



OUTER HOUSE, COURT OF SESSION

[2025] CSOH 42

CA26/25

OPINION OF LORD SANDISON

In the cause

TURNING POINT SCOTLAND

Pursuer

against

GLASGOW CITY COUNCIL

Defender

Pursuer: Lindsay KC; Brodies LLP

Defender: MacGregor KC, Breen; Harper Macleod LLP

2 May 2025

Introduction

[1] In this commercial action the pursuer, Turning Point Scotland, seeks reduction in terms of Regulation 90(1)(b)(i) of the Public Contracts (Scotland) Regulations 2015 of the decision of the defender, Glasgow City Council, to award certain lots in a public contract to The Salvation Army Trustee Company instead of to it. Each party claims that the other's position is irrelevant in law and the matter came before the court for a debate to determine which (if either) is right.

Background

[2] By way of an invitation to tender (ITT) dated 10 October 2024, the Council invited tender bids for a public contract underpinning its WAYfinder Service, a programme aimed at helping people who are at risk of homelessness, who are homeless or who have experienced homelessness to find secure housing, and to support them on the street, in their accommodation or in the community. The contract was split into lots including several different locality support services, a central hub and a list of approved suppliers for further services that might be required. The contract was to endure for 4 years with an optional 2-year extension, and had a total estimated value of £73.8 million.

[3] Section 1.2 of the ITT commenced:

“1.2 Lots

The tender has been divided into 6 separate Lots, the contract value for each of Lots 1-5 has been calculated using the current pricing of the services in scope and expected demand.

The lotting structure is as follows:”

[4] There followed descriptions of the various lots and their maximum value per annum.

[5] Lot 1, named “WAYfinder Central Services”, was described as a “City centre housing advice hub, people who are supported by the Street Outreach team (city wide), and out of hours provision (city wide)” and was said to have a value of £1,400,000.

[6] Lot 2, named “WAYfinder North East”, was described as for “People who are being supported by Community Homeless Services, Asylum and Refugee households & GCHSCP’s first point of contact for homelessness services” and was said to have a value of £2,700,000.

[7] Lot 3, named “WAYfinder North West”, was given the same description and was said to have a value of £2,000,000.

[8] Lot 4, named “WAYfinder South” was also given the same description and was said to have a value of £3,000,000.

[9] Lot 5 was named “WAYfinder Housing First North East, North West and South”, was described as “Housing First Service within each locality. Tied to Lots 2,3 & 4” and was said to have a value of £1,700,000.

[10] Lot 6 was named “WAYfinder Approved Providers” and was described as an “Unranked framework of approved WAYfinder providers” with an estimated value of £1,500,000.

[11] The ITT then continued, in terms which formed the principal point of contention in the arguments of the parties, as follows:

“To ensure consistency of support for the people who will use these services, Lots 2, 3 & 4 are tied to Lot 5. If bidding for Lots 2, 3 or 4 then you must also bid for Lot 5.

Lot 5 cannot be bid for as a standalone Lot.

As Lot 5 is linked with Lots 2, 3 & 4 there will be more than one Provider awarded to Lot 5.

Outwith Lot 5, Bidders can bid for any number/combination of lots but can only be awarded one of Lots 1-4. The Council reserves the right to amalgamate lots or to award more than one lot to one Provider to avoid any lots being unfilled. If bidding for more than one of Lots 1-4, Bidders must indicate in PCST [i.e. PCS-Tender, the national tendering portal] Section 1.11.2 within the SPD [i.e. Single Procurement Document], their order of preference for lot award. Where a Bidder has the most economically advantageous tender in more than one lot, this preference will be considered in lot allocation where it does not result in a lot being unfilled, therefore preference is not guaranteed.”

[12] Section 2.2 of the Invitation to Tender contained the following provisions:

“2.2 Clarification of the Invitation to Tender

If any part of the Invitation to Tender is unclear, contradictory or contains provisions that might prevent efficient and effective provision of the supply described in the specification, then the Bidder shall contact the Council to clarify or resolve any such issues no later than the date defined as the specific end date for clarification messages within the Public Contract Scotland Tendering System and in section 1.3

(Tender Timetable) of this ITT. Contact must be via the messaging function within the PCS-T System. Please include the title and reference of this Invitation to Tender in all correspondence.

If clarification is sought regarding interpretation of, or modification to, the text of the Invitation to Tender, then the Council shall provide the same information to all Bidders without disclosing the name of the Bidder who initiated the query via the messaging function within the National Public Contract Scotland eTendering System.”

[13] A Contract Notice was also published on 10 October 2024, which contained the following provisions of relevance to the dispute:

“II.1.4) Short description

...

This contract is being tendered under the Light Touch Regime Schedule 3 to the Public (Contract) Scotland Regulations 2015.

The contract length will be 4 years with an option to extend for a further 2 years. The total estimated value (including extensions) is 73.8 Million Pounds.

The service will have 6 lots, lots 1-4 will be single supplier awarded block contracts. Lot 5 will be cost and volume. In Lot 6 bidders are invited to join a Lot of approved WAYfinder suppliers. This lot will be used for any additional funding or new requirements that cannot be met through a modification of Lots 1-5.

Outwith Lot 5, Bidders can bid for any number/combination of lots but can only be awarded one of Lots 1-4. The Council reserves the right to amalgamate lots or to award more than one lot to one Provider to avoid any lots being unfilled.

...

II.1.6) Information about lots

This contract is divided into lots: Yes

Tenders may be submitted for all lots

Maximum number of lots that may be awarded to one tenderer: 3”

[14] On 8 November 2024 Turning Point submitted a clarification request in terms of Section 2.2 of the ITT in the following terms:

“It is our understanding that if a bidder bids for each of Lots 2,3 and 4 and, following evaluation, is the most economically advantageous tender for each of those lots they would be awarded their first preference lot. As a bidder can only be awarded one of lots 1 to 4 the remaining lots would be awarded to the next most economically

advantageous tender. Can you explain the reasoning for this and, in particular, why you do not want a single organisation to be awarded more than one lot?"

