OUTER HOUSE, COURT OF SESSION

[2007] CSOH 185

OPINION OF LORD CARLOWAY

in the cause

AQUATRON MARINE, t/a Aquatron Breathing Air Systems

Pursuers;

A3421/05

against

STRATHCLYDE FIRE BOARD

Defenders:

Act : Lake; Simpson & Marwick

Alt : P Motion, Solicitor Advocate; Brechin Tindal Oatts

16 November 2007

1. The Regulatory Framework

[1] The award of the contract with which this litigation is concerned was governed by the "Open Procedure" controlled by the, now superseded, Public Services Contracts Regulations 1993 (SI 1993/3228). Although nowhere stated in the Regulations, or in the Council Directive (92/50/EEC) which prompted them, it has been repeatedly emphasised by the European Court of Justice that at their heart is a duty, on the part of the authority awarding the contract, to observe a "principle of equal treatment of tenderers" (*Commission v Denmark* ("*Storebælt*") [1993] ECR I -3353, para 33; quoted in *SIAC Construction v County Council of the County of Mayo* [2001] 1 ECR 7725, para 33).

[2] Regulation 11 states:

"(2) The contracting authority shall publicise its intention to seek offers in relation to the public services contract by sending to the Official Journal as soon as possible after forming the intention a notice, in a form substantially corresponding to that set out in Part B of Schedule 2, inviting tenders and containing the information therein specified.

...

(8) The contracting authority may exclude a tender from the evaluation of offers made in accordance with regulation 21 only if the services provider may be treated as ineligible to tender...if the services provider fails to satisfy the minimum standards of economic and financial standing, ability and technical capacity required of service providers by the contracting authority; for this purpose the contracting authority shall make its evaluation in accordance with regulations...16 and 17".

The Open Procedure Notice form in Part B of Schedule 2 requires specification of:

"15 Criteria for the award of the contract. Criteria other than that of the lowest price shall be mentioned where they do not appear in the contract documents".

So far as technical elements are concerned, regulation 8 states:

"(2) If a contracting authority wishes to lay down technical specifications which the services to be provided under a public services contract...must meet it shall specify all such technical specifications in the contract documents.

(3) ...the technical specifications in the contract documents relating to a public services contract shall be defined by reference to any European specifications which are relevant".

"Technical specifications" are defined in the same regulation as:

"The technical requirements defining the characteristics required of the work or works...so that the works...are described objectively in a manner which will ensure that they fulfil the use for which they are intended by the contracting authority..."

Regulation 16 provides:

"(1) ...in assessing whether or not a services provider meets any minimum standards of ability and technical capacity required...for the purposes of regulation...11(8)...a contracting authority may have regard to-

(a) the service provider's ability, taking into account in particular skills, efficiency, experience and reliability; and

(b) his technical capacity, taking into account any of the following -

(i)... the qualifications of the service provider's managerial staff if any and those of the person or persons who would be responsible for providing the services under the contract...

(2) The contracting authority shall specify in the contract notice or in the invitation to tender...what information...it requires to be provided and it may require a services provider to provide such of that information as it considers it needs to make the assessment or selection".

Regulation 17 permits the contracting authority to require supplementary information or to clarify information given, "provided the information so required relates to the matters specified in regulation...16".

[3] Regulation 21 states:

"(1) ...a contracting authority shall award a public services contract on the basis of the offer which -

(a) is the most economically advantageous to the contracting authority, or

(b) offers the lowest price.

(2) The criteria which a contracting authority may use to determine that an offer is the most economically advantageous include the period for completion or delivery, quality, aesthetic and functional characteristics, technical merit, after sales service, technical assistance and price.

(3) Where the contacting authority intends to award a public services contract on the basis of the offer which is the most economically advantageous it shall state the criteria on which it intends to base its decision, where possible in descending order of importance, in the contract notice or in the contact documents".

Regulation 23 provides that an unsuccessful tenderer must be informed of the reasons for his failure. It requires a contracting authority to keep a record of, amongst other things, the names of the tenderers and the reasons why they were awarded or not awarded the contract. Central Government is entitled to seek a report

containing the recorded information for onward transmission to the Commission of the European Community (as it then was).

[4] It is provided by Regulation 32 that:

"(1) The obligation on a contracting authority to comply with the provisions of these Regulations...is a duty owed to services providers.

(2) ...any breach of the duty shall be actionable by any services provider who, in consequence, suffers, or risks suffering, loss or damage.

...

(5) ...in proceedings brought under this regulation the Court may -

...

(c) if satisfied that a decision or action taken by a contracting authority was in breach of the duty owed...-

...

(ii) award damages to a services provider who has suffered loss or damage as a consequence of the breach..."

[5] In essence then, leaving aside issues of a tenderer's financial standing which do not arise here, an authority planning to award a relevant contract must specify any minimum standards of ability and technical capacity that it requires of a contractor. It is limited on the matters to which it can have regard when determining whether these standards have been met. It must specify what information it requires in order to make that determination. A tender may be rejected under regulation 11(8) prior to any exercise of comparative evaluation because the terms of the tender do not comply with a contract specification's technical requirements under regulation 8. This may encompass a situation where the tenderer does not provide information called for under regulation 16. A tender may also be rejected under regulation 11(8) because the tenderer does not meet minimum standards of ability. Otherwise, the tender will proceed to the stage of evaluation of its comparative merits. It may thereafter be rejected as a result of the evaluation process, which must have regard to the stipulated criteria, under regulation 21. The contracting authority will have a wide discretion in relation to what criteria it chooses to select but must state what they are to be. The procedure and criteria for the award of contracts are thus intended to be respectively transparent and objective.

2. The Defenders' Invitation to Tender

[6] The pursuers are a partnership and carry on business in the fields of servicing, maintenance and repair of breathing apparatus and associated air purity testing and analysis. This business had previously been conducted along with diving operations by Aquatron Marine Limited. However, the business had been hived off from the limited company into the partnership to allow further shareholder investment purely in the diving operations (see website No 7/1 of process). It had been intended to convert the partnership into a new limited company called Aquatron Air Breathing Systems Ltd., but this did not happen.

[7] In March 2004, the defenders, who operate the Strathclyde Fire Brigade, issued an Invitation to Tender for certain services. As published in the Official Journal of the European Communities (6/11), the description of the contract contains four elements:

"...the Service Maintenance and Repair of Breathing Apparatus Compressors. The Service Maintenance and Repair of...Oxygen Transfer Pumps. The Provision of Air Purity Testing to EN12021 : 1998. The Examination and Repair of Low Pressure Tyre Compressors.

The contract was for the period 1 June 2004 to 31 May 2007. The OJ specifies the criteria for the award of the tender as:

"Economically most advantageous tender complying with technical specifications, i.e. price, delivery date, running costs, cost effectiveness, after sales service, compatibility, but not necessarily in that order".

Curiously and of significance *(infra)*, the quality of the service to be provided is not included, nor is the technical merit of the tender (cf regulation 21(2)(*supra*)).

[8] The pursuers noticed the invitation through an advertisement in the "Herald" newspaper and asked for the tender documents. These were sent to them by the defenders by letter dated 7 April 2004 (6/23). These "Instructions to Tenderers" incorporate a detailed Specification. This includes the following clauses:

"2. GENERAL DETAILS

2.1 At present the brigade has a range of breathing apparatus compressors, oxygen transfer pumps and various tyre compressors located throughout its premises that will require to be serviced, maintained and repaired in compliance with this Specification. In addition, to ensure the highest quality breathing air is available to our personnel, monthly air purity sampling and analysis to EN12021:1998 is required for all breathing apparatus compressors.

...

3. SERVICING REQUIREMENTS

3.1 The successful tenderer shall be required to service, repair and maintain each of the Boards breathing apparatus compressors, oxygen transfer pumps and low pressure tyre compressors.

...

3.2 ...The maintenance of the breathing apparatus compressors shall ensure that the Brigade complies with all relevant legislative requirements...which...shall include...the...Health and Safety at Work Etc Act 1974...

3.3 The successful tenderer shall undertake the provision of air purity testing to EN12021:1998...The air purity testing shall be carried out on a monthly basis for each breathing apparatus compressor. The successful tenderer shall arrange the collection, distribution and analysis of no fewer than 588 air samples per annum and based on 49 compressors at 12 samples per annum.

...

5 DESCRIPTIONS

5.1 Breathing Apparatus Air Compressors

These are used by the Brigade for the recharging of breathing apparatus cylinders...The typical form of application involves an electrically driven compressor unit...delivering breathable compressed air to EN12021: 1998 Standard through a filtration system to a cylinder charging panel...

...

11. COMPETENCE OF PERSONS UNDERTAKING WORK IN COMPLIANCE WITH THIS SPECIFICATION

11.1 It shall be the sole responsibility of the successful tenderers to ensure that all persons engaged to provide routine services, carry out repairs...refurbishment, testing and certification...and to fulfil any other

requirement of this Specification, shall be fully qualified and have the relevant experience and training to undertake such work in a safe and effective manner.

The tenderer shall, when submitting their tender include copies of any evidence of quality standards achieved by their workforce.

12 QUALITY ASSURANCE STANDARDS

12.1 To assure the Board of the quality standards operated by tenderers, it shall be a requirement for tenderers to operate a quality management system accredited to a certified quality assurance standard. The minimum standard for quality assurance applicable shall be ISO 9001 2000. Proof of attainment of this standard shall be submitted along with the tender documentation...

Where a tenderer intends to employ a sub-contractor...that sub-contractor shall also require to be accredited to ISO 9001, 2000.

Evidence of accreditation to ISO 9001, 2000 issued by a recognised accreditation centre shall be submitted with the tender documentation.

...

14 FREQUENCY OF AIR PURITY TESTING

14.1 The successful tenderer shall be required to conduct an air quality test on each breathing apparatus compressor which shall establish that the quality of air being delivered complies with EN 12021: 1998. These tests shall be carried out twelve times per annum - as per recommendation of British Standard (BS 4275: 1997). Tenderers shall submit with the tender documentation details of how they consider the required sampling regime shall be undertaken. Full details of the sampling regime and detailed specification of all equipment to be utilised to carry out such sampling shall be submitted along with the tender documentation.

Home Office Technical Bulletin 1/97 and Dear Chief Officer Letter 1/2001 details guidance on acceptable methods of air purity analysis. The Board shall utilise this guidance to determine acceptability for the method of analysis offered by tenderers.

...

15 STANDARDS OF AIR SAMPLE ANALYSIS

15.1 The successful tenderer shall undertake air sample analysis to the specified requirements for self-contained open-circuit breathing apparatus as stipulated in the European Standard EN12021: 1998, with particular reference to Section 6 and 7 of the said standard.

15.2 Tenderers shall submit with the tender documentation an assurance that they have the necessary equipment and competent staff to undertake air sample analysis to the above standard.

...

24 LEGISLATION, CODES OF PRACTICE AND STANDARDS

24.1 The successful tenderer shall comply throughout the duration of any contract with all legislation, regulations, approved codes of practice, guidance notes, Technical Bulletins, Dear Chief Officer Letters, and British and European Standards applicable to the subject matter of this Specification...

...

24.3 In the event of any conflict between the provisions of this Specification...and the legislative and regulatory requirements, then the legislative and regulatory requirements shall take precedence and shall be strictly adhered to...

...

27 HEALTH AND SAFETY

27.1 All work carried out shall be done in compliance with all relevant legislation and regulation including for the avoidance of doubt, the requirements of The Health and Safety at Work Etc Act 1974 and any subsequent amendments or associated regulations in force...

27.2 Tenderers shall submit along with their tender documentation details and qualifications of their Health and Safety representative.

27.3 Tenderers shall submit with their tender documentation, a copy of their Health and Safety policy."

[9] The problem which arises with breathing apparatus air compressors is that they are not permitted to vent to the outside air. Any fumes generated within the compressor, notably from lubricants in the crankcase, are fed into the breathing air intake (6/48), albeit hopefully removed from that air by a series of filters. The Standard EN 12021 : 1998, referred to several times in the Specification, is, in its up-dated form at the time of the invitation to tender, "British Standard EN 12021 : 1999" (6/3). The European Standard (or Norm) specifies the air quality required for use in breathing apparatus of the type used by fire fighters as follows:

"**6 Requirements**

6.1 Oxygen

The oxygen content shall be in the range of (21 $\pm$ 1) % by volume (dry air).

