

**THE HIGH COURT**  
**COMMERCIAL**

**[2013 No. 641 J.R.]**

**[2013 No. 131 COM]**

**BETWEEN**

**GASWISE LIMITED**

**APPLICANT**

**AND**

**DUBLIN CITY COUNCIL**

**RESPONDENT**

**JUDGMENT of Ms. Justice Finlay Geoghegan delivered on the 14th day of February 2014**

1. In these proceedings, Gaswise Ltd. ("Gaswise") challenges a decision taken by Dublin City Council ("DCC") to exclude it from a procurement process seeking to allocate four ranked places in a framework agreement for the maintenance and repair of boilers in public housing owned by DCC. Gaswise also challenges the decision made to award the contract and seeks other reliefs. This judgment is given on a first module relating primarily to the exclusion of Gaswise from the process.

2. The procurement process in issue relates to the inclusion on a multiparty framework for the annual servicing and maintenance of domestic gas boilers in DCC's housing stock. Gaswise provides gas installation, servicing and maintenance services. The framework agreement was projected to last for three years with an option for DCC to extend it for a further year. A minimum of four successful tenderers were to be included in the framework.

3. The Invitation to Tender ("the ITT") was published by DCC on 18th April, 2013. The deadline for the submission of tenders was 28th May, 2013. Gaswise submitted a tender on that date. The tenders were subject to a two-stage process conducted by an evaluation committee of DCC. The first stage involved screening tenders based on a number of pass/fail section criteria. Tenders which failed one or more of these selection criteria were excluded from the process at this stage. The second stage involved evaluation of the surviving tenders based on the service offered, price and contract management procedures. Four successful tenders were to be chosen and ranked in the framework based on the results of the second stage evaluation.

4. The evaluation committee of DCC decided to exclude Gaswise from the procurement process on the basis of its alleged failure to pass the criterion relating to replacement parts ("the Exclusion Decision"). Gaswise was informed of this decision by letter dated 23rd July, 2013. In the same letter, Gaswise was informed that the names of the successful tenderers in order of their ranking were:

1. BM Services
2. Gas Services Ltd.
3. Athena Enterprises
4. Carillion Energy

5. There was immediately correspondence between Gaswise and DCC. In the course of this, Gaswise learnt that Carillion Energy had withdrawn from the process. It was also informed by letter of 2nd September, 2013, that BM Services was Brian McGrady trading as BM Services.

6. On 13th August, 2013, these proceedings were commenced by Gaswise seeking, primarily, reliefs pursuant to the European Communities (Public Authorities Contracts)(Review Procedures) Regulations 2010 (S.I. No. 130 of 2010) ("the Remedies Regulations") to set aside the Exclusion Decision and the Award Decision. No contract has been entered into by DCC with the successful tenderers.

7. Notice of the proceedings has been given to the three remaining successful tenderers, who have not participated in the proceedings. A statement of grounds and a number of affidavits have been delivered on behalf of Gaswise. A statement opposing the application for judicial review and a number of affidavits have been delivered on behalf of DCC. There were interlocutory applications, amended statements of grounds and of opposition delivered and filed, and a date fixed for hearing.

8. At the commencement of the hearing, it was agreed that the case would proceed by way of modular trial and that the first module would be confined to the challenge to the Exclusion Decision and issues arising thereon, and in particular, that the following issues be considered and determined:

(1) Regarding the replacement parts statement criterion ("the RPSC") in the Invitation to Tender ("the ITT"):

(a) Did the ITT, properly interpreted and in the light of clarifications issued, require the submission of a replacement parts statement ("the RSP")?

(b) If so, in all the circumstances was it lawful for the Respondent to exclude the Applicant?

(c) If the Respondent did not err in excluding the Applicant from the competition for non-compliance with the RPSC, did the Respondent err in not also excluding BM Services and Athena Enterprises Limited from the competition for non-compliance with the RPSC?

(2) Regarding the requirement in the ITT to demonstrate turnover and insofar as same relates to the decision of the Respondent to exclude the Applicant and any relief to which the Applicant is entitled:

(a) Does the Applicant's case regarding the manner in which BM Services relied on the turnover of third parties fall within the grounds?

(b) If so, is it time-barred?

(c) If not, is the Applicant an eligible person to challenge the compliance of BM Services with the Turnover Requirement?

(d) If yes, did the Respondent correctly consider that BM Services met the Turnover Requirement, both in relation to the reliance on third parties and the provision of the requisite statement?

(3) Did the Respondent provide adequate reasons to the applicant in relation to the Exclusion Decision?

(4) If the Applicant succeeds on any part of its claim in this module, to what relief, if any, is it entitled?

9. This judgment is confined to a consideration and, insofar as necessary, a determination of the above issues. It is proposed, firstly, to consider the issues in relation to the Replacement Parts Statement Criterion ("the RPSC").

### Replacement Parts Criterion

10. The ITT dated 16th April, 2013, was published on "etenders.ie". Insofar as relevant to the disputes concerning the RPSC, under the heading of 'Selection and Award Criteria', it specified, at para 10.1, that DCC was using the open procedure for the award and that "only those demonstrating that they have the required level of financial and technical capacity will have their tender considered". It then set out a list of requirements which tenderers were required to satisfy in order to demonstrate their eligibility. Under a heading of 'Criterion: Replacement Parts', it stated:

"Rule: Must submit a statement confirming that an itemised list of parts, including cost will be submitted prior to the award of any contract. The City Council will agree prices with the Contractor before any work commences."