[15] The Council responded on 11 November 2024 in the following terms:

"The Council has made the decision to limit the number of lots that can be awarded to [sic] due to the size, value and length of the contract as part of our commitment to reduce barriers to new or smaller organisations and ensure there is sufficient market capacity and security".

[16] The parties were agreed that the contract was for the provision of social services listed in Schedule 3 to the 2015 Regulations and that its value was above the relevant thresholds. Turning Point submitted three timeous and compliant bids. The first was for Lot 3 linked with Lot 5, the second for Lot 4 linked with Lot 5, and the third for Lot 6. It ranked Lot 4 linked with Lot 5 first in its order of preference. On 6 February 2025, the Council's Contracts and Property Committee decided to award Lot 3 linked with Lot 5 to Turning Point and to include it as an approved supplier in terms of Lot 6; and to award Lot 4 linked with Lot 5 to the Salvation Army. The next day the Council issued to Turning Point a Notice of Intent to Award, which advised it of the decision taken in relation to Lot 3 linked with Lot 5 and that it would be an approved supplier for Lot 6. It transpired on 10 February 2025 that Turning Point had been the only compliant bidder for Lot 3 linked with Lot 5. In relation to Lot 4 linked with Lot 5, the Council advised Turning Point that its combined score for Lot 4 linked with Lot 5 was 89.29 (composed of a commercial score of 35.89 and a quality score of 53.4). The overall score awarded by the Council to the Salvation Army in respect of Lot 4 linked with Lot 5 was 79.76 (commercial 39.86 and quality 39.9). Nonetheless, the Council awarded the contract for Lot 4 linked with Lot 6 to the Salvation Army. The Council explained its reasons for its decisions in an email of 11 February 2025 which stated, *inter alia*:

"Turning Point Scotland were the only bidder for Lots 3 and 5 whose bid met the award criteria for these tied lots. Not awarding Turning Point Scotland to Lots 3 and 5 would have resulted in these tied Lots being unfilled. On this basis, and in line with the ITT, recommendation to award to Lots 3 + 5 was made. Turning Point Scotland are the highest scoring bidder for [Lot 4 linked with Lot 5]. However, as there is a limit as stated in the ITT to the number of lots a bidder can be awarded, and Turning Point Scotland are recommended to award to [Lot 3 linked with Lot 5], this Lot was recommended to award to the second highest scoring bidder, The Salvation Army Trustee Company. Their scores were as follows: Lot 4 and 5 Combined Score Commercial: 39.86 and Quality 39.9 Total 79.76 Turning Point Scotland have scored equal or higher to the recommended bidder for Lots 4 and 5 in all quality questions ..."

[17] Lot 1 was awarded to the Simon Community Scotland and Lot 2 linked with Lot 5 to Wheatley Care. Thirteen service providers, including Turning Point, the Salvation Army, the Simon Community and Wheatley Care, were approved as providers in terms of Lot 6. No issue is taken with any of those awards or approvals. Turning Point raised this action on 7 March 2025.

Applicable Regulations

[18] The Public Contracts (Scotland) Regulations 2015 provide *inter alia* as follows:

"Part 2

RULES IMPLEMENTING THE PUBLIC CONTRACTS DIRECTIVE

SCOPE AND GENERAL PRINCIPLES

SECTION 1 Scope

3.— Subject Matter and application of these Regulations

(1) This Part establishes the rules on procedures for the procurement by contracting authorities with respect to public contracts, framework agreements, dynamic purchasing systems and design contests which—

- (a) have a value estimated to be not less than the relevant threshold mentioned in regulation 5 (thresholds); and
- (b) are not excluded from the scope of this Part by any other Provision of these Regulations.

...

SECTION 2 General Rules

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.

...

RULES ON PUBLIC CONTRACTS

...

SECTION 5 Conduct of the Procedure

...

47.— Division of contracts into lots

- (1) A contracting authority may decide to award a contract in the form of separate lots and may determine the size and subject-matter of such lots.

...

- (3) Where a contracting authority decides to award a contract in the form of separate lots it must indicate, in the contract notice or in the invitation to confirm interest, whether tenders may be submitted for one, for several or for all of the lots.

- (4) A contracting authority may, even where tenders may be submitted for several or all lots, limit the number of lots that may be awarded to one tenderer, provided that the maximum number of lots per tenderer is stated in the contract notice or in the invitation to confirm interest.

- (5) A contracting authority must indicate in the procurement documents the objective and non-discriminatory criteria or rules it intends to apply for determining which lots will be awarded where the application of the award criteria would result in one tenderer being awarded more lots than the maximum number.

- (6) Where more than one lot may be awarded to the same tenderer, a contracting authority may award contracts combining several or all lots where the authority—
 - (a) has specified in the contract notice or in the invitation to confirm interest that it reserves the possibility of doing so; and
 - (b) indicated the lots or groups of lots that may be combined.

...

Choice of Participants and Awarding Contracts

...

67.— Contract award criteria

- (1) A contracting authority—
 - (a) must base the award of public contracts on the most economically advantageous tender assessed from the point of view of the contracting authority; and
 - (b) may not use price only or cost only as the sole award criteria.
- (2) A contracting authority must identify the most economically advantageous tender on the basis of the best price-quality ratio, which must be assessed on the basis of criteria linked to the subject-matter of the public contract in question and must include the price or cost, using a costeffectiveness approach.

...

PARTICULAR PROCUREMENT REGIMES

SECTION 7 Social and Other Specific Services

74. Award of contracts for social and other specific services

A public contract or framework for social and other specific services listed in Schedule 3 must be awarded in accordance with this Section, where the value of the contract or framework is equal to or greater than the threshold indicated in regulation 5(1)(d) (thresholds).