6.2 Contaminants

6.2.1 ***General***

Compressed air for breathing apparatus shall not contain any contaminants at a concentration which can cause toxic or harmful effects. In any event all contaminants shall be kept to as low a level as possible and shall be far below the national exposure limit. Combination effects of more than one contaminant shall be taken into account.

In the absence of more stringent national requirements the values in 6.2.2 to 6.2.5 shall be applied.

6.2.2 ***Lubricants***

Lubricant content (Droplets or mist) shall not exceed 0,5 mg/m^3. Where synthetic lubricants are present, 6.2.1 applies.

6.2.3 ***Odour and taste***

The air shall be without significant odour or taste.

6.2.4 ***Carbon dioxide content***

The carbon dioxide content shall not exceed 500 ml/m^3 (500 ppm).

6.2.5 ***Carbon monoxide content***

The carbon monoxide content shall be as low as possible but not exceed 15 ml/m^3 (15 ppm).

6.3 Water Content

6.3.1 There shall be no free liquid water.

...

7 Sampling and Testing

Any appropriate method may be employed, provided it conforms with the following requirements:

- for measuring and assessing results the accuracy of the method shall be taken into consideration, and

- the detection limit of the method employed shall be below the required limit value."

The foreword to the British Standard states in relation to clause 6.2.1 that:

"...National Occupational Exposure Limits (OEL) for substances hazardous to health are published yearly by the Health and Safety Executive and can be found in Guidance Note, *Occupational exposure limits* (EH40). In the context of this European Standard "below the national limit" will mean that the concentration level should not be greater than 10% of the relevant time (8 h) weighted average OEL".

[10] The Home Office Technical Bulletin 1/97 (7/48), referred to in clause 14, deals with breathing air compressors specifically in its Appendix 1, section 7, which reads:

"5...The maximum levels of contaminant which are acceptable in air used for BA are as follows

Carbon monoxide - 5 ppm (5.5 mg/m^3)

Carbon dioxide - 500ppm (900 mg/m^3)

Oil Mist - 0.5 mg/m^3)

The dew point of the air should be within the range -50^o to -70^o (British Standard 4275) and the air should be colourless and odourless. The oxygen concentration in the air should also be checked at the same time. It is the quality of the air delivered to the cylinder from the compressor that is to be checked. The concentration should be that found in normal atmospheric air ie 21%. Gas detector tubes connected to the outlet of the compressor or to the outlet of a recently filled cylinder is an appropriate means of detecting carbon monoxide, carbon dioxide and oil mist. Such tubes are less accurate for the detection of water vapour and oxygen, and it is recommended that electronic type moisture and oxygen measuring instruments are used, a variety of which are available, including portable units."

[11] The "Dear Chief Officer Letter" (DCOL) 1/2001 (7/49), also mentioned in clause 14, reads:

"2. The present Home Office guidance is contained in Technical Bulletin 1/1997 (TB1/97) at Appendix 1 Item 7. Here it is recommended that the output air quality of air compressors, whilst dependant upon usage, should be tested at least quarterly and after each filter change. It further details what should be included in a test regime. These include:

the maximum permitted levels of contaminants carbon monoxide, carbon dioxide and oil mist,

the moisture content,

the oxygen concentration,

a check on colour and odour.

Additionally TB 1/97 identified gas detector tubes as being suitable for the contaminants identified whilst recommending electronic devices for moisture content and oxygen....

5. The recommendations contained in TB 1/97 are reiterated, based on the fact that to date, the Home Office is unaware of any evidence from brigades to demonstrate that testing based on these recommendations has been inadequate in providing breathable air to BA wearers and would lead us to concluded that more frequent or comprehensive testing regimes are necessary as a matter of course.

6. However, when a brigade is establishing a testing regime for breathing air quality, both in terms of frequency of testing and the contaminants being tested for, it is necessary for the brigade's 'competent person' to undertake a suitable sufficient risk assessment for each particular system and/or situation. This risk assessment will take into account all relevant factors including location, frequency of use etc of the compressor; and if any other contaminants, in addition to those identified in TB 1/97, may foreseeably be expected."

[12] The Specification had been drafted mainly by Assistant Divisional Officer Alan McKnight, then of the defenders' Operations Department, who gave evidence for the defenders. He wrote specifications for all sorts of tenders, taking into account how existing contracts were operating and any new guidance or regulations. He maintained that he had included clause 11 to make sure that the persons executing the contract would have the relevant training and knowledge to do so. He accepted that this clause did not specifically ask for the submission of documentation relative to that training and knowledge. Indeed, employees might be recruited during the contract period. He had included clause 12 to ensure that the successful tenderer worked to standards of management which would ensure that the services required would be delivered. However, he considered that his drafting of this clause involved a mistake in its failure to call for accreditation specifically by UKAS (United Kingdom Accreditation Service). Clause 27 had been intended by Mr McKnight to ensure that the work, some of which was to be done on the defenders' premises, would be subject to the same health and safety considerations as the defenders would employ themselves. Mr McKnight accepted that this clause does not require that any minimum qualification be held by the Health and Safety representative. He also accepted that there was no requirement relative to the content of any Health and Safety policy submitted.

3. The Pursuers' Tender

[13] The pursuers submitted their tender to the defenders on or about 30 April 2004 specifying an annual sum of £74,100 and thus a total cost over the three year contract period of £222,300. The pursuers stated that they would be ready to commence the contract within two weeks of the defenders' order. The pursuers' tender was accompanied by a covering letter (6/23 and 24) which was to assume considerable importance (*infra*). It states:

"1. Insurance cover is in place.

2. Air analysis requirement of EN 12021 including analysis for COSHH contaminants using FTIR (leaflet enclosed) in house facility...

7. Our staff are experienced in the range of equipment covered and have attended the various manufacturers work courses.

9 Our Health and Safety representative Angus Furrie has been involved in this activity for several years conducting risk assessments for our clients...as well as in house activities. He has attended courses by the

Red Cross approved by the HSE."

"FTIR" is a reference to Fourier Transform Infrared Spectrophotometry (*infra*) and "COSHH" to the Control of Substances Hazardous to Health Regulations 1994 (SI 1994/3246).

[14] The pursuers' tender was also accompanied by a Quality Assurance Certificate. This is a document issued by QMS International plc, certifying the "quality management systems" of the pursuers as compliant with BS EN ISO 9001 : 2000. Such certificates specify the processes carried on by the business concerned and which are thus presumed to be subject to the approved management regime. The pursuers' certificate did not refer to the maintenance and repair of compressors. The insurance documentation, which was also enclosed, ran in the name of Aquatron Marine Limited (7/25 p 39). The pursuers sent in their Health and Safety policy (7/10). This is dated 19 April 2004 and is in the name of "Aquatron Breathing Air Systems Limited"; albeit that it is signed by Thomas Young as "senior partner". This document contains an elaborate "Chain of Responsibility/Command" chart referring to a senior partner (Mr Young) at its head, a Health and Safety manager (Angus Furrie) below him, a workshop manager (also Mr Furrie) and an office manager (Mrs Young) below the Health and Safety manager. The engineering staff (Mr Young, Mr Furrie and Mr Young's son, Rognvald) are shown at the bottom of the chain.

[15] Two other companies tendered for the work; CompAir UK Ltd. at £215,949.96 and MB Air Systems Ltd. at £253,740.00. One of the root causes of the problems which were to emerge in connection with the consideration of the tenders received by the defenders was that Mr McKnight, who had worked on the previous contracts and was, at least to a degree, familiar with the businesses which had previously carried out the works, was promoted. He left the Operations Department, which dealt with such tenders in the first instance, in May 2004, about a week after the tenders had been received. In his last week in the Department, Mr McKnight carried out an evaluation of only one of the tenders, that of CompAir UK, to see if it complied with the formal requirements of the Specification. He then handed over the whole process to his successor, ADO Paul Tanzilli. However, as will be seen, Mr Tanzilli was also transferred out of the Department not long afterwards, having in turn passed the files onto his successor, ADO Michael Davidson. Mr McKnight commented that it was "just unfortunate" that two of the persons involved with the tendering process both left the Department as that process was nearing its end. It would seem that this was a reference to what happened thereafter. Mr McKnight was a witness who was both thoughtful and careful with his answers and his comment was certainly apt.

4. The Clarification Meeting

(a) BACKGROUND

[16] By facsimile transmission (fax) dated 27 May 2004 (6/25), the pursuers were invited to attend a "clarification meeting" at the defenders' headquarters in Hamilton on 2 June 2004. The invitation was at the instance of the defenders' contracts officer, Barbara Ann Cairns (who did not give evidence). Attached to the fax was a list of the issues to be discussed. This includes:

"6. Please provide an outline of your organisational structure including numbers of staff etc who will provide the services required for this Specification.

8. (*sic*) Please provide details as to the training, experience, skills and competence of your engineers.

...

8. Section 17.2 - Please confirm the qualifications of...your Health and Safety representative and forward supporting evidence.

...

10. Section 6.4 - Please confirm that you understand the requirement to carry out annual testing and recalibration of each breathing apparatus and tyre compressors final safety valve and that this requirement has been included within the tender costs submitted.

11. With regards to your ISO 9001 2000 accreditation, please confirm that this accreditation applies to the servicing, maintenance and repair of breathing apparatus and tyre compressors and for air purity testing. Please provide evidence of this accreditation.

12. Please provide a copy of your quality system manual".

[17] This list had been compiled by Mr Tanzilli and revised by Mr McKnight, who was by then working in a different place and field, before being sent out to the pursuers. But Mr McKnight had not been involved, to any material degree, with the evaluation of the pursuers' tender. Of considerable significance, he had not been provided with the pursuers' covering letter (*supra* 6/23 and 24). Prior to the meeting, he had not seen that letter. At the meeting, the pursuers were represented only by Mr Young. The defenders were represented by Messrs Tanzilli, Davidson and McKnight as well as Mrs Cairns. A document (6/26) explaining the nature of the meeting (ie clarification and not improvement of the tender) was read out at the start.

(b) EMPLOYEES

[18] A major conflict arose in relation to what was said at the meeting about the pursuers' staffing levels and qualifications in terms of issues 6 and 8 (first) on the list. In the background to the discussion was the fact that the pursuers' principals (Mr Young and his son, Rognvald) and staff (Mr Furrie), when working for the pursuers' predecessors (Aquatron Marine Ltd.), had carried out the same work in respect of all but one (the most recent) of the contracts to service and maintain the defenders' compressors. They had carried out this work for a period of at least eight years. They had lost the contract in 2002, when they complained (7/19, 7/20), as they were to do again in 2004, that they had a far better system of air quality testing than their competitors. They suspected that the successful competitor (MB Air Systems) had offered to carry out such testing to a level which they regarded as lower than that stipulated by Standard EN 12021 : 1998. This loss seems to have had a profound effect on Mr Young. He not only informed the defenders that they were not complying with the Standard (which they denied - 7/21) but complained of this to the Scottish Executive (as it then was). He was asked in cross-examination whether the method of achieving the correct level of air purity had become a crusade for him. Although he denied this, judging by his written protestations and the vehemence of some of his testimony, it must have become at least something of an obsession.

[19] Mr Young is a chemistry graduate and had been installing, commissioning and repairing compressors, including those of the defenders, for many years (see CV 6/50). He had attended several courses run by the manufacturers of the compressors. Rognvald Young was a computing science graduate, but he too had worked as a compressor service engineer for some years (see CV 6/51). The third member of staff, Mr Furrie, had also worked on compressors for some ten years. The pursuers had a fourth staff member, namely Mr Young's wife, but she was on the administrative side of the business only. In short, the pursuers consisted of four persons, three of whom were capable of attending to the work in the Specification. [20] Mr Young stated that he had notes of the meeting but these were neither produced nor used by him when giving evidence. According to his testimony, he explained the staffing position to the defenders at the meeting. He did not convey the impression to the meeting that he had "4 staff presently none of which are Servicing Engineers" (6/32 *infra*) or even that "all 4 memb of staff can maintain BA compressor" (6/29 *infra*). He did say, however, that the pursuers would employ a fourth person as an engineer, if they were awarded the contract, because they were "getting quite busy". Mr Young considered that Mr McKnight would, in any event, have been fully aware of the competence of the pursuers' staff since he had been involved with the work under the previous contracts. Mr McKnight would also have known that the pursuers had actually installed most of the defenders' compressors.

