



OUTER HOUSE, COURT OF SESSION

[2016] CSOH 150

CA78/16

OPINION OF LORD TYRE

In the cause

DEM-MASTER DEMOLITION LIMITED

Pursuer

against

RENFREWSHIRE COUNCIL

AS LEAD AUTHORITY FOR SCOTLAND EXCEL

Defender

Pursuer: Lindsay QC; Ennova Law

Defender: Lord Davidson of Glen Clova QC, E Campbell; CMS Cameron McKenna LLP

19 October 2016

Introduction

[1] By notice published on 17 March 2016, the defender, as lead authority on behalf of Scotland Excel, invited tenders for participation in a framework agreement for the provision of demolition services to Scottish public authorities. The services to be provided under the framework agreement were divided into three lots. The pursuer submitted a tender in respect of all three lots on 14 April 2016, the deadline for submissions. On 12 May 2016, the defender advised the pursuer that it had failed to provide a commercial offer for any of the three lots because it had failed to provide percentage figures for overheads and profit in respect of Lots 1 and 2 and had submitted a blank template as part of its offer for Lot 3. The pursuer immediately responded providing all of the missing information and asked the defender to confirm that its tender would now be evaluated. On 16 May, the defender advised the pursuer that its tender could not be considered further.

[2] In this action the pursuer seeks an order setting aside the defender's decision not to evaluate its tender further, and an interim order suspending the procedure leading to conclusion of the framework agreement. There is an alternative conclusion for damages. The case came before

the court for a one-day proof before answer based on affidavit evidence and a joint minute of admissions by the parties.

Agreed statement of facts

[3] In addition to formalities such as copies being treated as equivalent to principals and communications having been sent and received on the dates and at the times that they bore, the parties were agreed on the following matters, set out in paragraphs 3 to 24 of the joint minute of admissions:

1. The pursuer is a decommissioning and demolition contractor.
2. The pursuer's demolition services range from city centre high rise residential and commercial to complex power and process plant decommissioning.
3. By letter dated 3 November 2015 the defender, as lead authority on behalf of Scotland Excel, advised that Scotland Excel had approved a recommendation to award to the pursuer and certain other tenderers a framework agreement for the provision of demolition services ("the First Framework Agreement").
4. The First Framework Agreement was for the period 1 October 2015 to 30 September 2017 with an option to extend for up to 24 months to 30 September 2019.
5. By e-mail sent at 14:53 on 2 December 2015 the defender advised the pursuer that Scotland Excel would not be proceeding with the award in favour of the pursuer and other tenderers in respect of the First Framework Agreement.
6. By notice dispatched on 15 March 2016 and published in the OJEU on 17 March 2016 under reference 2016/S 054-089987 the defender, as lead authority for Scotland Excel, invited tenders for a framework agreement using open procedure ("the Second Framework Agreement").
7. The deadline for submissions in respect of the Second Framework Agreement was noon on 14 April 2016.
8. The Second Framework Agreement is for the provision of demolition services from 1 August 2016 until 31 July 2018 with an option to extend for up to 24 months until 31 July 2020.
9. The Second Framework Agreement is being established on behalf of Scotland Excel's member councils and associate members.
10. The Second Framework Agreement has an estimated value excluding VAT of £64,000,000.
11. The Second Framework Agreement is divided into three Lots with a maximum of 40 forty suppliers being appointed.
12. Lot 1 is for demolition works up to £50,000.
13. Lot 2 is for demolition works of £50,000 and above.
14. Lot 3 is for emergency demolition works.
15. The award criteria for the Second Framework Agreement were the most economically advantageous tender with a commercial weighting of 70% and a technical weighting of 30%.
16. On 14 April 2016 at 09:38 the pursuer submitted a tender for Lots 1, 2 and 3 of the Second Framework Agreement.
17. The pursuer's tender for the Second Framework Agreement was submitted electronically via the portal on the PCS-Tender website.