...

76.— Principles of awarding contracts

- (1) A contracting authority must determine the procedure that is to be applied in connection with the award of a contract or framework subject to this Section and may take into account—
 - (a) the specificities of the services in question; and
 - (b) the requirements and needs of users.
- (2) The procedure must be at least sufficient to ensure compliance with the principles of transparency and equal treatment of economic operators.

...

(4) In particular, where, in accordance with regulation 75 (publication of notices), a contract notice has been published in relation to a procurement, the contracting authority must, except in the circumstances mentioned in paragraph (5), conduct that procurement, and award any resulting contract, in conformity with the information contained in the notice about —

...

(c) the award procedure to be applied.

(5) The contracting authority may, however, conduct the procurement, and award any resulting contract, in a way which is not in conformity with that information, but only if all of the following conditions are met —

- (a) the failure to conform does not, in the particular circumstances, amount to a breach of the principles of transparency and equal treatment of economic operators;
- (b) the contracting authority has —
 - (i) after giving due consideration to the matter, concluded that sub-paragraph (a) is applicable;
 - (ii) documented that conclusion and the reasons for it in accordance with regulation 83(7) and (8) (reporting and documentation requirements); and
 - (iii) informed the participants of the respects in which the contracting authority intends to proceed in a way which is not in accordance with the information contained in the notice.

...

(8) Without prejudice to the generality of paragraph (1), a contracting authority may apply procedures for the purposes of this regulation which correspond (with or without variations) to procedures, techniques or other features otherwise provided for in these Regulations, as well as procedures which do not.

(9) In relation to the award of contracts subject to this regulation, a contracting authority may take into account —

- (a) the need to ensure quality, continuity, accessibility, affordability, availability and comprehensiveness of the services;
- (b) the specific needs of different categories of users, including disadvantaged and vulnerable groups;
- (c) the involvement and empowerment of users;
- (d) innovation; and
- (e) any other relevant consideration.

(10) A contracting authority must award a contract or framework for services listed in Schedule 3 on the basis of the tender representing the best price quality ratio, taking into account quality and sustainability criteria for such services.

...

PART 3 REMEDIES

...

APPLICATIONS TO THE COURT

87.— Duty owed to economic operators, including those from countries with whom the EU has a relevant international agreement other than the GPA

(1) The obligation on a contracting authority to comply with the provisions of these Regulations (except where otherwise specified) is a duty owed to an economic operator from the United Kingdom or Gibraltar.

...

88.— Enforcement of duties through the courts

(1) A breach of the duty owed in accordance with regulation 87 (duty owed to economic operators) is actionable by any economic operator which, in consequence of the breach, suffers, or risks suffering, loss or damage.

(2) Any proceedings for the purposes of paragraph (1) must be brought in the Sheriff Court or the Court of Session.

- (3) Proceedings under this regulation 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; and
 - (b) the proceedings are brought in accordance with paragraph (4).
- (4) For the purpose of paragraph (3)(b), proceedings must be brought—
- (a) in the case of proceedings seeking an ineffectiveness order (as defined in regulation 91 (ineffectiveness orders))—
 - (i) where paragraph (5) applies, within 30 days from the relevant date referred to in that paragraph; and
 - (ii) in any other case, within 6 months from the date of the contract being entered into or the date of conclusion of the framework agreement; and
 - (b) 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.

- (5) For the purpose of paragraph (4)(a)(i), this paragraph applies where—
- (a) the contracting authority has submitted a contract award notice to the UK e-notification service in accordance with regulation 52 (publication on the UK e-notification service), including reasons for its decision to enter into the contract or conclude the framework agreement without prior publication of a contract notice, in which case the relevant date is the date of submission to the UK e-notification service; or
 - (b) the contracting authority has by notice in writing informed all tenderers concerned and all candidates concerned (if any) of its decision in relation to the award of the contract or the conclusion of the framework agreement, and the notice includes the information referred to in regulation 85(2)(d)(i), or as the case may be, (e) (notices of decisions to award a contract or conclude a framework agreement), in which case the relevant date is the date of sending of the notice.

...

90.— Powers and duties of the court

- (1) Subject to paragraphs (3) and (7), but otherwise without prejudice to any other powers of the court, in proceedings brought under this Part the court—

...

- (b) if satisfied that a decision or action taken by a contracting authority was in breach of the duty owed under regulation 87 (duty owed to economic operators), may do one or more of the following—
 - (i) order the setting aside of that decision or action;
 - (ii) order the contracting authority to amend any document;
 - (iii) award damages to an economic operator which has suffered loss or damage as a consequence of the breach.”

Submissions for the Pursuer

[19] On behalf of Turning Point, senior counsel asked the court to reduce the Council’s decisions to award the contract for Lot 4 linked with Lot 5 to the Salvation Army and not to award it to Turning Point. That would require the Council to retake the decision relating to which tenderer should be awarded the contract for Lot 4 linked with Lot 5, having regard to

such guidance as the court might provide on the permissible operation of Section 1.2 of the ITT. As Turning Point took no issue with any of the scoring of the tenders, no re-marking exercise would be required.

[20] The decision of the Council complained of was an unlawful exercise of the discretion conferred upon it by Section 1.2 of the ITT. That discretion could only be exercised in a manner which fulfilled the obligations imposed on it by the 2015 Regulations, and the way in which it had been exercised infringed Regulations 19(1), 67(1), 74 and 76 thereof. In terms of Regulation 87, the Council owed a duty to Turning Point as an economic operator to comply with those Regulations, and breach of that duty was, by dint of Regulation 88, actionable by any economic operator which, in consequence of the breach, suffered, or risked suffering, loss or damage.