[21] Mr McKnight expressed the view that the terms of paragraph 7 of the pursuers' covering letter had not met his expectations of what was required by clause 11 of the Specification. However, as noted above, he had

not seen the covering letter. There is a typed minute of the clarification meeting (6/32) which records:

"Q6 Response - 4 staff presently none of which are Servicing Engineers. A Servicing Engineer would be employed if Aquatron were successful with their tender submission.

Q7 Response - To be clarified by Mr Young, if Aquatron were successful with the tender, details of the individuals Qualifications, Experience and Training would be submitted at that time.

...

Q8 Response - Mr Young stated that Aquatron was a small company & they are not obliged to have a Health & Safety Representative however Gus Fury is in charge of Health & Safety, Mr Young asked what qualifications we require them to have (to be clarified), Mr Fury has a first aider certificate but no official Health & Safety Certificate. Aquatron use a FPB Health & Safety Guide Policy working on their own premises. If we let them know what we require they will comply...

...

Q10 Response - Confirmed yes...

Q11 Response - yes will proceed to have the certificate changed to reflect this.

Q12 Response - the quality manual is in draft format at this time & will be provided in approx 2 weeks with revised certificate".

The provenance of this document was not spoken to directly by its creator, although its contents were put without objection to several witnesses, including Mr Young, Mr McKnight, Mr Tanzilli and Mr Davidson. The creator was presumably Mrs Cairns, since the other three members of the defenders' staff did not speak to being its author, and Mr McKnight described Mrs Cairns as the person who took the minutes.

[22] Mr McKnight had not himself taken notes at the meeting, but his recollection was that Mr Young had said that he did not have any engineers at the time, although he would employ some if the pursuers were awarded the contract. This was the case even although Mr McKnight accepted that Mr Young may have said that the pursuers had four members of staff. He knew Mr Young senior, had spoken to Rognvald Young on the telephone and might have recognised Mr Furrie. However, he said that, despite his involvement with the previous contracts, he did not know who had actually performed the previous contract works.

[23] Mr Tanzilli said that he would have taken notes at the meeting, but did not now have them. His recollection was also that Mr Young had said that the pursuers had no engineers but would employ someone or increase their staff, were the pursuers to be awarded the contract. He did recall Mr Young stating that the pursuers would require to employ an engineer and that there were four people in the business. He had no recollection of it being said that three of the four could carry out the work. But, as with Mr McKnight, Mr Tanzilli had no recollection of seeing the covering letter. He accepted that the letter, combined with the two week starting period, suggested that staff were already in place to execute the contract.

[24] Mr Davidson had only just arrived in the Operations Department on the day of the clarification meeting, with no apparent skills or experience in tender assessment. He was put into the two clarification meetings, with the pursuers and CompAir UK, with very little background information. His only preparation had been to read the list of issues. He was at the meeting to obtain information, expecting the meeting itself to be conducted by the departed Mr McKnight and the departing Mr Tanzilli. As he put it, he was "only sitting in". Of critical significance, Mr Davidson also said that he had never seen the covering letter. He had not done so even by the time of his testimony at the proof. His notes of the meeting (6/31) were available. On the issue of staffing, these read as follows:

"4 People

Mr Young

+ 1 Ronald (computing science)

+ 1 Gus Fury

+ an other (fist full of courses)"

Mr Davidson's recollection was that Mr Young had said that the pursuers had three people and would employ a fourth. Mr Young had said that he was an engineer but it was Mr Davidson's understanding that the other two staff were not. He had been unable to say what the qualifications of the fourth person might be. Two handwritten notes, whose authorship remained a mystery, were put to Mr Davidson in relation to the response to issue 6. One of these (6/28) might be taken to read, "4 staff - TY. QA SRonald. G Furry - compressor maint + 1 other" and the other (6/29) reads "1 person primarily now in servicing and maintenance e.g. major breakdown all 4 memb of staff can maint BA compressor". Mr Davidson accepted, with some alacrity, that the content of these entries was inconsistent with his memory and that it appeared that his recollection was mistaken. He accepted that he had been told that Mr Furrie was the Health and Safety representative.

(c) CERTIFICATION

[25] In relation to issue 11 on the list, the certificate sent in by the pursuers had admittedly not been adequate because of its failure to mention the repair and maintenance of compressors. Mr Young explained to the meeting that there had simply been a mistake in the description of the processes covered by the certificate. He undertook to provide a corrected version in early course. Mr Davidson's note on this point is:

"11. Has not got a ISO 9001 accreditation required for maintenance + repair does not have accreditation for M + R !! To follow in 2/3 weeks.

12. Quality system management manual only in draft form full manual to be produced in the same time scale as question 11"

[26] The pursuers reverted to QMS International and obtained a corrected certificate (6/33). This covers the management systems applicable to processes stated as the "provision, maintenance and servicing of compressors and breathing air delivery systems, air analysis, pressure testing and calibration". The corrected certificate is dated 16 June 2004, but runs for a ten year period from 29 April 2004. This was forwarded to the defenders (7/26) when it was obtained in mid June 2004. The speed with which the pursuers had offered to produce a corrected certificate had surprised Mr McKnight, as he seemed to be under the impression that a full re-certification process lasting some months would be required. Mr Davidson initially said that he too had been surprised by the speed of the proposed alteration of the certificate and considered that this was "obviously a major point" when the tender was evaluated. When the matter was probed in greater depth, it appeared that Mr Davidson was not particularly conscious of the difference between obtaining a corrected certificate and gaining additional certification "from scratch".

[27] At about the same time as they produced the new certificate, the pursuers submitted their Quality Manual (6/35). This is an elaborate document relating to the management of the pursuers' processes. It is dated July 2004 and said to be in accordance with ISO 9001 : 2000. It was drafted by QMS. It runs in the pursuers' trading name, but its "quality structure chart" refers to a "chairman" and a "managing director" as having management functions and responsibilities.

[28] By fax dated 27 August 2004 (6/36), the defenders asked for further clarification on two points. The first related to the name on the insurance documentation. This was subsequently resolved satisfactorily (6/37),

although Mr Davidson's recollection, which must have been faulty on this point, was that it had not. The second was:

"The certificate...does not mention to which accreditated (*sic*) body QMS is affiliated, please clarify. In addition...The Quality Manual provided appears to refer to a Limited Company, however you have signed the Tender Documents as a Senior Partner, please clarify".

The pursuers confirmed that they were a partnership and responded to the other question by enclosing an Accreditation Certificate of QMS International plc (6/37, 7/28). This states that QMS have been inspected and accredited according to certain norms and guidelines by the International Accreditation Council. The certificate runs from 1 August 2004 to 31 July 2005.

[29] Included in the productions is a document (6/34) purporting to be a fax from the pursuers (Mr Young) to the defenders (Mrs Cairns) dated 29 June 2004. This reads:

"With reference to our Health and Safety representative's qualifications, Aquatron BAS has employed Gus Furrie since 1992 as an engineer; he has successfully and safely planned and managed our high & low-pressure compressor installations, servicing, pressure testing and repairs for this time. He has extensive experience working with Fire Brigades, the MoD, Police UWSU's, the British Airports Authority and large multi national companies, planning and preparing method statements and risk analysis and assessments with these organisations. He has attended conferences and seminars organised by the HSE on health and safety planning and procedures.

He has planned our "lone worker system" which we consider will go a long way to protect our staff when working alone on site".

This document was put to both Mr McKnight and Mr Davidson. Both said that they had never seen it before. Neither Mr Young nor any other witness spoke to this document ever having been sent, so its provenance remains unknown. Accordingly it has been left out of account in the analysis of the facts (*infra).*

5. Tender Evaluation, Award and Explanation

(a) GENERAL

[30] Mr McKnight had prepared a "Tender Evaluation/Award Criteria Form" dated 17 March 2004 (6/14) under which only three criteria were to be used in any comparative evaluation. These are price (50%), quality (25%) and technical merit (25%). As already noted, neither quality nor technical merit were included as criteria to determine the economically most advantageous tender in the Official Journal notice. After the clarification meeting, Mr McKnight effectively dropped out of the tender process. He had been left with the impression that the pursuers still required to produce further documentation and that their failure to do so would be detrimental to their position and could potentially disqualify them from the tender process. However, he had not evaluated the pursuers' tender, had not been given the covering letter and was not to be involved in the examination of the material subsequently produced by the pursuers.

[31] Mr Tanzilli had not been satisfied at the meeting that the pursuers could fulfil the contract. This was because of his understanding that they did not have any engineers, had no completed Quality Manual and lacked a person with a Health and Safety qualification. His recollection, especially of detail and documentation, was not great, but he did recall that the pursuers had not submitted all the required documentation. He thought that the pursuers' tender had not been well put together and that it required some time to digest. MB Air Systems were not asked to attend a clarification meeting as their tender was perceived as complying with the formal requirements of the Specification. Mr Tanzilli had been impressed with their tender, which he regarded as very professionally put together in an "easy to read" format. However, his involvement was to come to an end shortly after the clarification meeting.

[32] A written Evaluation of tenders (6/15) was prepared by Mr Davidson for forwarding to the defenders' Legal and Purchasing Departments. Mr Davidson accepted that he had no technical expertise which would enable him to determine whether a particular company had reached a particular standard, such as that specified in relation to air purity testing. He did not know what qualifications someone should have before carrying out the maintenance of compressors. He had not carried out a tender evaluation before but approached his task methodically, if not mechanically, by going through each paragraph of the Specification in turn to see if it appeared to have been complied with by the tender. His Evaluation considers that all three tenders had complied with the requirements of clauses 1 to 10.

(b) EMPLOYEES

[33] When it comes to clause 11, the Evaluation reads as follows:

"CompAir UK Ltd

Supplied information that all of their staff worked to the ISO 9001:2000 and were all trained within the Company, and suitably qualified.

MB Air Systems

Complied with requirements by supplying information on seven (7) employees who were available and qualified to carry out work.

Aquatron Breathing Air Systems

Did not supply any information on any employees with the tender documentation. At a subsequent Clarification meeting Mr Young stated that if given the contract he would employ an engineer with "a fist full of qualifications". It may not be considered prudent in business terms to procure the services of a company, without employees, who can immediately fulfil the required functions."

[34] Mr Davidson accepted that the references in the first part of clause 11 relate to what was required during the currency of the contract and not in advance of it. The requirement in the last sentence is for the production of evidence of "quality standards" achieved by a workforce. It is not phrased in terms of producing details of individual employees' qualifications or experience, although Mr Davidson approached the requirement on the basis that it did. Perhaps this was because that is what MB Air Systems had enclosed with their tender, although Mr Davidson had no knowledge of whether the CVs produced had any relevance to the contract works. He too had not seen the covering letter outlining the pursuers' position on the experience and qualifications of their staff, hence the opening sentence of his assessment of the pursuers in this area. That assessment, in its statement that the pursuers had not supplied any information on any employees with the tender documentation, is just wrong. Mr Davidson was proceeding on his apparent understanding that, contrary to the terms of the covering letter, Mr Young had said that he had no staff to carry out the contract.

[35] Tim Williams, the managing director of Millstream Associates Ltd., a company specialising in public procurement, was adduced as an expert by the defenders (report 7/47). He spoke to the need for objectivity, transparency and equal treatment in the regulated open procedure. Normally, a tender would be evaluated by a panel of persons with varied expertise rather than by one person. It would also be unusual, if the evaluator were simply one person, for him to begin his involvement at the stage of a clarification meeting. Mr Williams expressed the view that clause 11 of the Specification did not provide for any minimum standard to be met so far as qualifications, experience or training were concerned. A tenderer could thus not be eliminated from the process on this ground at the first stage; i.e. when compliance with the Specification was being determined, as distinct from the second stage of comparative evaluation. However, the clause did have a requirement for the tenderer to submit evidence of quality standards achieved by their workforce. Mr Williams described this as a "fairly open" requirement, which was not complied with by the terms of paragraph 7 of the covering

letter. He maintained in his report that the pursuers' "failure to provide information on the qualifications and names of the staff they were proposing to support this contract is a serious omission" (7/47 para 14). Therefore, he argued, had he been awarding the contract, he would have ruled the pursuers' tender to be "invalid" at "an early stage". He accepted that the final part of clause 11.1 did not refer to qualifications or training but thought it was difficult to see what else it could be referring to. He accepted too that there was no requirement to produce the names of the employees who would be engaged on the contract. He conceded that if the defenders' staff had seen the covering letter and had been given further information on employees at the clarification meeting, it would not have been correct to report that the pursuers had no employees to carry out the work.