18. By e-mail sent at 13:26 on 12 May 2016 the defender, as lead authority on behalf of Scotland Excel, advised the pursuer that it had failed to provide a commercial offer for all lots that it had tendered for because it had: (i) failed to provide percentage figures for overheads and profit added to the Defined Costs for Lots 1 and 2; and (ii) submitted a blank template under the commercial offer for Lot 3.
19. As a consequence of these failures the defender, as lead authority for Scotland Excel, advised the pursuer that its tender for the Second Framework Agreement would not be evaluated further.
20. By e-mail sent at 14:39 on 12 May 2016 the pursuer: (i) advised the defender that the percentage of overheads and profit added to the defined cost for people was 15% and that the percentage of overheads and profit added to the other defined costs was 15% for both Lots 1 and 2; and (ii) attached a copy of a commercial spread-sheet with reference number ITT8846.
21. The completed commercial spreadsheet for Lot 3, which was attached to the pursuer's e-mail of 12 May 2016, was the same as the completed commercial spreadsheet which was submitted in support of the pursuer's tender for the First Framework Agreement.
22. By e-mail sent at 17:10 on 16 May 2016 the defender, as lead authority on behalf of Scotland Excel, advised that Scotland Excel could not consider the pursuer's offer further for evaluation.

Information provided to tenderers

[4] Prospective tenderers were provided with a document entitled "Information and Instructions to Tenderers", which included the following paragraph:

"F. Post Tender Negotiation

After the closing date and time, Tenderers may not supply any unsolicited information. Following evaluation of the tenders received, Scotland Excel reserves the right subject always to the Public Contracts (Scotland) Regulations 2012, to clarify any information supplied by Tenderers or to enter into negotiations, including negotiations on price, with the Tenderer who has submitted the most economically advantageous tender..."

[5] The tender itself was divided into three parts described as Qualification, Technical and Commercial Envelopes, all of which had to be completed electronically by tenderers. The Commercial Envelope consisted of sections 3.1 to 3.5. Section 3.1 contained instructions on completion of the Commercial Envelope. Section 3.2 required to be completed by tenderers offering for Lot 1. Subsection 3.2.3 (entitled "Compensation Event – People") contained the following instruction:

"Please state the percentage for overheads and profit added to the Defined Cost for people.

For example if your uplift is 2% please enter '2' in the response field.

Should you not apply any compensation uplift please insert '0'.

PLEASE NOTE THAT FAILURE TO PROVIDE A RESPONSE TO THIS QUESTION WILL RESULT IN YOUR OFFER FOR LOT 1 NOT BEING CONSIDERED.”

Subsection 3.2.4 (entitled “Compensation Event – Other”) contained the instruction:

“Please state the percentage for overheads and profit added to other Defined Costs.”

This was followed by exactly the same text as above, including the warning in capital letters. Each of subsections 3.2.3 and 3.2.4 contained a box in which the tenderer’s response required to be provided electronically.

[6] Section 3.3 required to be completed by tenderers offering for Lot 2. It was in terms identical to Section 3.2, including the warnings in capital letters and boxes for the tenderer’s response.

[7] Section 3.4.1 contained the following instruction:

“Tenderers offering for Lot 3 – Emergency Demolition must download the document Demolition Services 1115 – Emergency Demolition Commercial Offer sheet Lot 3. This is available within the Commercial Offer Folder within the ‘Buyer Attachments’ area.

When submissions are completed, Tenderers must upload their Lot 3 Commercial Offer Sheet into the General Attachments area of this envelope.

Section 3.4.2 then stated:

“FAILURE TO UPLOAD THE LOT 3 COMMERCIAL OFFER SHEET INTO THE GENERAL ATTACHMENTS AREA OF THIS COMMERCIAL ENVELOPE WILL RESULT IN YOUR OFFER FOR LOT 3 NOT BEING CONSIDERED.”

[8] Section 3.5 contained final instructions for the Commercial Envelope including renewed warnings that failure to respond to questions would lead to an offer not being considered.