[21] The Council's position was that it had limited the number of lots that could be awarded to a single provider as part of its commitment to reduce barriers to new or smaller organisations operating in the relevant market and to ensure that there was sufficient market capacity and security. The procurement process had failed to achieve this objective as no new or smaller providers were awarded any of the lots.

[22] The true meaning and effect of Section 1.2 of the ITT and of Sections II.1.4 and 6 of the Contract Notice were matters of law for the court: *Working on Wellbeing Ltd v DWP*

[2024] EWHC 766 (TCC) per Freedman J at [86]. When considering the meaning and effect of those provisions, the yardstick of the reasonably well informed and normally diligent ("RWIND") tenderer was an objective standard applied by the court, such a standard being essential to ensure equality of treatment: *Healthcare at Home Ltd v CSA* [2014] UKSC 49, 2014 SC (UKSC) 247, 2014 SLT 769 per Lord Reed at [12].

[23] Section 1.2 of the ITT conferred a discretion upon the Council in circumstances where one economic operator had submitted the most economically advantageous tender for more than one lot. It allowed the Council (i) to amalgamate lots; (ii) to award more than one lot to the same economic operator; or (iii) to allocate lots according to tenderer preference where that did not result in a lot being unfilled. That discretion was subject to the provision in Section II.1.6 of the Contract Notice that the maximum number of lots that might be awarded to one economic operator was three. The setting of the maximum number of lots at three confirmed that Section 1.2 conferred a discretion to award more than one lot to an economic operator in the circumstances defined by the Section.

[24] Section 1.2 did not provide a formula for awarding the lots, nor did it mandate any particular outcome when an economic operator submitted the most economically advantageous tender for more than one lot. Rather, it conferred a discretion that required to be exercised in a lawful manner. That meant that it could not be exercised on an unlimited, capricious or arbitrary basis: *Capita Business Services Ltd v CSA* [2023] CSOH 9, 2023 SLT 482 at [8].

[25] The discretion could only be exercised in a manner that complied with the contracting authority's obligations under the 2015 Regulations. In particular, it had to be exercised in accordance with the principle of equal treatment: see, e.g. *Working on Wellbeing* at [104].

[26] In any event, a contracting authority always retained a residual discretion to waive compliance with the requirements of an ITT if it was necessary to do so in order to ensure the equality, transparency and proportionality of the procedure as a whole: see, e.g. *Inhealth Intelligence Ltd v NHS England* [2023] EWHC 352 (TCC), [2023] PTSR 1179 per Adam Constable KC at [29] and [30]; *Working on Wellbeing* at [114].

[27] The Council's decision was unlawful. From the reasons it had given, it was clear that it proceeded on the unlawful basis that Section 1.2 of the ITT conferred upon it an absolute discretion to award each lot as it considered to be most conducive to ensuring that every lot was filled and that no economic operator was appointed to more than one lot. However, the discretion conferred upon the Council by Section 1.2 of the ITT had become available to it to exercise in the circumstances which had transpired, it fell to be exercised in accordance with the obligations imposed by Regulation 19(1), and also in accordance with the obligation to award Lot 4 linked with Lot 5 to the most economically advantageous tenderer imposed by Regulations 67(1), 74 and 76.

[28] In such circumstances, the only lawful starting point for the Council, when assessing the tender submissions, was to identify the most economically advantageous tender in respect of each lot. As Turning Point had submitted the most economically advantageous tender in respect of both Lot 3 linked with Lot 5 and Lot 4 linked with Lot 5, the Council was required to appoint it to both of those lots in order to comply with its obligations. Where there was a risk of Lot 3 being unfilled, in order to fulfil those obligations the Council required to exercise its discretion under section 1.2 of the ITT in one of two ways. Firstly, it could have amalgamated Lot 3 linked with Lot 5 with Lot 4 linked with Lot 5 and awarded the amalgamated lot to Turning Point. Alternatively, it could have awarded both Lot 3 linked with Lot 5 with Lot 4 linked with Lot 5 to Turning Point as the most economically advantageous tenderer. Either way, Turning Point would have had the benefit of those contracts in respect of which it had submitted the most economically advantageous tender. Allocating lots according to preference would not have resulted in a lot being unfilled if the Council had exercised its discretion under Section 1.2 of the ITT in either of the foregoing

ways. Further, and in any event, an RWIND tenderer would have expected the Council to exercise its discretion under Section 1.2 of the ITT in that manner.

[29] Purporting to exercise its discretion in a way that allowed it to appoint a tenderer other than the most economically advantageous tenderer to any lot, when it had lawful options at its disposal that would not have had that result, was a breach of Regulation 19(1). The duty of equal treatment required that the Council, as contracting authority, had to treat Turning Point and the Salvation Army in the same way. They were both tenderers for Lot 4 linked with Lot 5 in response to the same ITT and Contract Notice and their tenders fell to be assessed in accordance with the same criteria. They were accordingly in a comparable situation and should not have been treated differently unless such treatment was objectively justified: see, e.g. *Working on Wellbeing* at [86]. Different treatment in this context amounted to discriminatory treatment. The Council's approach resulted in the tenderer with the most economically advantageous tender for a given lot being disqualified from that lot on the sole ground that it was the only tenderer for another lot, irrespective of how high it had scored in the first lot and how low it had scored in the second lot. That was a clear breach of the principles of equal treatment and non-discrimination, as the Salvation Army had been treated more favourably than Turning Point. For such a disqualification to have been lawful, the ITT would have required clearly and transparently to spell that out: see, e.g. *Capita Business Services* at [7]. It did not do so.

[30] Further, awarding Lot 4 linked with Lot 5 to the Salvation Army, in circumstances where it was not the most economically advantageous tenderer, was a breach of the obligations imposed upon the Council by Regulations 67(1), 74 and 76, which expressly required it to award the contract for Lot 4 linked with Lot 5 on the basis of the tender representing the best price quality ratio, taking into account quality and sustainability

criteria for such services. In the present case, the highest scoring tender for Lot 4 linked with Lot 5, and therefore the most economically advantageous tender, was submitted by Turning Point.