(c) CERTIFICATION

[36] In dealing with Clause 12, the Evaluation reads:

"CompAir UK Ltd

CompAir supplied a UKAS ISO 9001 Certificate that did not have accreditation for the Repair and Maintenance of Compressors, only for Design and Manufacture...the management of CompAir UK...were endeavouring to get the relevant Certification within the next few months, and as they did not have the relevant Certification made the presumption that they would be excluded from the tender process.

Due to not having the relevant Certification this was indeed the case.

Aquatron Breathing Air Systems

Aquatron supplied an ISO Certificate that did not have an accreditation for the Repair and Maintenance of Compressors, only for the Provision of Air Delivery Systems, Air Analysis and Pressure Testing.

At the Clarification meeting Mr Young stated that this would be rectified within 2/3 weeks.

After a length of time a Certificate arrived which stated that the Company now were Certificated for Provision, Maintenance and Servicing of Compressors and Breathing Air Delivery Systems, Air Analysis, Pressure Testing and Calibration.

...

It was envisaged that by inclusion of "Evidence of Accreditation to ISO 9001 : 2000 issued by a recognised accreditation Centre" in the Brigade Tender Document. Then accreditation would be to a UKAS approved Centre.

However as it was not specifically required in the specification that UKAS Accreditation was mandatory, then any other national Accreditation Centre would have to be considered.

When asked to supply information of the Accreditation body to which QMS were affiliated, by return the Brigade received a copy of an Accreditation Certificate from the International Accreditation Council.

The Council's IAC documentation states that they are "An Independent and self-funded accreditor meeting the needs of both certifier and certified".

By definition this would take them outwith the scope of an approved Centre as they are Independent of any recognised national or accreditation body.

On the Certificate supplied by IAC it shows membership of their organisation from 1/8/2004 to 31/7/2005, to QMS International plc, yet the Certificate issued by QMS to Aquatron is dated until April 2014...

By virtue of the fact that should QMS be removed by the IAC then accreditation would not extend beyond 31/7/05.

...

The Quality Manual referred to by Mr Young actually refers to and outlines, a Limited Company and is therefore in direct conflict with Mr Young's statement [that they are a partnership], the discrepancy has not been adequately explained to this Brigade, it therefore must be questioned as to the integrity of the entire document."

There was no mention of MB Air Systems' certification.

[37] Mr Davidson's evidence was that there had been a presumption that the certification would be by UKAS. However, it was realised that this could not be done as the contract had a European dimension. Certification bodies established by other European Union national governments would have to be regarded as acceptable too. However, because QMS and IAC were independent companies, he did not consider their certification satisfactory. In short, he did not consider that QMS were a "recognised...centre". In relation to a British company, which the pursuers were, only a UKAS certificate would have satisfied Mr Davidson that there had been compliance with clause 12. Because IAC were a private company, Mr Davidson's view was that they were "nothing, in effect". Mr Davidson had considered that MB Air Systems had complied with this provision since they had produced a UKAS certificate. When it was put to Mr Davidson that in fact they were to use CompAir UK as a sub contractor and that CompAir UK's certificate had been deemed inadequate, Mr Davidson conceded that he had simply not looked at this at the time. Equally, so far as the certification of the other sub-contractor (Steadvale Air Systems) having expired was concerned, he conceded that he had simply missed this too. He accepted that he did not have the technical expertise to determine just what ought to have appeared on a certificate of a tenderer.

[38] Mr Williams gave evidence that QMS "is a company widely recognised as an accreditation centre, although it is not accredited by UKAS". Although he accepted the proposition that there was no difference between issuing annual certificates after an audit (as UKAS did) and having the power to recall a certificate of longer duration after such an audit (as QMS did), he had some doubts about the auditing system employed by QMS and the maturity of the pursuers' management system as certified by them. However, he was of the view that nevertheless the defenders "were incorrect to completely reject Aquatron's certification" (7/47 para 29). He expressed the view that the IAC certificate did not demonstrate any standard of performance and doubted whether it had any "validity". It was not clear why he had reached that view. Mr Williams also doubted the wisdom of the defenders' exclusion of the CompAir UK tender on the grounds of the inadequacy of its certificate. That inadequacy related to the description of the processes on the certificate. But the description of the processes on a certificate was, in Mr Williams' view, of a general umbrella type rather than specific to particular types of work. Focussing on the exact wording was pedantic and possibly misguided. For this reason too, Mr Williams thought that the absence of a specific reference (for example) to recalibration of gauges on MB Air Systems' certificate was not significant as that operation would be an integral part of servicing (para 48) even if air purity testing were not. However, in order to determine conclusively whether a particular process was covered by a certificate, the quality manual or audit report would have to be consulted.

[39] Mr Williams accepted that there was a lack of a level playing field in connection with the defenders' comparative scrutiny of the certificates of the pursuers and MB Air Systems. On the other hand, he considered that the pursuers' Quality Manual had been hurriedly put together and not properly checked. This was because, unusually, it was dated after the issue of the certificate and the structure described in it was that of a limited company. The pursuers' Health and Safety policy contained a different structure.

(d) AIR PURITY TESTING

[40] The Evaluation considers that all three tenders complied with clauses 13 to 26. Mr Davidson had therefore decided that MB Air Systems' tender had complied with clause 15 (Standards of Air Sample Analysis). When this was explored in some depth with him, he accepted that this tender had not specifically stated that the tenderers would carry out air purity testing to Standard EN 12021 : 1998. It had stated that air purity testing would be carried out to a different standard, namely BS 4275. Mr Davidson did not know what, if any, difference there was between the two standards since, once more, he did not have any technical knowledge in this area. For the same reason, although he knew what a Drager tube was, he had no knowledge of whether testing the air for contaminants by Drager tubes was sufficient compliance with the Standard.

[41] A Drager Tube is a tube, through which the air is passed, containing a chemical which discolours if a particular contaminant, which the tube is designed to detect, is present. There are many (over 200) different Drager tubes for many different contaminants, but each is capable of detecting only one at a time. Ian White, a product specialist with Drager Tubes, was adduced by the defenders to explain the capabilities of the tubes. He maintained that the use of the tubes was an appropriate method of testing for the compounds specifically mentioned in the Standard EN 12021 : 1998, namely: lubricants; carbon dioxide; and carbon monoxide. An electro chemical sensor would be required to gauge the level of oxygen. Some thirty fire brigades in the United Kingdom use Drager tubes to test the air purity of their breathing apparatus. Mr White agreed with the advice given in the Technical Bulletin and the DCOL. There had been no complaints from the Home Office or any fire brigade about the adequacy of the tubes for their purpose.

[42] Mr Williams did not consider that there was any obligation upon the defenders to determine whether Drager tubes were suitable. The Specification had said that the defenders would use the Technical Bulletin and the DCOL guidance and Drager tubes were deemed acceptable in terms of that guidance.

(e) HEALTH and SAFETY

[43] In relation to clause 27, the Evaluation states:

"CompAir UK Ltd

Has personnel trained to IOSH standard within the Company.

Aquatron Breathing Air Systems

Has no personnel with any formal Health and Safety Qualifications

MB Air Systems

Has no personnel with any formal Health and Safety qualification although a member of staff has started study for NEBOSH qualification".

Mr Davidson had looked at the pursuers' Health and Safety policy and formed the impression that it was a compilation of photocopies. He noted that it was in the name of a limited company. Mr Davidson had also noticed the corporate structure but had taken account of it only in relation to his assessment of the Quality Manual, which contains a different structure. Mr Williams was of the view that the pursuers' tender was inferior to that of MB Air Systems by reason of the latter having a person training for a certificate, even if there had been no minimum standard to be reached.

(f) CONCLUSION

[44] Mr Williams had looked at the criteria which Mr McKnight had devised and which Mr Davidson intended to apply to any evaluation process; price, quality and technical merit. He recognised that the criteria in the Official Journal were not those ultimately selected for use. Of those in the OJ, the pursuers were cheaper than MB Air Systems on price. Delivery was the same. It was difficult to see what "running costs"

were involved. Cost effectiveness was related to price. "After sales service" did not seem an appropriate or suitable criterion for this contract, as there was no sale involved. "Compatibility" was equally inappropriate. Mr Williams focussed on what he described as the three issues in this case, namely compliance with clauses 11, 12 and 27. He applied a points system to the tenderers in relation to their compliance with each of these clauses. On clause 11 he would have awarded the pursuers no points and MB Air Systems eight points, out of ten. On clause 12, the pursuers' certificate merited further investigation, but he would have awarded five points to them and six or seven to MB Air Systems. On clause 27, the pursuers would have scored three but MB Air Systems eight or nine as they had a person with a degree in mining engineering. On pricing the pursuers would have gained 48.5 points and MB Air Systems 42.5. Thus, he reasoned, MB Air Systems would have succeeded on a comparative basis. However, if, instead of focussing on the clauses, the selected (but not published) criteria were looked at, he accepted that the pursuers ought to have succeeded on price. As they had more modern testing equipment then they might have succeeded on technical merit. If there were a rough parity on quality management, the pursuers might have come out ahead overall. However, as will be seen, Mr Davidson did not reach the stage of carrying out either of these types of comparative exercise.

[45] The Evaluation continues with an accounting sheet comparing the financial aspects of each tender. This takes into account not only the three tendered amounts but also the cost of extra works, which would be done under the contract but paid for additionally. The calculation involves a consideration of hourly labour rates in respect of 800 hours and travel expenses for 7,000 miles. The eventual totals brought the cost of the CompAir UK tender in at £215,949.96; the pursuers' tender at £222,300; and the MB Air Systems' tender at £253,740. The Evaluation summary reads:

"CompAir UK Ltd

Although having the lowest Tender price the Company were unable to meet the required criteria of tender in that the Company does not hold an ISO 9001 : 2000 certificate.

Aquatron Breathing Air Systems

Although the Company provided an ISO 9001 : 2000 certificate it was not acceptable to this Brigade for the reasons given above.

The fact that prior to grant of contract the Company has no suitable employees, must be considered a weighting factor. In the absence of any Health & Safety expertise, taken together with all other factors suggests that best value to the Brigade would not be met by this company, therefore, fails to comply with the specification of this tender.

MB Air Systems

Complied with all sections of the tender although having staff with only practical experience of Health & Safety, staff are only in the process of gaining formal Health and Safety qualifications.

Conclusion

The outcomes based on the various aspects of the weightings placed on this contract, being, Cost, Quality and Technical Merit, I make the recommendation that as the only tenderer, to comply with the specifications required, under all of the criteria required by this Brigade that MB Air Systems be awarded the contract."

[46] Mr Davidson accepted that the levels of scrutiny which were applied to the pursuers' tender and MB Air Systems' tender had been different. Ultimately the recommendation to accept the latter had been because the tenders from CompAir UK and the pursuers had failed to meet the requirements of the Specification. The MB Air Systems' tender was the only one left standing. There was then no need to evaluate it. Thus, although the Evaluation concludes on the basis that a comparative evaluation had been carried out, that is not what happened. The pursuers' tender did not reach a regulation 21 evaluation. It was eliminated as non compliant

with the Specification. Mr Davidson sent his report off to the Legal and Purchasing Departments and his involvement in the process ceased. Were his conclusion to be followed, as it was, only the MB Air System tender could be accepted.