[9] During the period prior to the deadline for submission of tenders, the defender operated an online message board where prospective tenders could ask questions about the tender, with the questions and answers being available to all users of the message board. In response to queries regarding a question in the tender within the Technical Envelope, the defender gave a response which included the observation; “Mandatory questions are indicated by a red asterisk and the system will not allow a submission until all mandatory questions are complete”. In response to another query, also concerning questions within the Technical Envelope, the defender stated “As this is a non-mandatory question there is no requirement to provide a response. For clarity, mandatory questions are marked with a red asterisk”. None of sections 3.2.3, 3.2.4, 3.3.3, 3.3.4 or 3.4 was marked with an asterisk.

The pursuer’s tender submission

[10] In the pursuer’s tender submission, the boxes in sections 3.2.3 and 3.2.4 (for Lot 1) and sections 3.3.3 and 3.3.4 (for Lot 2) were left blank. As regards Lot 3, the Commercial Offer spreadsheet received by the defender along with the pursuer’s tender was a blank template. The

tender was submitted by Ms Diane Irons, the pursuer's Bid & Community Liaison Manager. In her affidavit Ms Irons noted that the pursuer had found the tender confusing as to what pricing information was required. She was also led to believe that if any necessary information was omitted when a tender was submitted, it would be rejected automatically by the defender's system. That was not in fact the case; the defender's automatic system could not be used for this tender because tenderers were not obliged to bid for all three lots. Most importantly, however, Ms Irons confirmed that despite these uncertainties, the omission of responses to questions 3.2.3, 3.2.4, 3.3.3 and 3.3.4 was not deliberate. She had intended to answer all questions. The omission of answers to these questions was an error. She had also intended to submit a completed spreadsheet in respect of Lot 3 and could not understand how it had come about that a blank template was attached to the pursuer's tender. When the omissions were drawn to her attention it took little more than an hour to provide the required information, which did not differ from that provided for the abortive First Framework Agreement. The pursuer does not seek to contend that there was any electronic fault in the defender's tender submission process.

Effect on pursuer of exclusion from the framework agreement

[11] According to the affidavit of Mr Richard McCulloch, the pursuer's Managing Director, it is very unlikely that the pursuer will obtain work from the vast majority of councils in Scotland if it is excluded from the framework agreement for the next two, and possibly four, years. Work for councils represents about 60% of the pursuer's turnover and employees will have to be made redundant. The pursuer is the preferred demolition contractor of a number of councils.

The Public Contracts (Scotland) Regulations 2012

[12] For the purposes of the 2012 Regulations, the pursuer is an economic operator and the defender is a contracting authority. In terms of regulation 4(3),

“A contracting authority must –

- a. treat economic operators equally and without discrimination; and
- b. act in a transparent and proportionate manner.”

The issue in the present case is whether, in refusing to consider the pursuer's tender for evaluation, the defender has acted in a proportionate manner.

Argument for the pursuer

[13] On behalf of the pursuer it was submitted that the principle of proportionality was a general principle of EU law requiring a two-step enquiry, namely (i) whether the measure at issue was appropriate for attaining the objective pursued, and (ii) whether the measure at issue went beyond what was necessary to achieve the objective. By virtue of regulation 4(3), the award of contracts in the context of public procurement had to comply with this principle. In the present case, on a proper application of the principle, the defender ought to have allowed the pursuer to correct its tender submission by providing the required percentages and a completed commercial spreadsheet after its errors had been brought to its attention. Reference was made to the judgment

of the Court of First Instance in *Tideland Signal Ltd v European Commission* [2002] ECR II-3785, paragraphs 39-43. The omissions were obvious and easily corrected errors causing minimal disruption and delay to the procurement process. Nor was correction of errors precluded by the EU principle of equal treatment. In *Ministeriet for Forskning, Innovation og Videregående Uddannelser v Manova A/S* [2014] PTSR 254 (Case C-336/12), the Court of Justice had held that the principle of equal treatment did not preclude a contracting authority from requesting the correction or amplification of details of such an application, on a limited and specific basis, provided that (i) the request related to particulars or information, such as a published balance sheet, which could be objectively shown to predate the deadline for applying to take part in the tendering procedure, (ii) the contract documents did not expressly state that the application would be rejected unless such documents were provided, and (iii) the request did not unduly favour or disadvantage the candidate or candidates to which it was addressed. Those requirements were met in the present case. Paragraph F of the Information and Instructions to Tenderers had reserved a wide discretion to the defender to clarify information supplied by tenderers.

