retrospectively and did not always reflect the council's decision-making process at the time of approval of her recommendation to the board. But the question for the court is whether the council failed to assess Procast's tender in accordance with the terms of the ITT. In my opinion there was no material departure from its terms. The key point, in my view, was that the ITT expressly provided for self-certification of minimum annual turnover. Procast certified that it met the requirement and the council was entitled, if it so wished, to take a decision on the basis of that self-certification. This was not, of course, the end of the matter:

all that happened on 30 January 2019 was that the council's head of corporate services was authorised to accept Procast's tender. No contract was then entered into. Nor was the contract entered into on 13 February 2019 when the council informed Procast that its tender had been successful, but by this time the council had in any event sought and obtained evidence, in the form of unaudited accounts, to satisfy it that the minimum turnover requirement had been met. The information and documentation supplied made clear that Procast was relying upon the combined turnover of itself and the two JR companies in order to meet the requirement. In terms of the ITT that amounted to an alternative proposal, which the council was entitled, if it so chose, to regard as sufficient. By the time the council intimated its intention to award the contract to Procast, it was fully informed as to the means by which Procast claimed to meet the requirement; *a fortiori* it was in possession of that information at the time when the tender was formally accepted and the contract entered into.

[39] There were undoubtedly inconsistencies in the information submitted by Procast from time to time: the ESPD wrongly stated that Procast was not relying on the capacities of other companies, and the post-tender correspondence referred to a single company called JR Group Ltd whereas ESPDs were submitted in relation to two companies with different names. However, by the time of conclusion of the contract, the council was entitled to reach the view that those inconsistencies had been satisfactorily resolved. By at latest 5 February 2019 there was no remaining doubt that Procast was relying upon the combined annual turnover of itself and the two specified JR companies in order to meet the minimum turnover requirement.

[40] I reject the submission that the terms of Mrs Tannock's portal entry dated 15 February 2019 demonstrate that at the time of intimation of the award of the contract the

council was not in possession of the information necessary to enable it to determine whether the requirements specified in the ITT had been met. Matters such as the identity of the person with whom the contract would be entered into were clearly of importance, but there was nothing in the terms of the ITT to require them to have been finalised before the decision to award was made. I accept that if at a late stage a problem had arisen in relation to whether Procast could propose a contractual structure acceptable to the council, this might have created significant concerns, including funding difficulties, for the council. That, however, appears to have been a risk that the council was prepared to take: as Mrs Tannock observed, if Procast had failed to provide satisfactory evidence of its financial stability, the matter could have gone back to the board or back to tender. However unfortunate that would have been, it is not relevant to the question whether the terms of the ITT were met.

[41] I turn now to the specific issue of adjustment of turnover for any inter-company trading among Procast and the two JR companies. In my opinion it is a sufficient answer to this point that the ITT did not provide for any such adjustment, and accordingly there was no obligation on the council to investigate the matter. I accept Mr Hughes' evidence that the effect of a substantial degree of inter-company trading could have been that the consolidated turnover of the three companies would be reduced because of double counting. It would have been open to the council to make provision for such a situation in the terms of the ITT, but it did not. The only relevant provision of the tender is set out at para [4] above, ie that where the members of a consortium did not meet the minimum turnover in their own right, the council would consider whether an alternative proposal by the tenderer could be considered equivalent to the minimum requirements. In considering Procast's alternative proposal, it would in my view have been open to the council to seek information regarding inter-company trading with a view to making an allowance for it, but it was under no

obligation to do so, either as a matter of law or in terms of the ITT. Failure to meet the £10 million minimum turnover requirement would not have led to automatic disqualification.

[42] I am not persuaded that the approach adopted by the council was unfair to single company tenderers. Although the expert witnesses agreed that inter-company trading could provide an opportunity for fraudulent inflation of aggregate turnover, it was not suggested that any such thing had occurred in the present case, and I must consider the comparison between a consortium tenderer and a single company tenderer on the assumption that no improper conduct has taken place. Any potential unfairness was removed by the discretion retained by the council to award the contract, whether to a consortium or a single company, even if the minimum turnover requirement was not met.

[43] Nor, in my view, can it be asserted that the council fell into manifest error in failing to inquire into and make adjustments for any inter-company trading. It was common ground between the expert witnesses that neither company law nor financial reporting regulations required a consortium to prepare or submit consolidated accounts. Mr Hughes's view was that despite there being no such requirement he would want, if in the council's position, to see all the cards on the table, including details of any inter-company trading. Mr Bell's opinion was that the appropriate method of presentation of the accounts of a consortium - as opposed to a group - was not to consolidate, and that the most accurate means of measuring combined turnover was simply to aggregate the turnover of the individual companies. Neither of those opinions appears to me to be so unreasonable that I must reject it as logically unsupportable (cf *Bolitho v City and Hackney Health Authority* [1998] AC 232, Lord Browne-Wilkinson at page 243). It cannot therefore be said that the approach adopted by the council amounted to manifest error in the sense of an error that "almost

jumps from the page”, as Lord Malcolm put it in *Glasgow Rent Deposit & Support Scheme v Glasgow City Council* (above) at paragraph 15. Putting the matter the other way round, it was within the council’s margin of discretion to proceed on the basis of the figures supplied and vouched by Procast without inquiring into the existence or extent of inter-company trading between or among it and the two JR companies. I do not regard the evidence regarding work carried out by Procast for North Lanarkshire Council as being of any relevance to the issue in the present case.