[47] Mr Williams identified the problem about the applied criteria in his report (7/47 para 40). He describes the application of criteria different from those advertised in the Official Journal as "a clear fault in the process". Nevertheless, he maintains that the defenders were correct in considering the pursuers' tender to be "invalid" because of the pursuers being "clearly unable to demonstrate that they had sufficient qualified personnel in place, either at the time of tender submission or even at the clarification meeting" (para 45). He summarises his conclusions on the tendering process (para 57) in describing a "series of errors" by the defenders as follows:

"i) the specification (12.1) failed to clearly identify the minimum standard required in respect of quality certification...

ii) the requirements for the Health & Safety representative were vague (27.2)...

iii) the award criteria in the Official Journal did not appear to be particularly relevant to this contract.

iv) the award criteria used by the evaluation team were different from those listed in the Official Journal notice.

v) It is not clear...that there was a clearly understood process for scoring the responses of the candidates and matching these to the award criteria.

vi) the evaluation of Aquatron's quality certification was at fault, in that Aquatron met the requirements stipulated in the specification.

vii) Although Aquatron failed to provide significant information in their tender regarding the competence of their personnel, [the defenders] invited them to attend a clarification meeting. When Aquatron failed to provide adequate information at this meeting, [the defenders] should have informed them that this failure meant that their tender was invalid.

viii) Given that [the defenders] did not disqualify Aquatron immediately following the clarification meeting, they should have continued with an objective scoring process in order to clearly demonstrate that their evaluation of the most economically advantageous tender was transparent and non-discriminatory."

Nevertheless:

"Despite the errors...Aquatron failed to provide crucial information required so that [the defenders] could determine the most economically advantageous tender. [The defenders] were correct to reject Aquatron for this failure and I can see no reason for [the defenders] to reject MB's tender. As such, there was only one compliant tender and [the defenders] were therefore justified in awarding the contract to MB Air Systems Ltd.

...even if Aquatron's tender was not rejected for the failure to provide information, and both tenders had continued to [be] evaluated on the basis of which was the most economically advantageous, it seems very probable that MB's tender would have been successful."

(g) REPORT and REASONS

[48] A report dated 1 November 2004 was placed before the defenders' Executive Sub-Committee. This report (6/38) does not appear to have had the Evaluation attached. It seems to have emanated from the Purchasing Department, but no-one from that Department gave evidence as to its provenance or the basis for

its recommendation. It was clearly based on the content of the Evaluation. It refers to the three tenders and states:

"These offers have been examined and evaluated in conjunction with senior officers at Brigade Headquarters.

The offer received from CompAir UK Limited of £215,949.96 is not to specification because CompAir UK Limited does not hold an ISO 9001 : 2000 Certificate and as such is unable to meet the required criteria in terms of Quality Assurance Standards.

The offer received from Aquatron Breathing Air Systems £222,300.00 is not to specification because:-

1. Aquatron Breathing Air Systems was unable to satisfy the Brigade that it has suitably qualified employees in place prior to the award of the contract in accordance with Section 11 - Competence of Persons Undertaking Work of the specification.

2. Aquatron Breathing Air Systems failed to satisfy the Brigade of its Quality Accreditation in accordance with Section 12 - Quality Assurance Standards in the specification.

4 Recommendation

4.1 I recommend acceptance of the only offer to specification...received from MB Air Systems Limited at a total cost of £253,740.00..."

[49] By letter dated 17 November 2004, the defenders advised the pursuers that their tender had not been successful (7/40). The pursuers requested the reasons for this (6/41). The reply, dated 23 November (6/42), was that:

"The tender...did not conform to Strathclyde Fire Board's Specification. At Clause 11...Aquatron did not supply evidence of quality standards achieved by its workforce and on enquiry it appeared that personnel would be employed if Aquatron's tender was successful. Further, the evidence of accreditation to meet quality assurance standards in compliance with Clause 12...was found to be unacceptable".

By letter of 21 December (6/43) the defenders enclosed the report to the Sub-Committee (*supra*) and confirmed that it had been the basis for the decision. This is certainly what Mr McKnight said would happen; viz. that the Sub-Committee would take its decision based on the report. Even though there was no evidence from anyone present at the Sub-Committee meeting stating what actually happened, it can be inferred that the Sub-Committee proceeded on the basis of the report. A further more detailed letter from the defenders to the pursuers' law agents dated 27 April 2005 (6/48) re-iterated that the pursuers' tender had failed because of its non-compliance with clauses 11 and 12. It also founded upon an additional failure, in terms of clause 27, to provide details of their "competent" Health and Safety person.

6. The pursuers' complaint

(a) THE RECORD

[50] The pursuers' complaint is set out generally in their averments on record as follows:

"...it was the duty of the defender to treat all tenderers, including the pursuers, equally and fairly throughout the tender process, and in a manner which was not arbitrary and capricious. It was the duty of the defender to take due account of all information provided by the pursuers during the tendering process in relation to matters which were relevant to said process. Both in rejecting the pursuers' tender as non-compliant with the specification and in concluding that the tender from MB Air Systems Limited complied with the specification the defenders acted in a manner that was arbitrary and capricious and did not treat the tendering parties

equally and fairly. By accepting a tender that did not conform to the published specification, the defenders were in breach of the Public Services Contracts Regulations".

The pleadings are unusually silent on which regulation, or part of a regulation, was breached and the manner of that breach. That is perhaps because the pursuers' grievance is aimed more at an alleged failure by the defenders to abide by the "principle of equal treatment of tenderers" which, as noted above, is not expressed in the Regulations at all. Although it appeared that Mr Young thought something suspicious had gone on in the tendering process, he was not inclined to share these suspicions with the Court. Ultimately, he was not prepared to impugn the integrity of those evaluating the tenders and any analysis (*infra*) proceeds on the understanding that it is not suggested that the defenders acted other than in good faith. Rather, as a generality, Mr Young expressed the view that the problem was that those involved had simply not had the experience to undertake the evaluation task or sufficient understanding of their task in terms of the Regulations.

(b) EMPLOYEES

[51] Mr Young spoke to the specifics of the pursuers' complaint. The starting point was that he considered that his tender had complied with the formal requirements of clauses 11 and 12. It had been rejected first under clause 11 because it had been stated in the report to the Sub-Committee that he had not satisfied the defenders that the pursuers had suitably qualified employees in place. But clause 11 did not state that the employees had to be in place in advance of the contract. In the letter giving the reasons, the complaint was of not supplying evidence of quality standards. MB Air Systems seem to have passed this test by supplying details of the qualifications of individual staff members. This had not been asked for in terms of clause 11 but had, in any event, been dealt with in the pursuers' covering letter and by Mr Young at the clarification meeting.

[52] Enclosed with the MB Air Systems' tender had been the detailed training records of seven employees, who might have been involved in the contract. However, according to Mr Young, only one of the seven actually had a qualification relevant to carrying out the work. He had not understood that the Specification had called for the production of a detailed *curriculum vitae* for each member of the pursuers' workforce. Had he been asked to produce this, then he would have done so. As he put it, he did not seek to provide "a catalogue of inconsequential rubbish" with the pursuers' tender.

(c) AIR PURITY TESTING

[53] It was Mr Young's view that only his air purity testing system complied with the provisions of the Specification (e.g. Clauses 14 -16), which required compliance with Standard EN 12021: 1998. In that regard, the heating of compressor lubricant oils could produce carcinogenic polycyclic aromatic hydrocarbons (PAHs), which required to be detected if present in the breathing air produced. The pursuers had invested almost £50,000 in a machine capable of detecting a great number of contaminants. This machine carried out Fourier Transform Infrared Spectrophotometry (FTIR) of air samples. Both Mr Young and his son had received training in the United States of America on this method of air analysis.

[54] Mr Young did not consider that the MB Air Systems' tender (6/7), which he had obtained and clearly analysed with a detailed and expert eye, was compliant with the Specification. This was so even although the MB Air Systems' tender was generally a far larger and more detailed presentation than that of the pursuers. According to Mr Young, the MB Air Systems' tender did not state that it would carry out air purity testing to the Standard EN 12021 : 1998. It stated that air purity testing would be carried out to a different Standard, namely that contained in BS 4275. This testing would be by "Drager Tubes for oil, CO & CO2, and by Dewpoint Meter for moisture" (6/7 p 41). Mr Young thought little of these tubes and the pursuers did not use them. The tubes did not carry out any chemical analysis and their calibration was a "nonsense" in scientific terms. Their accuracy could deviate by thirty per cent. In any event, MB Air Systems planned to check only for contamination by oil, carbon monoxide and carbon dioxide. No other contaminants, i.e. other than those specifically mentioned in EN 12021 : 1998 would be looked for. However, Mr Young had noted that under one of the Specification's clauses, (8), the MB Air Systems' tender had stated that Anderol 555 and Millair 30

were to be used as lubricants. However, the latter was not recommended by compressor manufacturers and the Safety Data Sheet for the former stated that it contained a PAH, namely diphenylamine, which might therefore be produced as a contaminant upon thermal decomposition. Yet it was not to be checked for. Furthermore, there was no mention in the MB Air Systems' tender of measuring for oxygen levels, also a feature of the Standard. Mr Young considered that the testing regime outlined in the Technical Bulletin and the DCOL was out of date. He regarded the defenders' employees as "arrogant and incompetent" in their failure to realise that such a testing regime did not meet Standard EN 12021 : 1998. He considered that they did not understand the Standard.

[55] Mr Young's testimony on how to test for contaminants was supported by an eminent source, namely Professor D Thorburn Burns, emeritus professor of analytical chemistry at Belfast University. He observed in his detailed, if occasionally repetitive, report (6/55) that the requirements of BS EN 12021 : 1999 were, other than in relation to oxygen, expressed in terms of upper exposure limits. There was a need in terms of this Standard to be able to provide assurances on the absence of contaminants other than those specifically mentioned (ie oil, CO and CO_2). Drager tubes could not deal with the general requirement under paragraph 6.2.1 of the Standard to ensure that the air should not contain "any contaminants", because the tubes were designed to detect only one particular element at a time. They were not a multi-analyte test of the type needed to satisfy the Standard. They were also not very accurate. There was a particular problem in using the tubes to detect oil and oil mist because oil is not a unique compound. Different tubes would be needed to detect the different compounds in different oils, such as the carcinogen Diphenylamine in Anderol 555, which might escape into the air upon heating the lubricant in the compressor. The professor concludes in his report that "Drager or similar 'length of stain tubes' cannot provide the analytical data necessary:

"1 ... to satisfy the requirements of BS EN 12021 : 1999, specifically with regard to Lubricants.

2 ...to satisfy the requirements of BS EN 12021 : 1999, specifically with regard to 6.2.1 General which refers to 'any contaminant'.

3 ...to meet the requirements of COSHH regulations, where the identities of compounds as well as their amounts have to be established in relation to occupational exposure limits."

It follows that the professor did not agree with the guidance in the Technical Bulletin and the DCOL.

[56] There was a conflict in the evidence between the professor and Mr White. Mr White disagreed with each of the three conclusions. He considered that the tubes could check for the components of every lubricant, including, he thought, the diphenylamine in Anderol 555. If there were contaminants appearing because the oil had reached a particular temperature then there would be increases also in carbon monoxide and carbon dioxide, which would be detected. Testing for "any contaminant" could be achieved if there were a risk assessment carried out to identify what contaminants might be present. These particular contaminants could then be checked for. The tubes could also produce the necessary detail to ascertain amounts where necessary. The tests with the tubes could be made more or less sensitive by increasing or reducing the volumes of air tested. Oil levels of as low as 0.1 mg/ml^3 could be detected although there was a +/- 30% margin of error.

[57] William Swanson, a retired public analyst, was also adduced by the defenders in support of Drager tubes as a satisfactory method of testing for contaminants. He did not have specific experience of breathing air apparatus. Like Mr White, he considered that a risk assessment was a fundamental requirement in any exercise of hazard identification, even if such an assessment was not mentioned in the Standard. The safety data sheets of the materials used would have to be consulted to see what was to be looked for. It was not practical to test for everything, even if FTIR was a very powerful technique and superior to the use of a Drager tube or multiple tubes. FTIR could only detect substances in its "spectral library". The defenders would attempt to identify potential contaminants in each fire station and these could then be tested for, using the tubes.