[14] As regards domestic authorities, the law was summarised in principles discerned by HH Judge Waksman QC in *R (Harrow Solicitors and Advocates) v Legal Services Commission* [2011] EWHC 1087 (Admin). Applied to the circumstances of the present case, those principles required the defender to exercise the power reserved in paragraph F to seek clarification by the pursuer of the obvious errors in the tender submission. Reference was also made to the judgment of Carr J in *R (All About Rights Law Practice) v The Lord Chancellor* [2013] EWHC 3461 (Admin). The circumstances of the present case were very different, and if Carr J's approach was adopted here the defender's decision was demonstrably disproportionate. There was no risk of abuse by a tenderer seeking to improve its original bid. The public interest favoured not excluding a potentially advantageous tender.

Argument for the defender

[15] On behalf of the defender, it was submitted that the pursuer had failed to comply with the tender procedure. The requirement of strict compliance was clearly stated in the tender documentation and applied to all tenderers. There was no discretion to the defender to excuse non-compliance. The pursuer's failures were in respect of fundamental requirements of all three lots and were not mere formalities. The pursuer's assertion of an intention to submit percentages and a completed spreadsheet was irrelevant. Whereas arithmetic error or obvious genuine errors in rates could be resolved by the discretionary clarification process, the pursuer had submitted no figures whatsoever. There was no general duty to allow corrections. It was not obvious what the pursuer had intended to submit. The *Tideland Signal* case was concerned with resolution of ambiguity: there was no ambiguity here. The present case had similarities with a number of English cases in which decisions not to allow submission of material after the tender deadline had been held not to be disproportionate. These included *JB Leadbitter & Co Ltd v Devon County Council* [2009] EWHC 930 (Ch); *R (Hoole & Co) v Legal Services Commission* [2011] EWHC 886 (Admin); *R (All About Rights Law Practice) v Legal Services Commission* [2011] EWHC 964 (Admin); and *R (All About Rights Law Practice) v The Lord Chancellor* (above). Application of the principles enumerated in *Harrow Solicitors* led to the conclusion that the defender's decision had been proportionate.

Was the defender's decision disproportionate?

The authorities: review

[16] The *Tideland Signal* case concerned a project put out to tender by the European Commission after a previous tender procedure had been cancelled. Tenderers were obliged to remain bound by their tenders for 90 days from the submission deadline. In its tender submission for the new procedure, Tideland Signal inadvertently retained the date for remaining bound that had been contained in its previous tender. As this was less than 90 days after the submission deadline in the new procedure, the tender was rejected by the Commission. The Court of First Instance held that the decision to reject without seeking clarification of the intended period of validity of the tender was clearly disproportionate. At paragraph 39, the Court observed:

“... The principle of proportionality requires that measures adopted by Community institutions do not exceed the limits of what is appropriate and necessary in order to attain the objectives pursued and that where there is a choice between several appropriate measures recourse must be had to the least onerous ...”

The Court noted that Tideland's tender documentation had stated in two other places that the tender remained valid for 90 days. This was therefore a case of ambiguity which the principle of good administration required the recipient of the tender to resolve. As regards the principle of proportionality, the recipient had a choice between two courses of action, either of which would have resolved the obvious ambiguity, and was bound to select the less onerous one.

[17] In the *Manova* case, the invitation to tender required tenderers to include a copy of their most recent balance sheet with their application. Two tenderers failed to comply with this requirement until requested by the contracting authority to do so, after the submission deadline. They were both subsequently awarded contracts. The awards were challenged by Manova, an unsuccessful tenderer, on the ground that the contracting authority had acted in breach of the principle of equal treatment. The Court of Justice referred to certain requirements laid down in *SAG ELV Slovensko and Others* [2012] 2 CMLR 36 (Case C-599/10) to mark the bounds of a contracting authority's right to request clarification of a tender, including the general rule that the contracting authority must treat tenderers equally and fairly, in such a way that the request does not unduly favour or disadvantage the tenderer or tenderers to whom it is addressed. The Court then stated (at paragraphs 39-40):

“39 ... A contracting authority may request the correction or amplification of details of such an application, on a limited and specific basis, so long as that request relates to particulars or information, such as a published balance sheet, which can be objectively shown to pre-date the deadline for applying to take part in the tendering procedure concerned.