[31] Rather than engaging with the grounds of challenge as averred, the Council mischaracterised Turning Point's case as being one that challenged the lawfulness of the terms of Section 1.2 of the ITT. That was incorrect. It did not do so. It accepted that the terms of Section 1.2 were lawful, and did not infringe any of the obligations imposed upon the Council by the 2015 Regulations, as the discretion which it conferred enabled the Council to act in accordance with those obligations. Rather, Turning Point challenged the award decision on the basis that the Council had failed to exercise that discretion in a lawful manner. As it was not challenging the terms of the ITT, no time bar issue arose. It was challenging the Council's decision of 6 February 2025 to award the contract for Lots 4 linked with Lot 5 to the Salvation Army, and the present proceedings were commenced timeously.

Submissions for the Defender

[32] On behalf of the Council, senior counsel invited the court to dismiss the action. The Council had awarded Lot 4 linked with Lot 5 of the contract to the Salvation Army in accordance with the direct and natural meaning of Section 1.2 of the ITT. Its decision aligned with what all RWIND tenderers would have understood Section 1.2 to mean, and how they would have expected it to be applied (cf *SIAC Construction Ltd v County Council of Mayo* (Case C-19/00) [2001] ECR I-7725, [2001] 3 CMLR 59). The Council accordingly acted transparently, and treated bidders equally. In the circumstances which transpired, it had no discretion under the ITT to award both Lots 3 linked with Lot 5 and Lot 4 linked with Lot 5 to Turning Point, notwithstanding that it was the highest scoring bidder in respect of both

lots. Turning Point's suggestion that the Council acted in breach of the 2015 Regulations by awarding Lot 4 linked with Lot 5 to the second highest scoring bidder rather than the most economically advantageous tender fell properly be considered as a challenge to the terms of Section 1.2 itself. Such a challenge was time barred.

[33] The Contract Notice envisaged that a single bidder could be awarded one of Lots 2 to 4, plus Lot 5 (as tied to Lots 2 to 4), plus Lot 6. That was the award that the Council had made to Turning Point.

[34] The ITT was clear in its terms that a bidder could not be awarded more than one lot within Lots 1 to 4. It was similarly clear that the Council would not take account of a bidder's lot preference where that would result in a lot being unfilled, and therefore a bidder which achieved the highest score in respect of more than one lot within Lots 1 to 4 was not entitled to be awarded its preferred lot. As Turning Point was the only suitable bidder for Lot 3 linked with Lot 5, the Council awarded that lot to it. The Council awarded Lot 4 linked with Lot 5 to the second highest bidder for that lot, the Salvation Army.

[35] The procurement fell under the ambit of Schedule 3 to the 2015 Regulations. It accordingly required to be conducted in accordance with Section 7 of Part 2 thereof, namely Regulations 74 to 76. The specific regime for cases falling under Schedule 3 was to be applied in preference to the general regime provided for by the Regulations: see Regulation 3(1)(b). Regulation 76 afforded contracting authorities significant discretion in determining the procedure that was to be followed in order to procure services falling within the ambit of Schedule 3. That discretion was limited by Regulation 76(2), which provided that "the procedure must be at least sufficient to ensure compliance with the principles of transparency and equal treatment of economic operators".

[36] Regulation 76 required to be read alongside Regulation 47, which permitted and regulated the division of a contract into lots. The inevitable consequence of permitting tenderers to bid for more lots than they could be awarded, as was envisaged by Regulation 47(4), was that not all lots might necessarily be awarded on the basis of the most economically advantageous tender. Regulation 67, which imposed a general obligation on contracting authorities to make contract awards on the basis of the most economically advantageous tender, accordingly required to be read alongside and subject to both Regulation 76(10) and Regulation 47(4).

[37] Section 1.2 of the ITT set out the circumstances in which one tenderer could be awarded more lots than the permitted maximum number. Those circumstances did not arise in the present case. The Council lawfully applied Section 1.2. It accepted that, as a matter of principle, contracting authorities were required to act proportionately in carrying out any procurement exercise. It was likewise not disputed that any exercise of discretion on the part of a contracting authority could not be exercised on an unlimited, capricious or arbitrary basis. Section 1.2 of the ITT was not capable of bearing the meaning or producing the outcome for which Turning Point contended. It set out a formula which made plain that:

- (i) a bidder could only be awarded one of Lots 1 to 4 (Lots 2, 3 and 4 being tied to Lot 5);
- (ii) if a bidder bid for more than one of Lots 1 to 4 and was the highest scoring bidder in respect of more than one of those lots, it would nevertheless only be awarded a single lot within Lots 1 to 4; (iii) in the foregoing scenario, the highest-scoring bidder was not guaranteed to be awarded its preferred lot, as bidders' preferences would only be considered if that would not result in a lot being unfilled; and (iv) the Council reserved a residual discretion to award more than one of Lots 1 to 4 to a single bidder or to amalgamate

lots only where a lot would otherwise be unfilled. All RWIND tenderers would understand Section 1.2 to bear that meaning.

[38] The hypothetical understanding of RWIND tenderers was an objective standard applied by the court; what actual bidders understood the document to mean was irrelevant to that assessment: *Healthcare at Home*. The Council applied Section 1.2 of the ITT in precisely the full and fair manner that would be anticipated by all RWIND tenderers.