[58] Professor Burns spoke to FTIR analysis being capable of finding compounds which an analyst did not know or anticipate might be in the air. It could be used to detect not only the three compounds specifically mentioned in BS EN 12021 : 1999 (CO CO_2 and water vapour) but also other contaminants, especially those derived from oil. It was a much more reliable method of analysis. It is used by the Ministry of Defence as their standard method of testing air purity in aircraft and diving operations. It is also widely used in the United States of America. It does not test for oxygen content but there were many other instruments that could do that. The professor concludes that:

"In order to meet the requirements of BS EN 12021 : 1999 and COSHH it is necessary to carry out multi-analyte examination of air samples, for example using FTIR, to provide the necessary information with regard to the content of carbon dioxide, carbon monoxide, water, lubricant and other contaminants. In addition, it is necessary to obtain a reliable determination for the oxygen content of an air sample."

(d) CERTIFICATION

[59] Mr Young explained that the pursuers had produced the required certification in terms of clause 12. It had not been a requirement of the Specification that a UKAS or other nationally approved equivalent certificate be produced or that the company issuing the certificate should provide details of its own accreditation. He had produced a certificate from "a recognised accreditation centre" as required. Peter Gamble, the managing director of QMS Systems plc, gave evidence that his company was a recognised certifying centre. It issued certificates to many multi-national corporations and public service institutions as well as to "one man businesses". It issued thousands of certificates in many countries. It had offices in thirteen countries and had been in business for fourteen years.

[60] Mr Gamble had personally signed the pursuers' certificate (*supra* 6/33). He had not himself carried out an inspection of the pursuers' systems but an assessor had done so. This followed an approach from the pursuers in early 2004. The assessor's function was: to visit a business; to conduct a standard "gap analysis" to see if any system faults existed; to discuss the systems; and to produce a report on anything that the business required to do or had agreed to do in the future. He would also produce a draft quality manual. The assessor would visit the business again to confirm that a quality management system was either in place or that substantial progress had been made in that regard. If that were the situation, a certificate would be issued to the effect that the business had a management system compliant with BS EN ISO 9001 : 2000. A certificate could be issued if the assessor were confident that appropriate system changes would be made even if they had not yet been implemented. The assessor would return annually to ensure continued compliance. If a serious fault were discovered, then certification could be revoked. If a company continued to use a revoked certificate then a report to Trading Standards would be made. The fact that, in their Quality Manual, the pursuers referred to themselves as a limited company would not invalidate their certificate. The legal status of the business and the titles of their management were not important.

[61] Mr Gamble explained that it was wrong to describe his company as an "accreditation" centre. It issued a certificate to a business, which would thereby be "certified". His company, but not the business, was "accredited" by a different body, namely the International Accreditation Council (7/28), a private company established in the Netherlands. Although the particular document produced ran for a year from August 2004, his company had been accredited since 2000. In due course, the accreditation would be renewed by the IAC either after an audit or automatically. The Department of Trade and Industry had established UKAS as a certifying body. Mr Gamble considered the methods of UKAS certification to be unnecessarily bureaucratic and complicated.

[62] In advance of Mr Davidson's concessions (*supra*), Mr Young pointed out that MB Air Systems' tender stated that the air purity testing would be carried out by sub-contractors, including the same CompAir UK whose certificate had been declared deficient. The MB Air Systems' tender also stated that the spare parts suppliers were to be Steadvale Air Systems, but their certificate had expired prior to the period to be tendered for.

7. Submissions

(a) PURSUERS

[63] The pursuers outlined the content of the Regulations and described the appropriate manner of their interpretation under reference to the judgment of the European Court of Justice in *Gebroeders Beentjes* v *Netherlands* [1988] ECR 4635. Two points arose from that case. First, if, as here, an authority determined to award a contract on the basis of the "most economically advantageous tender" rather than simply the "lowest price" then the criteria for the award had to be stated either in the Official Journal or the contract documents (para 35). The notice in the OJ had stipulated five criteria but the three criteria actually selected were different. The criteria adopted by Mr Williams relative to his evaluation of compliance with clauses 11, 12 and 27 were also not those published. Secondly, any conditions which a contractor had to meet when tendering had to be specified in the notice or documents (para 34). These conditions had to be capable of objective interpretation throughout the European Union (*SIAC Construction* (*supra*) paras 33 et seq.). It did not matter what the drafter of a particular clause had in mind, the Specification had to be construed according to what the reasonably informed tenderer would think that it meant. It was for the Court to make that decision. At the stage of evaluation, the criteria required to be applied objectively and uniformly (*SIAC Construction* (*supra*) para 44). Where reasons had been given for the refusal to accept a particular tender, the contracting authority could not later rely on a different reason (*Harmon CFEM Facades (UK) v Corporate Officer of the House of Commons* (1999) 67 Con LR 1, Judge Humphrey Lloyd QC at para 239).

[64] Two objections to the evidence were insisted upon. First, any evidence that the pursuers' tender was deficient other than in terms of clauses 11, 12 and 27 (eg under clauses 14 and 15) ought to be excluded on the basis of lack of record. The defenders were not entitled to argue that, even if the MB Air Systems' tender had been excluded as non compliant, the pursuers' tender would also have been knocked out on grounds other than those specified. Secondly, the evidence about what persons thought clauses 11 or 12 meant, or were intended to mean, was irrelevant; that being a matter of construction for the Court to decide.

[65] On the evidence in general, that of Mr Young ought to be preferred over those of the defenders' ADOs so far as discussions at the clarification meeting were concerned. The ADOs accepted that their recollections either might be mistaken or were at odds with the written notes of the meeting. They were also in conflict with the defenders' own averments on record. The evidence of Mr Williams and Mr Swanson should not be accepted as reliable. Mr Williams had been too keen to express views on matters outside his experience. Mr Swanson had no experience in breathing air apparatus or the testing of air purity in that context.

[66] The pursuers' tender should not have been excluded for the reasons given in the report to the Sub-Committee. On the issue of the certificate, the only specific condition in the Specification had been to demonstrate compliance with Standard ISO 9001 : 2000. That had been done by the pursuers. Mr Gamble had not been challenged on whether QMS were a recognised centre and Mr Williams had accepted that they were. It was not for the defenders to introduce additional accreditation requirements beyond those in clause 12. In that regard, the accreditation of QMS was irrelevant as were the contents of the pursuers' Quality Manual and Health and Safety policy. With regard to the latter, clause 27 did not require any minimum standard of policy. The dates on the certificates did not matter either, nor did the time it might take to amend a certificate. Any defect in insurance information had been cured. So far as employees were concerned, clause 11 did not require there to be employees in place prior to the contract nor did it require details of employees' qualifications. In any event, those had been given in the covering letter. Furthermore, even if no information had been provided, that (i.e. the lack of information as distinct from employees) had not been the reason for exclusion. The reason given had no foundation in the terms of this clause. Thus the pursuers ought to have been allowed to proceed to the second stage, i.e. comparative evaluation.

[67] The MB Air Systems' tender should have been excluded at the first stage of determining compliance with the Specification. First, it did not meet Standard ISO 9001 : 2000 required by clause 12 since the sub-contractors, CompAir UK, were, despite Mr Williams' position on the wording, non compliant. The

defenders had failed to investigate this and had thus not treated the tenders of the pursuers and MB Air Systems in an equal manner. Secondly, the air purity testing, which MB Air Systems had offered, did not comply with Standard EN 12021 : 1998. Paragraph 6.2.1 required a multi-analyte test to identify contaminants which are not anticipated. The terms of the Technical Bulletin and the DCOL were irrelevant in that respect.

[68] Accordingly, if the MB Air Systems' tender ought to have been excluded, the pursuers' tender ought to have been accepted. If both had gone through to the evaluation stage then they ought to have been judged on the criteria specified in the Official Journal. On price, the pursuers would have been ahead. On delivery date the tenders were the same. The criteria "running costs" and "cost effectiveness" were meaningless in the context of this contract. "After sales service" was also inappropriate for a contract of this type as was "compatibility". So the pursuers would have won. If both tenders had been excluded then a re-tendering exercise would have taken place and the pursuers would have had an opportunity to re-tender and win. This chance would have been a valuable one. It could be assessed on a broad basis at about seventy five *per centum* of the contract value.

(b) DEFENDERS

[69] The defenders drew attention to certain cases in which the Regulations, or their equivalents, had been discussed, notably: *Tay Premium Unit Consortium Petitioners*, 20 October 1995, Lord Cameron of Lochbroom, unreported; and *Clyde Solway Consortium* v *Scottish Ministers* 2001 SC 553, in both of which the contracting authorities' decisions had been challenged by judicial review. Reference was also made to the Privy Council decision in *Pratt Contractors* v *Transit New Zealand* [2005] 2 NZLR 433 in which Lord Hoffman, delivering the decision of the Judicial Committee, said (para 47) that "The duty to act fairly meant that all the tenderers had to be treated equally". A contracting authority is afforded a "significant discretion" in the selection of the criteria and their application at both stages of the tender process (see generally Arrowsmith : The Law of Public and Utilities Procurement (2nd ed) paras 7.101, 7.120-121). The authority is entitled to use "a wide margin of discretion in making commercial assessments" (para 21.53 under reference to *Luck (t/a G Luck Arboricultural & Horticultural)* v *Tower Hamlets* [2003] EWCA Civ 52, Rix LJ delivering the judgment of the court at para 60; see also *Lion Apparel Systems* v *Firebuy* [2007] EWHC 2179 (Ch), Morgan J at paras 26 - 38).

[70] As a preliminary matter, there had been no evidence about how the Sub-Committee had arrived at its decision. The Minutes of that body had not been produced nor had the authors of the subsequent correspondence from the defenders given evidence. In the absence of such evidence, the pursuers had failed to prove that the defenders had based their decision on the report to the Sub-Committee. Thus a breach of the Regulations had not been proved.

[71] In relation to the two objections which had been maintained, the pursuers were putting forward a case that their tender had not been deficient in certain specified ways. The defenders were entitled to challenge that and to present a contrary case that, even if the decision to exclude had been erroneous, the defenders would have reached the same conclusion on other grounds. The importance of the evidence in that regard was in connection with causation. Although it was agreed that interpretation of the terms of the Specification was a matter for the Court, it was legitimate to ask the persons involved how they had implemented those terms.

[72] On the pursuers' substantive submissions, it was not accepted that the grounds for rejecting a tender ought to be restricted to those connected with the published criteria. There must be an inherent discretion to exclude a tender if, for example, its presentation was unacceptably poor. It was reasonable for the defenders to take account of the lack of care and attention used by the pursuers in putting together their tender and in their performance at the clarification meeting. Economic considerations were not the only ones which could be taken into account.

[73] In interpreting clause 11, the starting point was its heading, which referred to the "competence of persons undertaking the work". The defenders had been entitled to disqualify the pursuers for non-compliance with this clause. The final two sentences clearly called for some information. The tenderers were being asked to demonstrate that they were "up to the job". As Mr Williams said, it was difficult to see what other interpretation there could be, other than that it was calling for evidence of the training and experience of the persons engaged to carry out the work. Dealing with it in a single sentence in a covering letter was not compliant. Mr Young must have known that the pursuers were supposed to be producing something, but nothing had been produced. Although it was possible to read it as calling for some form of institutional mark, that was not the correct interpretation in its context.

[74] The defenders were entitled to have serious doubts about the certificate produced under clause 12 even if, as Mr Willams conceded, it ought not to have resulted in exclusion at the stage it did. Mr Williams' approach to the wording of the processes covered by a certificate was sound.

[75] In stating that they would comply with BS 4275, the defenders were not saying that they were not going to comply with EN 12021 : 1998. The defenders were entitled to specify the requirements as being those in the Technical Bulletin and the DCOL. MB Air Systems had said that they would conduct air testing in accordance with the guidance in these documents.

[76] In determining what occurred at the clarification meeting, it was not competent to take into account the terms of unproved notes. The same applied to the typewritten version, except in so far as it had been incorporated into the pleadings. The evidence of all three of the defenders' ADOs had been consistent in saying that Mr Young had said that he had no engineers or staff. As the pursuers were going through a restructuring process, this may have been technically true.

[77] On Clause 27, the Health and Safety policy was supposed to have been provided with the tender and the defenders were entitled to assess the tender at that date. They were also entitled to the view that MB Air Systems had a Health and Safety representative with some qualifications in the form of the mining engineer in their employment. Although there was no minimum standard laid down, the defenders were entitled to exclude the pursuers on the basis of what was said by them at the clarification meeting.

[78] Overall, the correct decision had been reached. If its procedure had been flawed then it had been so for all the tenders. The Court could look at all the factors bearing upon the pursuers' tender in determining whether it would have been successful if the correct criteria had been applied.