40 However, it should be explained that this would not be the case if the contract documents required provision of the missing particulars or information, on pain of exclusion. It falls to the contracting authority to comply strictly with the criteria which it has itself laid down (see, to that effect, *Commission v CAS Succhi di Frutta* [2004] ECR I-3801 (Case C-496/99 P), paragraph 115).”

The *Manova* case has nothing to say about the principle of proportionality, being concerned rather with the principle of equality of treatment and the obligation of transparency.

[18] If there is a common thread running through the English domestic authorities, it seems to me to be that the court should only interfere in exceptional circumstances with a contracting authority's decision to

reject a non-conforming tender. In *JB Leadbitter v Devon County Council* (above), tenders required to be accompanied by four completed case studies. Leadbitter submitted its tender electronically a few hours before the deadline but then realised that it had not included the case studies. Although these had been prepared and were ready to send, it was not possible to add them before the deadline to the already-submitted electronic tender. They were sent by email to the contracting authority 26 minutes after the deadline. The contracting authority rejected the tender. David Richards J held that the contracting authority had not acted disproportionately, for the following reasons:

“66. Fundamentally, Devon CC relies on the simple proposition that a procurement process requires a deadline for the submission of tenders and that a deadline is a deadline. The [invitation to tender] could not have been clearer on the requirement for a single upload and submission before the deadline, and the claimant's witnesses readily accepted that they knew this was the requirement. In addition, there are clear statements of policy and practice in Devon CC's code of business conduct that late tenders are not considered...

1. As well as the deadline, the other key elements of submitting tenders, such as the requirement for a single submission and the lack of provision for changes to submitted tenders, were clear and well understood by the claimants, as their witnesses' evidence made clear. Fairness to all tenderers, as well as equal treatment and transparency, required that these key features should be observed.
1. There may be circumstances where proportionality will, exceptionally, require the acceptance of the late submission of the whole or significant portions of a tender, most obviously where, as noted by Professor Arrowsmith [*The Law of Public and Utilities Procurement* (2005), para 7.96], it results from fault on the part of the procuring authority. But in general, even if there is discretion to accept late submissions, there is no requirement to do so, particularly where, as here, it results from a fault on the part of the tenderer. In addition to the considerations already mentioned, the particular facts on which the claimant relies to characterise its case as exceptional would require investigation and determination by Devon CC and I do not see that it was required to undertake those tasks. In my judgment, the decision of Devon CC to reject the claimant's tender was well within the margin of discretion given to contracting authorities.”

The case affords a useful illustration of the potential for conflict between the principle of proportionality on the one hand and the principle of equal treatment on the other. It also emphasises the respect that should be accorded by the court to a decision made in exercise of the contracting authority's discretion.

[19] The case of *R (Hoole & Co) v Legal Services Commission* (above) is of interest for present purposes because it concerned the inadvertent submission of a blank form in the commercial envelope section of the applicant's tender. Upholding the contracting authority's decision to refuse to allow the tender to be amended after the deadline, Blake J held that *Tideland Signal* was of no assistance to the applicant because there was no ambiguity in the bid, merely an uncompleted section of the form. Other factors mentioned were that the contracting authority was not to blame for the applicant's failure, and that an overbroad

exercise of the power to seek clarification would be contrary to the principle of equal treatment. It would have been unfair to rival tenderers to allow the applicant to amend its application by completing the commercial envelope. Blake J observed (paragraph 30):

“Viewed entirely from the point of view of a public law duty to act fairly, it may well be that the exercise of a discretion to grant a benefit should be based on all matters that could or should be known to the authority, and that fairness might well include a reasonable opportunity to correct obvious errors without changing the fundamental nature of the bid submitted. It is after all in the public interest that a well-qualified and experienced provider of legal services in the field of immigration should be permitted to continue in business. However, any such duty is severely circumscribed where there is a competitive tender and an over-riding duty to treat all tenderers equally. Here for reasons that were not the responsibility of the defendant, the claimant had failed to supply the information that would have led them to being ranked in priority where there was competition for the award of [new matter starts]. Any general duty to give an applicant an opportunity to correct errors in the absence of fault by the defendant, yields to the duty to apply the rules of the competition consistently and fairly between all applicants, and not afford an individual applicant an opportunity to amend the bid and improve its prospects of success in the competition after the submission date had passed.”