[39] In bidding for both Lot 3 linked with Lot 5 and Lot 4 linked with Lot 5, Turning Point took a commercial risk. It knew or ought to have known that it could only be awarded one of those lots. Section 1.2 of the ITT made clear that, although it was entitled to express a preference as to which lot it would prefer to be awarded, the Council did not guarantee that bidders' preferences would be respected. In the event, Turning Point was the highest scoring bidder in Lot 3 linked with Lot 5 and in Lot 4 linked with Lot 5. It was the only suitable bidder for Lot 3 linked with Lot 5. There was another suitable bidder for Lot 4 linked with Lot 5. If the pursuer had not been awarded Lot 3 linked with Lot 5, that lot would have been unfilled. Section 1.2 of the ITT accordingly required the Council to award Lot 3 linked with Lot 5 to Turning Point. It was awarded Lot 3 linked with Lot 5, notwithstanding its preference for Lot 4 linked with Lot 5. As Turning Point could only be awarded one lot within Lots 1 to 4, Lot 4 linked with Lot 5 fell to be awarded to the second highest scoring bidder, the Salvation Army. In such circumstances, no lot was unfilled.

[40] Where Turning Point had elected to bid for more than one lot within Lots 1 to 4, the Council was not obliged to award it its preferred lot, Lot 4 linked with Lot 5. Its discretion to amalgamate lots or to award more than one lot to a single bidder under Section 1.2 did not arise. That discretion arose only "to avoid any Lots being unfilled". In the event, there was no prospect of any lot being unfilled. Even if the discretion had arisen, the Council

would not have wished to exercise it in the way demanded by Turning Point because of the policy considerations which had led it in the first place to impose limits on how many lots could be awarded to a single provider. The terms of Section 1.2 (which, as of the date of making the contract award decision, had not been challenged by any bidder) did not permit the Council to adopt the approach proposed by Turning Point. The direct and natural consequence of the application of Section 1.2 in circumstances where a single bidder submitted the highest scoring bid in respect of more than one lot within Lots 1 to 4 was that the lot which was not awarded to that bidder fell to be awarded to the second highest scoring bidder. If it were otherwise and Section 1.2 permitted each lot to be awarded to the highest scoring bidder, even if that meant that a single bidder would be awarded more than one lot within Lots 1 to 4, there would have been no utility in requiring bidders to submit a preference as to lot award. Any suggestion by Turning Point that Section 1.2 of the ITT required to be read subject to the overarching provision in section II.1.6 of the Contract Notice that the maximum number of lots which could be awarded to a single bidder was three, and that that justified it being additionally awarded Lot 4 linked with Lot 5, was misconceived. Turning Point was, in fact, awarded three lots: Lot 3, Lot 5 and Lot 6. It now maintained that, by one mechanism or another, it should have been awarded four lots. The provision in the Contract Notice that a bidder could be awarded a maximum of three lots was subject to the limitation, expressed within both the Contract Notice and the ITT, that a single bidder could not be awarded more than one lot within Lots 1 to 4. The Council's application of Section 1.2 of the ITT aligned with what all RWIND tenderers would understand the Section to mean, and how they would expect it to operate. Accordingly, the Council had acted transparently and treated bidders equally. By contrast, the course of action contended for by Turning Point was unsupported by Section 1.2 of the ITT. If the

Council had elected to award both Lot 3 linked with Lot 5 and Lot 4 linked with Lot 5 to it, or to amalgamate those lots and award the amalgamated lot to it, that decision would have been susceptible to challenge on the basis that it was non-transparent, failed to treat bidders equally, and failed to award the contract in line with the published award criteria in breach of, *inter alia*, Regulations 19 and 76 of the 2015 Regulations. Section 1.2 of the ITT provided no scope for the Council to award both Lot 3 linked with Lot 5 and Lot 4 linked with Lot 5 to the highest scoring bidder in the circumstances which transpired. In applying Section 1.2, the Council acted proportionately, non-discriminatorily and transparently, and treated bidders equally.

[41] Where the Council's decision plainly involved the direct application of Section 1.2 of the ITT; and that Section did not permit it to adopt the approach contended for by Turning Point, the suggestion that it breached Regulations 67(1), 74 and 76 by awarding Lot 4 linked with Lot 5 to the second highest scoring bidder fell to be construed as a challenge to the terms of Section 1.2 itself rather than as a challenge to a perverse application of Section 1.2 by the Council. The Section clearly provided that a bidder who bid for more than one lot within Lots 1 to 4 and was the highest-scoring bidder in respect of more than one of those lots would nevertheless only be awarded one of Lots 1 to 4. The direct and natural consequence of Section 1.2 was that if the highest scoring bidder for a given lot within Lots 1 to 4 was also the highest scoring bidder for another lot within Lots 1 to 4, one of those two lots would require to be awarded to the second highest scoring bidder. Turning Point's contention that the Council breached the requirements of Regulations 67(1), 74 and 76 therefore had to be properly characterised as a challenge to the terms of the Section itself.

[42] Such a challenge was time-barred. Regulation 88(4)(b) provided that proceedings had to be brought 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 considered that there was a good reason for extending the period within which proceedings might be brought, in which case it might extend that period up to a maximum of three months from that date. Turning Point knew or ought to have known, on its view of matters, that it had grounds to challenge the terms of Section 1.2 of the ITT from 10 October 2024, the date on which that document was published. On its own case, it risked suffering damage as of that date. That was the date on which time began to run for the purpose of Regulation 88: *Jobsin Co UK plc v Department of Health* [2001] EWCA Civ 1241, [2002] 1 CMLR 44 per Dyson LJ at [26] and [27]. Turning Point was not entitled to harbour its alleged concerns and permit the procurement to reach a conclusion in the hope that a more favourable outcome for it would emerge. The present action was not raised until 7 March 2025, more than three months after 10 October 2024. The court accordingly retained no discretion to permit the challenge to proceed.