[79] On quantum, the Court had not heard from the person who had previously carried out the work. The loss of the contract had not caused a drop in the pursuers' annual profit. There was no case on record permitting a claim for the loss of a chance. If such a claim were to be permitted then a conservative approach was required (*Harmon CFEM Facades (UK)* (*supra*) paras 319-320; see also *Matra Communications v Home Office* [1999] 1 WLR 1646, Buxton LJ at 1656).

8. Analysis

(a) GENERAL PRINCIPLES

[80] The first issue is to identify the legal tests to be applied where a tenderer challenges a contracting authority's decision not to award him a contract. Regulation 32 makes it clear that what is involved is a legal obligation to comply with the Regulations. The European Court of Justice has stated that compliance requires the equal treatment of tenderers (*Commission v Denmark* (*supra*), *SIAC Construction v County Council of the County of Mayo* (*supra*) *Pratt Contractors v Transit New Zealand* (*supra*)). That must involve the process and evaluation being transparent and objective. Regulation 21 lays down that a contracting authority can only award a contract on the basis of the "lowest price" or "most economically advantageous" tender. This carries with it the implication that the considerations which will govern the award will be economic ones. In this area, and on the legal principles to be applied, I agree with the observations of Morgan J in *Lion Apparel*

Systems v Firebuy (*supra* at para 28 *et seq*). However, economic considerations may embrace a wide spectrum of matters (see the range of criteria in Regulation 21). Other than considering any breach in that context, whether there has been compliance with the Regulations or not must be primarily a matter of fact.

[81] Regulation 11 makes it clear that the criteria for an award must be published. Regulations 8 and 16 make it equally clear that any technical specifications and any requirements to produce information must be stated in the contract documents. By virtue of these provisions, the Regulations are making it plain that a tenderer cannot be excluded by reason of some unspecified technical defect or because of a failure to provide information not expressly called for. At the evaluation stage, the criteria applied must be those published and not either hidden criteria or ones created later during the tendering process.

[82] A contracting authority has a wide discretion in its evaluation of the commercial benefits or drawbacks of any tenders received, but it is not vested with any discretion to avoid compliance with the Regulations or to award a contract on the basis of considerations not mentioned in the documentation required by the Regulations. Once more I agree with Morgan J's remarks (*supra* at 37-38). Beyond examining the issue of regulatory compliance, the Court should not normally carry out a wider exercise of exploring whether common law principles of judicial review have been engaged (cf *Tay Premium Unit Consortium Petitioners* (*supra*) and *Clyde Solway Consortium v Scottish Ministers* (*supra*); *Luck (t/a G Luck Arboricultural & Horticultural)* v *Tower Hamlets LBC* (*supra* at 59-60)). Unless it is suggested that the reasons given by a contracting authority are not the real reasons for its decision, such an authority will not normally be entitled to rely upon a reason beyond those which, in accordance with Regulation 23, it has stated it did use in making its decision. In this respect I agree with Judge Humphrey Lloyd QC in (*Harmon CFEM Facades (UK) v Corporate Officer of the House of Commons* (*supra*) at para 239).

(b) EXCLUSION OF THE PURSUERS' TENDER

[83] The exclusion of the pursuers from the tendering process at the first stage of determining compliance with the Specification amounted to a breach of the Regulations.

[84] At the heart of the tender problems, as may already be apparent from the above, was not that those involved in advance of submitting the Evaluation to the Sub-Committee were acting other than in good faith and trying to be fair to all parties. It was that they did not possess the requisite expertise to process the tenders from a technical viewpoint, did not have sufficient experience to carry out the task of evaluation and did not have an adequate understanding of what was required of the defenders in terms of the Regulations.

[85] The reasons given for the exclusion of the pursuers were twofold. First it was that the pursuers "did not supply evidence of quality standards achieved by its workforce and on enquiry it appeared that personnel would be employed if [the pursuers'] tender was successful". There are several difficulties with this reason. They stem from the phrase used in the Specification. In the context of a paragraph dealing with the competence of the staff undertaking the work, Clause 11 calls for "copies of any evidence of quality standards achieved by their workforce". The clause does not set down any minimum requirement which a tenderer requires to meet in order to proceed to the evaluation stage. It simply asks for evidence of quality standards to be forwarded with the tender. Presumably, if a tenderer's workforce has not achieved any quality standards then no evidence can be forwarded. In that event, although the absence of a quality standard might prejudice a tenderer at the stage of a comparative evaluation (depending on the stipulated criteria), the fact that no evidence is produced cannot be used as a means to exclude a tenderer prior to that evaluation since the Specification does not state, in terms of Regulation 8, that any quality standard is required.

[86] The next difficulty is the construction of the phrase "quality standards achieved by their workforce". The impression gained from Mr McKnight was that he had not fully thought out just what he was asking for and had taken this phrase from another, perhaps previous, contract and simply pasted it into this clause. The phrase has to be construed according to what the well informed tenderer would think it to mean, rather than what the drafter intended it to mean. The evidence of what Mr McKnight thought he was doing, the manner in which the defenders sought to implement the clause and the views of an expert in the processing of public

procurement contracts may not be entirely irrelevant to the Court's assessment, even if any relevance may be peripheral. I will accordingly repel the objection to that evidence. However, I do not consider that the well informed tenderer could have thought that this phrase was intended to require him to include the *curriculum vitae* of individual staff or any similar documents. As is often said in these situations, if that is what had been intended then it would have been simple to say so in plain unambiguous terms. Rather the phrase can only be construed as applying to "quality standards", in the sense of certificates of achievement under institutional or other schemes gained by a "workforce" as a whole. Since there is no suggestion that the pursuers, or indeed any of the tenderers, had ever achieved such standards, no evidence of them could ever have been enclosed in terms of this clause.

[87] A further difficulty stems from that part of the Sub-Committee's reason, stemming from the Evaluation and the report, whereby it is stated that the personnel who would work on the contract would only be employed if the pursuers' tender were successful. Much of the focus at the proof related to what was said at the clarification meeting. But the damage to the pursuers' prospects of gaining the tender had already been done by virtue of the failure to give the covering letter to any of the defenders' three ADOs at any time. A crucial part of the pursuers' tender submission was thus not considered by the defenders at all. That amounts to a breach by the defenders of the general obligation to treat each tenderer equally. Put another way, the defenders did not consider the pursuers' tender, they considered only part of it. In excluding the pursuers on the grounds of lack of ability or technical capacity under regulation 11, the defenders did so having failed to consider the whole terms of the tender made and thus did not comply with that regulation.

[88] It may be that a determination of what occurred at the clarification meeting becomes ultimately of marginal significance. What has to be noticed *in limine* of a consideration of this matter is that the parties must have been at cross-purposes from the very start. Mr Young was proceeding on the understanding that the defenders had the covering letter. This had explained that the pursuers' staff were "experienced in the range of equipment covered and have attended the various manufacturers work courses". The defenders' representatives, or at least the ADOs who gave evidence, were working from a blank, or rather non-existent, page. I accept that Mr Young did indeed tell the meeting about having four staff, three of whom were able to participate in the work. I have reached that conclusion because all are agreed that the issue of staff was discussed and I can see no reason why Mr Young would tell the meeting that he did not have qualified staff, when he did. Secondly, the defenders' position on record is that Mr Young had mentioned that: he had four members of staff who could maintain a breathing air compressor, although he did not elaborate on their qualifications and experience; both Rognvald Young and Mr Furrie were referred to by name; and a servicing engineer would be engaged if the pursuers were awarded the contract. That position presumably emerged from the defenders' enquiries into the events and is consistent, broadly, with Mr Young's evidence. In that connection, although I cannot take into account the content of any unproved notes of the meeting, I regard it as adequately proved that the typed document produced was the defenders' minute of that meeting and the minute reflects the defenders' position on record. Thirdly, I did not find the evidence of the ADOs on this issue to be entirely reliable in that their ultimate positions appeared inconsistent with the proved facts, as some (if not all) of them appeared to accept.

[89] Although it was Mr McKnight's impression by the time of the proof that Mr Young had said he had no "engineers", he appeared to accept also that he had said that he had four members of staff. It is perhaps sufficient to say that, if he had been left with that impression, then it was erroneous. Had he had sight of the covering letter, he could hardly have been under any illusion that the pursuers had no engineers at all. This is particularly so having regard to the pursuers' offer in their tender to start work within two weeks of the award of the contract. Mr McKnight also recognised that the ability of the pursuers to promise a corrected certificate is inconsistent with their having no engineering staff, since it would be difficult, if not impossible, to have a successful audit of the management systems of an organisation carrying out engineering operations if in fact they had no engineers. Similar considerations apply to the testimony of Mr Tanzilli and Mr Davidson. Mr Tanzilli's recollection of what was said was not particularly good in any event, no doubt because he had very limited involvement with the process.

[90] Mr Davidson was the person who ultimately reported that the pursuers did not have employees in position to fulfil the contract. The Evaluation and the report which followed it had a material influence on the ultimate decision. If Mr Davidson did think this, then it stemmed again from the failure of the defenders to provide him with the covering letter. Perhaps because of his late introduction into the tender process and his lack of background knowledge of the pursuers' prior involvement with the defenders' compressors, he may simply misunderstood what Mr Young had said. But, in that connection, he ultimately seemed to accept (in terms of his own notes) that Mr Young had referred to having four staff and that he himself was an engineer. He had also recorded the existence of Mr Young's son and Mr Furrie, who had been engaged on the previous maintenance work. It is difficult, against the whole background, to grasp just how he could have concluded that the pursuers were totally devoid of any staff to carry out the work, but that is certainly what he wrote. There is no basis upon which to conclude that he was being deliberately misleading in his report but he was certainly in error.

[91] The second reason given by the defenders was the unacceptability of the pursuers' "accreditation" in accordance with clause 12. There appears to be no real dispute that the defenders should not have excluded the pursuers' tender prior to the evaluation stage on this ground. All that the Specification required was evidence of "accreditation to ISO 9001 2000 issued by a recognised accreditation centre". The pursuers provided this evidence in the form of the QMS certificate. QMS are a recognised centre. This was confirmed by their managing director, Mr Gamble, whose evidence I accept, and indeed by Mr Williams. Mr Davidson candidly admitted that he had been looking for a UKAS certificate, or at least its equivalent from a European governmental institution. He had decided that the QMS certificate was not acceptable because it was issued by a private company and QMS were themselves accredited by another private company. Their independence from government seems to have been a decisive factor in rejecting the certificates issued both to QMS and the pursuers. That rejection was not permissible in terms of the Regulations. This is because the required standard and information necessary had been made clear in the Specification in terms of the Regulations and the pursuers had met these requirements. Exclusion of the pursuers by reason of their not having a UKAS or equivalent certificate was a breach of Regulation 11. For completeness, Mr Davidson's comment on the effect of the expiry date of QMS's own certificate issued by the IAC is without significance, given that the certificate was that current at the time and there was no reason to suppose that it would not have been renewed in due course. In addition, the manner in which the pursuers' certificate was scrutinised when compared to that of MB Air Systems amounted to a breach of the general principle of equal treatment of tenderers, as was basically accepted by Mr Davidson and Mr Williams. That comparison will be revisited when looking at the MB Air Systems' tender (*infra*).

[92] For the reason already given above, the defenders are not entitled to rely on clause 27 at this stage since that was not a reason given for excluding the pursuers from a comparative valuation. In any event, since clause 27 did not lay down any minimum requirement in relation to the qualifications of the tenderer's health and safety representative or the content of their Health and Safety policy, these matters could not have been used to exclude the pursuers. Furthermore, as will be seen, the criteria made no mention of these matters such that they could be taken account of when carrying out a comparative evaluation.

[93] Having established that the defenders' treatment of the pursuers' tender involved several breaches of the Regulations, the next issue is to discover what, if any, losses flowed to the pursuers as a result of their exclusion prior to the evaluation stage.

(B) INCLUSION OF THE TENDER OF MB AIR SYSTEMS

[94] The defenders were entitled to regard the tender of MB Air Systems' tender as compliant with the Specification.