At paragraph 32, Blake J referred to a “judgment call” that must be made by the contracting authority as to how and when general fairness must yield to equal treatment.

[20] The two *All About Rights Law Practice* decisions (above) also concerned the inadvertent submission of a blank form (“the TIF”) whose completion was mandatory in terms of the information given to tenderers. In the second of the two decisions, Carr J listed her reasons for holding that the decision to reject the bid was not disproportionate as follows:

- (a) this was a non-responsive tender by the applicant;
- (b) the information for applicants made it clear that completion of the TIF was mandatory;
- (c) the TIF was of fundamental importance to the bid;
- (d) the TIF was singled out as the only mandatory form;
- (e) to allow submission of a completed form would have been effectively to allow submission of a new bid. This was not clarification of ambiguity or an obvious error;
- (f) a new bid would have disadvantaged others by reducing the pool of work available to other bidders;
- (g) the necessary information could not have been obtained from other material submitted by the applicant;
- (h) it was not clear that the remedy would be quick and easy;
- (i) the mistake could not be attributed to any fault on the part of the contracting authority;
- (j) to have allowed further submission would have jeopardised implementation, increased the administrative burden and created a risk of abuse;
- (k) the potentially harsh economic consequences for the tenderer should not induce the court to accommodate a failure to comply with a mandatory requirement of the bid.

[21] In *Harrow Solicitors* (above), the applicant’s error consisted of erroneously answering a question in the tender form “no” rather than “yes”. Had it answered “yes” (as it claimed to have intended to do, and to have been entitled to do) it would have scored enough points to be awarded a contract. The principles discerned from previous case law by HH Judge Waksman QC were as follows:

- (1) All tenderers must be treated equally;

- (2) It would violate that principle and the principle of good administration in the tendering process if any tenderer were permitted to change its bid after bidding had closed;
- (3) If the awarding authority had a discretion to seek clarification about a bid from the tenderer, the Court would not normally interfere with the exercise of that discretion unless (a) it was exercised unequally or unfairly across the relevant bidders or (b) it was not exercised, yet it appeared to the awarding authority that there was an ambiguity or obvious error which probably had a simple explanation and could be easily resolved; seeking clarification in the latter case was required in order that consideration of what might be an advantageous bid should not be excluded; it would be for the awarding authority to determine whether the clarification exercise would be simple or not;
- (4) But any purported clarification must not amount to a change in the bid.

Judge Waksman added:

“... If the inability to proceed with a bid, which may be an advantageous addition to the competitive process, can be resolved easily and quickly it should be done, assuming there is no change to the bid or risk of that happening. If there is an obvious error or ambiguity or gap, clarifying it does not change the bid because, objectively the bid never positively said otherwise.”

There was no principle that entitled a tenderer who had made an error which did not render it ambiguous or deficient on its face, but which was objectively verifiable, to have the tender rectified. Here there was no ambiguity or obvious error. Although the consequences of the mistake were very serious for the tenderer, the result was not disproportionate. Nor was proof of actual prejudice to other tenderers necessary in order to render proportionate a decision not to permit correction of the mistake.

Application to the circumstances of this case

[22] The only case to which I was referred in which the principle of proportionality was successfully invoked by a rejected tenderer was *Tideland Signal*. That case is of no direct assistance to the pursuer in the present case because it concerned what the Court of First Instance clearly regarded as a patent ambiguity in the terms of the tender. That is not, in my view, the same thing as a patent failure to comply with the instructions to tenderers. Although it may be likely that such a failure has occurred as a consequence of an error on the part of the tenderer, there could be other explanations. It might be an attempt to gain a competitive advantage, although there is no suggestion that that was so in the present case. But obvious error is not the only factor to which regard must be had in assessing whether the course adopted by the contracting authority was disproportionate. In particular, as I have already noted, there may be a conflict with the principle of equal treatment, and the thrust of the English case law, at least in cases where the problem has arisen through error on the part of the tenderer, is to accord priority to equal treatment.