[43] In summary, the Council had interpreted and applied Section 1.2 of the ITT in a manner that complied with its obligations under the 2015 Regulations. Its application of Section 1.2 was not perverse or unlawful. In terms of the Section, it enjoyed no discretion to award both Lot 3 linked with Lot 5 and Lot 4 linked with Lot 5 to the pursuer. Turning Point's complaint that Lot 4 linked with Lot 5 was awarded to the second highest scoring bidder was properly characterised as a challenge to the terms of Section 1.2 itself, which was time-barred.

Decision

[44] It is necessary to bear in mind in considering the proper resolution of this dispute that the procurement process in question was one which fell within the scope of the so-

called “Light Touch” regime provided for by Schedule 3 to the 2015 Regulations, and that the terms of Section 7 of Part 2 of those Regulations accordingly provide the primary basis for the identification of the obligations incumbent upon the Council in the design and operation of the procurement exercise: see Regulation 74 and the general principle that *specialia generalibus derogant*. Regulation 3(1)(b) does not govern the situation, as the Council contended, since cases falling within the ambit of Schedule 3 still require to proceed within, rather than without, Part 2 of the Regulations. The Regulations in Part 2 outwith Section 7 apply to this procurement exercise only insofar as not inconsistent with the terms of Regulations 74 to 76.

[45] The Section 7 regime has certain features of relevance in the present context. In terms of Regulation 76(1), the contracting authority is to determine the procedure to be applied for the award of a contract subject to the Section. Those procedures may correspond to procedures otherwise provided for in the Regulations, with or without variations, or they may not: Regulation 76(8).

[46] Where a Contract Notice has been published, as it was here, the procedure described in that Notice is to be followed, with a possible exception which does not arise on the facts of this case: Regulation 76(4). The only legal standards which the procedure settled upon must satisfy are identified by Regulation 76(2); it must be at least sufficient to ensure compliance with the principles of transparency and equal treatment of economic operators.

[47] A further cardinal feature of the Section 7 regime is provided for by Regulation 76(10) – a contracting authority must award a contract subject to the Section on the basis of the tender representing the best price quality ratio, taking into account quality and sustainability criteria for such services. A wide range of matters, only some of which are specifically identified by Regulation 76(9), may be taken into account in relation to the

award of contracts. It is true that the concept of the best price quality ratio also underpins the notion of the most economically advantageous tender posited by Regulations 67(1) and (2), but – at least in the context of Regulation 76 – it is capable of comprehending a much wider range of considerations.

[48] In this review of those elements of the 2015 Regulations of relevance to this dispute, it is finally necessary to note that Regulation 47 is not inconsistent with the terms of the Regulations within Section 7 of Part 2, and thus is applicable to the lotted approach taken to the procurement exercise in this case. Regulation 47(4), in particular, makes it clear that limits on the number of lots that may be awarded to a single provider are in principle lawful, and, given that there was such a limit in the procedure adopted here, but no restriction on the number of lots for which one prospective tenderer could bid, an implication that the highest scoring bidder for a particular lot might not in fact be awarded it was clearly inherent in that procedure from the outset.

[49] Turning from the applicable regulatory background to the terms of the Contract Notice, as setting out the procedure which had to be followed, the following principal points about that procedure may be seen from sections II.1.4 and II.1.6: (a) tenders might be submitted for all lots; (b) the maximum number of lots which might be awarded to one provider was three; (c) only one tenderer could be awarded each of Lots 1 to 4; and (d) the Council was entitled to amalgamate lots or award more than one lot to one provider to avoid any lot being unfilled.

[50] Turning to the ITT, and recalling that its procedural provisions are of less central importance to the identification of the obligations incumbent on the Council because of the primacy accorded to the Contract Notice in this context by Regulation 76(4) and because of the potential residual discretion to waive elements of an ITT alluded to in *Inhealth Intelligence*

and *Working on Wellbeing*, it may further be seen that (i) bids for Lot 2 linked with Lot 5, Lot 3 linked with Lot 5, or Lot 4 linked with Lot 5 were to be taken as bids for two lots rather than just one; (ii) there was a reference to the most economically advantageous tenders, which was potentially misleading given that the core award criterion in a Section 7 process is that of the best price quality ratio; and again (iii) if a lot would otherwise be unfilled, the Council might amalgamate lots or award more than one lot to a single provider.

[51] Having now identified the applicable regulatory background and the principal procedural rules of the procurement exercise of relevance to the dispute, it is necessary to deal briefly with the concept of the RWIND tenderer, which was invoked by each party in support of its own case. It is necessary to bear in mind that the RWIND tenderer is the court's avatar for the purposes of determining whether or not tender documents are sufficiently clear to enable tenderers to interpret them in the same way, and thus whether the obligation of transparency implicit in the principle of equal treatment has been complied with; *SIAC, Healthcare at Home*.

[52] In the present case, the question of the compliance of the tender documentation with the obligation of transparency does not arise for decision. Any argument to the effect that the documentation was not so compliant was eschewed by Turning Point, not least because any such non-compliance ought to have been apparent much earlier than 30 days before the raising of the action on 7 March 2025 and any complaint based on it would accordingly be barred by the operation of the limitation provisions of Regulation 88(4)(a)(i). The services of the RWIND tenderer are thus not required in this action; he may and should reboard the omnibus carrying him on his mythical and never-ending journey to Clapham.

[53] Had the matter been a live one, I might have had some sympathy with the suggestion that the tender documentation in various respects fell short of an ideal standard

of clarity in its description of the process that would be followed to award the available contracts, and might even ultimately have been persuaded that the standards of transparency required by the Regulations had not been achieved. In particular, it is not immediately apparent to me that the procurement documents complied with the requirement of Regulation 47(5) that the objective and non-discriminatory criteria or rules which would be applied if application of the award criteria would result in one tenderer being awarded more lots than the maximum allowable number should there be indicated, or with that of Regulation 47(6)(b), that the lots or groups of lots that might be combined should also be indicated. Those matters may, rather, have been left to surmise, and there may accordingly have been room for differences of view on the part of RWIND tenderers about them.