[95] The Specification provides, in several places, that air purity testing has to be in accordance with the Standard EN 12021 : 1998. In submitting their tender and signing the various sections containing references to the Standard (eg clauses 2.1; 3.3, 5.1, 14.1 and 15.1), MB Air Systems were agreeing to carry out the air

purity testing to that Standard. However, in clause 14 of the Specification, the defenders make it clear that the method of testing which they would regard as acceptable is that contained in the Technical Bulletin and the DCOL. The defenders thus set out in the Specification the technical requirements which they regard as the minimum necessary to meet their contractual needs. It follows, from what has already been observed generally, that a departure from that minimum would itself have amounted to a breach of the Regulations. That minimum involved the use of "gas detector" (ie Drager) tubes as "the appropriate means of detecting carbon monoxide, carbon dioxide and oil mist" together with electronic moisture and oxygen measuring instruments.

[96] The MB Air Systems' tender complied with the minimum in that it stated in its supporting documentation that testing would be "by Drager Tubes for oil, CO and CO_2, and by Dewpoint Meter for moisture". It is true that it did not specifically mention testing for oxygen. That omission might have been something justifying a clarification meeting but, since MB Air Systems had, in terms of Clause 14, provided details of their proposed sampling regime, the omission would not have been a good ground upon which to exclude them from the evaluation stage. In that connection, MB Air Systems had, in terms of clause 15 of the Specification, undertaken to carry out analysis in terms of the Standard; specifically to paragraph 6 of that Standard. It is a reasonable assumption to make that they would also be testing for oxygen content in terms of sub-paragraph 6.1 and the evidence was that there were several devices readily available to carry out that task.

[97] So far as this part of the tender process is concerned, what Mr Young, Professor Burns, Mr White or Mr Swanson thought of the merits of Drager tube analysis is essentially irrelevant. The minimum standard had been set by the defenders. They made it clear that they considered that Drager tube analysis would suffice for the purposes of EN 12021 : 1998 in terms of the Technical Bulletin and the DCOL. Whether that is correct as a matter of fact or law is not the point. In the absence of some specific testing system being prescribed by the Standard, it was for the defenders to set the minimum technical requirements they required in the Specification. It was for them to determine what they regarded as sufficient to satisfy them that EN 12021 : 1998 would be complied with and they did so. For what it is worth, had a decision required to made on this topic then there can be little doubt that using FTIR analysis is a much better way of testing for contaminants than using Drager tubes. It can test for many contaminants rather than for one at a time. However, it would be going too far to say that, when dealing with the equipment of fire brigades, the carrying out of a proper risk assessment to identify potential contaminants plus the use of Drager tubes to test for those contaminants would be incapable of amounting to compliance with the Standard, assuming that appropriate testing for moisture and oxygen levels were also to be carried out. This is so even if the Standard makes no specific reference to a risk assessment.

[98] MB Air Systems had stated that air purity testing and the provision of certain spare parts was to be carried out by sub-contractors. They produced their own ISO 9001 2000 UKAS certificate for the years 2003 to 2006 which specified "Sale, service, hire and installation of compressed air equipment...". They produced CompAir UK's ISO 9001 : 2000 certificate for a similar period which detailed "Design and manufacture of reciprocating compressors including the repair, refurbishment, installation, commissioning, servicing and supply of associated spare parts". They produced Steadvale Air Systems' Certificate, which related to another Standard (ISO 9002 : 1994), and had expired in July 2003. This certificate covered "Reconditioning of compressor valves, compressor refurbishment and service (in house and on site)...". What the Specification sought was proof of attainment to Standard ISO 9001 : 2000. The Standard relates to a business' quality management system. The idea is that the possession of a certificate shows that the management system employed is capable of delivering the product or service required. Clause 12 does not specify what exactly has to be set out in the section of the certificate which states various processes carried on by the business. Although it is possible to pick holes in the precise terms of many of the certificates produced, they do all certify that the businesses concerned have attained the Standard (or in Steadvale's case, a similar standard) and that is the minimum requirement to qualify for the evaluation stage. No doubt the quality of certification can be a relevant factor when carrying out a comparative evaluation (depending upon the criteria selected) and an out of date certificate may cause a problem then too. But the minimum has been attained and this

entitled the MB Systems' tender to proceed to an evaluation of its merits. In this regard, there is merit in Mr Williams' view that the processes specified in a certificate are of a general type, to be regarded as umbrella descriptions rather than specific to particular areas of enterprise. In order to test exactly what a certificate covers, the certifier's audit report or the business' quality manual may require to be studied, perhaps in some detail. It may well be reasonable for a contracting authority simply to look at a certificate to see if the contract works might fall within the descriptions given and, if they do, regard that as sufficient. It would be reasonable in that regard to suppose that servicing of breathing air apparatus compressors would involve a capacity to test the purity of the air delivered and other related calibration work.

(C) COMPARATIVE EVALUATION OF THE TENDERS

[99] Both the pursuers' tender and that of MB Air Systems ought therefore to have been evaluated on their merits. There is some force in the view that CompAir UK ought to have been included in that process too, but they effectively ruled themselves out because of a perceived deficiency in their certification and they are not included in any further analysis. In any event, apart from its price, there was little, if any, reference to the terms of their tender. The question then becomes not so much of what would have happened had both tenders been comparatively evaluated by Mr Davidson and reported on to the Sub-Committee. Rather, as was not disputed, it is what ought to have happened if the evaluation had taken place in accordance with the Regulations. Since both tenders did comply with the technical specifications, that ought to have involved a determination of which was the "economically most advantageous". That is the overriding criterion set forth in the Official Journal.

[100] With the exception of "price", all of the criteria stipulated in the OJ appear to have little or no relevance to a contract of the type under consideration. This was the position even of the defenders' own expert, Mr Williams. Rather, the criteria appear to be more appropriate to a contract for the sale or supply of goods. Each of the "non-price" criteria can be discounted as inapplicable or of little significance. That essentially leaves "price" as the decisive criterion for the award of this contract. The pursuers' tender was lower in price than that of MB Air Systems. Therefore, if the criteria had been applied properly in terms of the Regulations, the pursuers would have been awarded this contract.

[101] All of this is not to say that, looked at in general, the pursuers' tender was without its deficiencies. It is clear that, in comparison with that of MB Air Systems, it was not well presented. It was accompanied, at the time or subsequently, by documents such as the Quality Manual and the Health and Safety policy that have the air of having been rapidly put together from other documents. They are not particularly convincing as evidence of how the pursuers actually operate. But it has to be borne in mind also that the contract under consideration was a relatively small one which might involve no more than one or two engineers. Some of the manuals and certifications called for in the Specification are not of the type which might reasonably be expected to be uncovered when dealing with small businesses that might tender for a contract of this magnitude. But the style of presentation of the tender, the quality of the management system and the Health and Safety regime were not made specific criteria for the determination of the award nor is it possible to fit them in as aspects to be considered in an assessment of one or more of the published criteria. They could have been made criteria within the wide context of the economics of a contract award, but were not. In particular, since neither quality nor technical merit were included as criteria, it is not possible to see under which of the published criteria the adequacy of the various documents complained of could have formed part of a legitimate evaluation process in terms of the Regulations.

[102] Similar considerations apply to the pursuers' staffing levels and competence, including that of their Health and Safety representative. As already explored, the Specification does not lay down any minimum requirements in these areas. The pursuers complied with the Specification requirements. It is therefore once again not possible to see which of the published criteria could have enabled the defenders to take into account what they considered to be inadequacies in the pursuers' staffing levels and qualifications when carrying out a comparative evaluation. It is probably because of this problem that Mr Williams could not

easily fit his view that the pursuers' tender should have been ruled "invalid" at "an early stage" into the process of determining compliance and evaluating compliant tenders envisaged by the Regulations.

[103] The same can be said of the further criticisms of the pursuers' tender beyond those in relation to clauses 11, 12 and 27. Had it been necessary to decide the point, I would have sustained the objection taken to the evidence of these deficiencies by reason of lack of record. As it is, none of the deficiencies explored appear capable of being linked to the criteria published as applicable in the evaluation exercise. Even if a much wider number of considerations were permissible, such as quality and technical merit, the pursuers' tender would still have stood at least an even chance of acceptance and I would have regarded it as open to the Court to make an award for the loss of such a chance on the basis that a claim for loss of a chance to obtain a contract is included in averments claiming the full contract value. I would have assessed this loss at half of that contract value.

8. The Pursuers' Losses

[104] The financial effect on the pursuers in not being awarded the tender was spoken to primarily by Rognvald Young. Although the pursuers did not suffer a downturn in annual profit because of the loss of the contract, since they continued to seek and obtain alternative business, they would have made considerably more profit had they been awarded this contract. In particular they would have made the profit available on it. The starting point for the assessment of damage is the income which the contract would have generated. The annual sum is £74,100, broken down (6/23 p 26) into three parts: servicing the breathing apparatus at £39,514; servicing the low pressure tyre compressors at £4,010; and air purity analysis at £30,576. The total for the three years is £222,300.

[105] Rognvald Young spoke to the benefits which would have been received in respect of the extra work. This would have been charged at £32.00 per hour with a mileage rate of 75 pence. On the basis of the Evaluation, there would have been 800 hours of work, thus producing £25,600. There would also have been 7,000 miles, thus giving further income of £5,250. The extra works would bring in a total income of £92,550 (3 x £30,850), increasing the value of the tender up to £314,850. However, although there is a general averment about this on record (37 B-C), the pursuers' claim does not appear to include the profit on this extra work. That claim, on record and in submissions, is simply based on the contract works of £222,300 less the costs of those works. The profit on the extra work (if any) will therefore not be taken into account.

[106] Rognvald Young had produced a spreadsheet detailing the costs in respect of servicing each fire station (6/1 and 6/53 p 3) together with notes on the figures used (6/53 p 1). These figures were based on the pursuers' previous contract with the defenders. His basic labour cost is £10.12 per hour. However, he doubled that figure to take into account overheads of one sort or another. He reached that overhead uplift using the accounts (6/53 p 2) for the last year in which the pursuers were engaged on the contract. The uplift is somewhat greater than the arithmetic demonstrates (see note 3) but, no doubt, these matters cannot be weighed on too fine a scale. Labour costs are then taken as being £20.24 per hour. So far as the time expended on the work at each station is concerned, Rognvald Young took what he regarded as a generous (to the defenders) 2.5 hours for each service. Looking at mileage, the figures given on the spreadsheet do not always represent distances from the pursuers' base at Kinning Park in Glasgow to each station, as a number of stations in a locality would be visited on one particular day. The distance taken may be from one station to another on a programmed route. Forty pence is taken as the mileage cost. All of this produces a total of £21,094.76 per annum. Next, there are the air purity sample costs. These consist first of postage of £4.18 (6/2). Six tests would be carried out in an hour using FTIR. If labour is taken at £20.24 per hour, each test would cost £3.37. With the postage added, there is a cost of £7.55 for each test. The contract involved 588 tests, so the total is £4,439.40 per annum. Next, there is the cost of servicing the tyre compressors, which is estimated at £3,804.96. The testing of the storage cylinders adds another £726.17 per annum. Overall then, the total costs for the main contract works, based on the pursuers' previous contract experience, would have been about £30,065.28 per annum.

[107] However, Rognvald Young estimated, again erring on the side of caution, that the new contract works would cost 25% more than the previous works, an additional £7,516.32 per annum. The addition produces total costs of £37,581.60 (see 6/2). This amount, subtracted from £74,100 leaves £36,518.40 (cf 6/2) to produce a total loss over the three years of almost £109,555.20. That is what the pursuers sought in submissions but it is rather more than the sum sued for (£102,300), which was based on a slightly different calculation of costs. A motion to amend was made in that regard at the end of the pursuers' submissions. Although the defenders opposed that motion, the discrepancy is relatively minor and it is in the interests of justice to allow it.

[108] It was not disputed that interest should be applied to any sum awarded at the rate of 4 *per centum per annum* for the duration of the contract and 8 *per cent* thereafter. It is not known when the contract awarded to MB Air Systems actually started. It did not do so on time. In these circumstances I was invited to (and will) take a start date of 1 January 2005, which would produce £12,594 in interest to date at 4 *per cent*.

[109] I will accordingly repel the defenders' first to fifth pleas-in-law and sustain the pursuers' first and second pleas-in-law and grant decree for £122,149.20.