[23] The first two requirements that must be met, according to the *Manova* case, in order to avoid a breach of the principle of equal treatment are, firstly, that documents requested after the deadline can be objectively shown to predate the deadline and, secondly, that it was not expressly laid down in the tender information that the application would be rejected if the omitted documents were not provided. I am not satisfied that either of those requirements is satisfied in the present case. In the first place, it does not appear that the spreadsheet submitted in respect of Lot 3 existed prior to the omission being drawn to the

pursuer's attention. What existed was the spreadsheet that had been submitted with the tender for participation in the First Framework Agreement, and a decision appears to have been taken when the problem came to light to submit the same spreadsheet for the Second Framework Agreement. That in my view is a different situation from the one addressed by the Court in *Manova* where the prior existence of the tenderers' balance sheets was readily verifiable. In the second place, it was repeatedly and unequivocally asserted in the instructions for the Commercial Envelope that failure to provide a response to a question, or to submit the Lot 3 spreadsheet, would result in the tenderer's offer not being considered. Those statements were not, in my view, overridden by the reservation in paragraph F of the Information and Instructions to Tenderers of a right to "clarify any information supplied". The reservation applied in its terms to resolution of ambiguities, and did not extend to a right to seek late submission of information *not* supplied, especially where, as here, it had been made clear that the information was required before the tender would be considered. It follows, in my opinion, that if the defender had acceded to the pursuer's request to accept the figures and spreadsheet submitted late, there would have been a powerful case to be made by the successful tenderers that the defender had breached the principle of equal treatment. A contracting authority which acts in a manner necessary to avoid breaching that principle cannot, in my view, be said to be acting disproportionately.

[24] Even if I were wrong in my view that the requirements of *Manova* were not met, I would in any event hold that the defender's refusal did not constitute a breach of the principle of proportionality. Most of the reasons listed by Carr J in *All About Rights Law Practice* (paragraph 20 above) apply to the circumstances of the present case. The warnings attached to sections 3.2, 3.3 and 3.4 of the Commercial Envelope were clear and unequivocal. Completion of the Commercial Envelope was clearly regarded by the defender as a matter of fundamental importance, yet the combined effect of the pursuer's errors was that no information at all was provided in that part of the tender. There was no ambiguity to clarify. Insertion of the information would in effect have amounted to a new tender; it was not self-evident that the pursuer would, if asked, supply figures and other data identical to that contained in the First Framework Agreement tender. There was no reason why the defender, in making its decision whether or not to reject the incomplete tender, should have assumed that the remedy would be quick and easy. It was not contended that the pursuer's error ought to be attributed to fault on the part of the defender. To have allowed further submission might have jeopardised the tender, at least to the extent that one of the successful tenderers could reasonably have challenged such a decision as a breach of the principle of equal treatment. For these reasons, even if it was obvious that errors had been made by the pursuer, there was no duty incumbent upon the defender to afford the pursuer an opportunity to correct them after the deadline for submission of the tender had passed.

[25] Nor, in my opinion, are these considerations outweighed by the adverse consequences for the pursuer in being excluded from the framework agreement. There are strong policy reasons for enforcing deadlines for submissions of tenders, including fairness to other tenderers and avoidance of risk of abuse. I note that in at least one of the English cases (*All About Rights Law Practice*), it was acknowledged that failure to obtain a legal aid contract would probably render the tenderers' business unviable. The consequences for the pursuer in the present case are unfortunate but not such as to render the defender's decision disproportionate.

Disposal

[26] For the foregoing reasons, I shall sustain the defender's third plea-in-law and grant decree of absolvitor. The question of an interim order suspending procedure does not arise. Expenses are reserved.