[44] Finally, I do not consider that any of three respects in which the pursuer contends that the contract was awarded otherwise than according to the terms of the ITT amounts to a breach of the obligation of transparency. I have already addressed the decision to award the contract to Procast even though none of the consortium members individually met the minimum annual turnover requirement. The fact that the contract was ultimately entered into with Procast alone was, putting it at its highest for the pursuer’s case, a failure by the council to secure an advantage to which the erroneously-included paragraph 1.18 might have entitled it, and not a failure to assess the competing bids in accordance with the terms of the ITT. The same may be said about any failure to secure the joint and several liability of the JR companies. If indeed there was such a failure (a matter on which I need make no finding), it had no impact on the assessment of tenders which is the substance of the pursuer’s case.

[45] For these reasons I accept the council’s submission that there was no failure to assess the competing tenders in accordance with the terms of the ITT, and accordingly that there was no breach of the obligation of transparency in regulation 19(1). The pursuer’s claim falls to be refused.

Time bar

[46] In the light of my conclusion, the question of whether the present proceedings were raised timeously does not strictly arise for decision, but as the matter was argued I shall express my view on it. Regulation 88 provides *inter alia* as follows:

- “(3) Proceedings under this regulation may not be brought unless —
 ...
 (b) the proceedings are brought in accordance with paragraph (4).
 (4) For the purpose of paragraph (3)(b), proceedings must be brought —
 ...
 (c) in any other case, within 30 days beginning with the date when the economic operator first knew or ought to have known that grounds for starting the proceedings had arisen unless the court considers that there is a good reason for extending the period within which proceedings may be brought, in which case the court may extend that period up to a maximum of 3 months from that date.”

The pursuer did not seek to argue that there were grounds for exercise of the court’s discretion to extend the period, and so the matter for determination is when the pursuer first knew or ought to have known that grounds for starting proceedings had arisen.

[47] On behalf of the council it was submitted that the 30 day period in regulation 88(4)(c) began to run on 13 February 2019, when the pursuer was informed that the contract was to be awarded to Procast. Mr Kennedy’s evidence had been that the pursuer took the view that the council could not have properly applied the applicable rules, because it was clear Procast did not meet the required economic and financial standing set out in the ITT. Mr Kennedy had established from publicly available information that Procast’s turnover in recent years was well below £10 million. Letters challenging the award to Procast had been sent during the standstill period. The previous action had been raised on this basis. The 30 day period had accordingly expired before the present action was raised on 13 June 2019.

[48] The pursuer contended that the 30 day period had begun to run on 17 May 2019, when the council produced documentation which disclosed Procast’s reliance on the

turnover of the two JR companies in order to meet the minimum turnover requirement. That documentation had post-dated the board's decision to authorise the award of the contract to Procast. Mr Kennedy explained that the pursuer took the view that these documents had not been, and could not have been, taken into account when Procast's tender was evaluated, and that without them Procast had required to be assessed as a fail in terms of the ITT. Until the pursuer had had sight of these documents, the pursuer was not aware and could not have been aware of the grounds of challenge relied on in the present proceedings.

[49] In *Johnson & Johnson Medical Ltd v Greater Glasgow Health Board* [2016] CSOH 12, the Lord Ordinary (Lord Jones) referred at paragraph 66 to the decision of the Court of Appeal in *Sita UK Ltd v Greater Manchester Waste Disposal Authority* [2011] 2 CMLR 32, noting that it had been held in that case that, when deciding whether an unsuccessful tenderer had sufficient knowledge to bring a claim for infringement of the public procurement rules, the applicable standard was knowledge of facts which clearly indicated, though they did not absolutely prove, an infringement. Applying that test to the circumstances of the present case, I consider that the proceedings were timeously raised. During the period following intimation of the decision to award the contract to Procast, the pursuer was aware only that Procast's turnover was insufficient to meet the minimum turnover requirement. The issue in the present case is whether the council acted unlawfully in awarding the contract on the basis of Procast's reliance on the combined turnover of itself and the two JR companies.

Although the pursuer was made aware in February that Procast's bid had been a consortium bid, the critical facts in relation to the consortium's satisfaction of the minimum turnover requirement did not come to the pursuer's knowledge until the relevant documentation was disclosed on 17 May. That, in my view, was the earliest time at which the pursuer had

knowledge of the facts that have formed the basis of its assertion that the contract was awarded in breach of the terms of the ITT.

Disposal

[50] For these reasons I shall repel the pursuer's pleas in law and also the council's first plea in law (that the action is time-barred), sustain the council's third plea in law, and grant decree of absolvitor. Questions of expenses are reserved.