[54] Although quite irrelevant in point of law to any conclusion about what an RWIND tenderer would have thought, it is at least illustrative of the potential difficulties in construction which might have emerged that Turning Point's query in the clarification process proceeded on the basis that expressed preferences would be given effect to if a single tenderer submitted the most economically advantageous tender for more than one lot, whereas the Council at least now takes a different view about that, although it did not express that view in its response to the clarification query. However, in the event no argument about the transparency of the procurement documentation could be or was run by Turning Point, and it is thus neither necessary nor appropriate to say any more about the issue.

[55] The bases upon which Turning Point may properly challenge the award of Lot 4 linked with Lot 5 to the Salvation Army must therefore be limited to the conduct, rather than the nature, of the procurement procedure. The available criticisms are (a) that the procedure

was operated in a manner falling short of the requirements of transparency implicit in the obligation of equal treatment; (b) that the procedure was operated in a manner other than that set out in the tender documentation, and in particular the Contract Notice; or (c) that the procedure was operated in a manner which breached the obligation of equal treatment incumbent on the Council in terms of Regulation 76(2).

[56] No attempt was made to argue that the way in which the procedure was operated was not sufficiently transparent. The Council did what it did and explained the reasons for its actions clearly and promptly. Turning Point's complaint is not that any relevant lack of clarity attends what was done, but rather that what was done was in breach of other obligations owed to an economic operator in the context of a procurement governed by the Section 7 regime.

[57] Turning Point does complain that the procedure followed by the Council was not in accordance with the published contract procedure. Its attempt to enrol the RWIND tenderer to assist it in making good that contention is misplaced, for the reasons already stated; the question in this connection is not whether the tender documentation was capable of being read in the same way by the body of potential tenderers to which it was addressed, but whether the actions of the Council can be shown by Turning Point to be outwith the scope for action afforded to it by the description of the procedure to be implemented which was set out in the documentation (which description cannot now, for the reasons already canvassed, be criticised as lacking in the clarity required to meet any obligation of transparency of expression).

[58] The "red lines", or the irreducible minimum requirements of the procedure envisaged by the Contract Notice, are very few, and nothing is added to them by the terms of the ITT. Read short, no provider was to be awarded contracts for more than three lots,

and no tenderer was to be awarded more than one of Lots 1 to 4 inclusive, unless the Council decided to take that course of action in order to avoid one of those lots being unfilled. The discretion afforded to the Council to amalgamate lots, or award more than one of Lots 1 to 4 to a single provider in such circumstances, was not exercised by it, and it cannot be said that, at least as a question of the courses of action open to it on the face of the tender documentation, it was bound to exercise it, or if it chose to do so, to exercise it in one particular available way as opposed to another.

[59] In the event, no provider was awarded contracts for more than three lots, and no tenderer was awarded more than one of Lots 1 to 4 inclusive. The minimum requirements of the terms of the contract documentation were met and so the claim that the procedure was not operated in accordance with those terms is not made out.

[60] The final available ground of criticism is that the procurement procedure was operated in a manner which breached the Council's obligation of equal treatment. Whether tenderers were treated equally must depend on the context in which the question arises, in this case represented by the ground rules for the procurement exercise under examination. Although Turning Point and the Salvation Army were bidders in the same exercise and acted in response to the same tender documentation, by the time of the Council's consideration of how to award the available contracts, being the point at which the unequal treatment is said to have occurred, those parties were not in the same or comparable positions. Turning Point had by that point emerged as the only compliant bidder for Lot 3 linked with Lot 5. It was clear from the terms of the tender documentation that the Council wished to secure providers for all lots, and that that was regarded as a sufficiently important objective to justify it, if it saw fit, in departing from certain aspects of the award process as originally anticipated. If the positions of Turning Point and the Salvation Army at the stage

of the contract awards had been reversed, and the latter had been the only compliant bidder for one lot, then there is no reason on the available material to suppose other than that it would have been awarded the contract for that lot regardless of whether or not that was its preference or whether it was the most economically advantageous tender for another or other lots. In other words, it would have been treated exactly as Turning Point was treated. There is in such circumstances no proper basis for the allegation of unequal treatment in the operation of the procurement procedure.

[61] The essence of Turning Point's complaint, albeit clad in the garb of unequal treatment, is simply that it was not awarded Lot 4 linked with Lot 5 despite its tender being the most economically advantageous for that lot. Despite the erroneous reference in the ITT to the most economically advantageous tenders, there can be no doubt, standing the terms of Regulation 76(10), that the core award criterion in a Section 7 procurement process had to be that of the best price quality ratio as that term is to be understood in the context of Section 7, with the necessarily greater scope in potentially relevant considerations that that implies. The Council had explained, in its response to Turning Point's clarification query if not earlier, that the structure of the procurement exercise which it was then embarking upon, especially the limit on the number of lots that could be awarded to one provider, was aimed at reducing barriers to entry to the market and to ensure that there was sufficient market capacity and security. So long as dealt with proportionately, those are all considerations amply capable of properly influencing both decisions as to the structure of a procurement exercise and, if need be, as to the manner of its operation within the broad limits prescribed in the context of the particularly delicate types of health, social and related services listed in Schedule 3 to the Regulations. The suggestion, against that background, that a failure to award a contract for a particular lot to the most economically advantageous tenderer for that

lot amounts to even a *prima facie* case of unequal treatment or breach of the other substantive obligations owed to an economic operator in a case like the present, is baseless.

[62] Turning Point has failed to state a relevant case that the award of Lot 4 linked with Lot 5 to the Salvation Army represented a breach by the Council of the obligations incumbent on it in this particular procurement exercise. I shall accordingly sustain the Council's third plea-in-law, repel Turning Point's pleas, and dismiss the action.