It was expressly stated that this was a pass/fail criterion and under Note 1 to this section the ITT specified "[o]nly tenderers meeting the above qualifying criteria will be considered for inclusion in the award process".

11. Included in the ITT were a 'Checklist for Tenderers' and 'Instructions to Tenderers'. The final instruction to tenderers under a heading ("**Additional documents to be included/attached to the Tender Document**") stated "[p]lease refer to checklist for Tenderers". The Checklist for Tenderers listed fourteen items, and at number ten, specified "[i]temised list of replacement parts". The checklist did not include a statement in relation to replacement parts as set out in the selection criterion at para. 10.1.

12. DCC accepts that the reference in the checklist to an itemised list of replacement parts was an error. The instructions to tenderers in Section 2 provided, *inter alia*:

"You should also inform the Dublin City Council of any ambiguity, discrepancy or error in the Tender Documents. Dublin City Council shall, upon receipt of such notification, notify all Tenderers of its ruling in respect of any such ambiguity, discrepancy, error or omission. Such ruling shall be issued in writing and shall form part of the Invitation to Tender."

13. Pursuant to this provision, a ruling in response to queries was given by DCC. Gaswise accepts that the question and response forms part of the ITT. It was in the form of question and answer document and Question 1 is relevant. It provided:

### "Will an itemised list of replacement parts be supplied at tender stage?"

The answer given was:

"Please refer to page 7 of the tender document: SELECTION AND AWARD CRITERIA: Technical capacity: Criterion: Replacement parts:

**Rule:** Must submit a statement confirming that an itemised list of parts, including cost will be submitted prior to the award of any contract. The City Council will agree prices with the Contractor before any work commences.

Item 10 in the Checklist for Tenderers relates to the submission of this statement. The City Council will request an itemised list of parts including cost before any contract is signed. The cost of replacement parts does not form part of the tender submission."

14. Gaswise did not submit a replacement parts statement ("RPS"). It submitted what it states is a replacement parts list ("RPL") as specified at Item 10 of the checklist. DCC does not accept that the list submitted is properly described as an RPL. It was a list of replacement parts under a heading "(Van Stock List)". However, this is not of importance as DCC primarily submits that the ITT, properly interpreted, in the light of the clarification issued required a RPS and not on a RPL.

### Interpretation of ITT

15. The first issue to be determined is whether the ITT, properly interpreted and in the light of the clarifications issued, required the submission of an RPS. This requires consideration of the law applicable to the interpretation by a court of the ITT. The fundamental principles are not in dispute. Counsel for the respective parties drew attention to certain approaches both of the Court of Justice of the European Union ("CJEU") and certain national courts in the application of same as disclosed by the case law.

16. The interpretation of the ITT is a matter for the court. That interpretation must be carried out in a manner which gives effect to

the core principles of equal treatment and transparency in the legislative framework as amplified by the judgments, in particular of the CJEU. Article 2 of Directive 2004/18/EC of the European Parliament and Council of 31 March, 2004, on the coordination of procedures for the award of public works, contracts, public supply contracts, O.J. L134/114, 30.4.2004 ("the Public Contracts Directive") provides:

"Contracting authorities shall treat economic operators equally and non-discriminatorily and shall act in a transparent way."

17. This has been transposed in this jurisdiction by Article 17 of the European Communities (Award of Public Authorities Contracts) Regulations 2006 (S.I. 329 of 2006) ("the Public Contracts Regulations").

18. The principle of equal treatment has been referred to as being "at the very heart of the public procurement directives" (*Fabricom SA v. Belgium* (Case C-21/03) [2005] E.C.R. I-1559 at para. 26). In *Universale-Bu & Ors.* (Case C-470/99) [2002] E.C.R. I-11617, the CJEU said of the relationship between the principle of equal treatment and the principle of transparency:

"[91] The principle of equal treatment, which underlies the directives on procedures for the award of public contracts, implies an obligation of transparency in order to enable verification that it has been complied with....

[93] It follows...that the procedure for awarding a public contract must comply, at every stage, particularly that of selecting the candidates in a restricted procedure, both with the principle of equal treatment of the potential tenderers and the principle of transparency so as to afford all equality of opportunity in formulating the terms of their applications to take part and their tenders..."

19. The application of the principles of equal treatment and transparency to the formulation of award criteria was specifically considered in *SIAC Construction v. Mayo County Council* (Case C-19/00) [2001] E.C.R. I-7725, where CJEU stated:-

"41. Next, the principle of equal treatment implies an obligation of transparency in order to enable compliance with it to be verified....

42. More specifically, this means that the award criteria must be formulated, in the contract documents or the contract notice, in such a way as to allow all reasonably well-informed and normally diligent tenderers to interpret them in the same way.

43. This obligation of transparency also means that the adjudicating authority must interpret the award criteria in the same way throughout the entire procedure..."

20. The requirement that award criteria be formulated in such a way "as to allow all reasonably well-informed and normally diligent tenderers to interpret them in the same way" continues to be the test applied by the CJEU. In, *Commission v. Netherlands* (Case C-368/10) 10th May, 2012, the CJEU repeated this requirement in similar terms and in relation to an alleged infringement of Article 2 of the Public Contracts Directive at para. 109 stated:-

"The principle of transparency implies that all the conditions and detailed rules of the award procedure must be drawn up in a clear, precise and unequivocal manner in the notice or contract documents so that, first, all reasonably informed tenderers exercising ordinary care can understand their exact significance and interpret them in the same way and, secondly, the contracting authority is able to ascertain whether the tenders submitted satisfy the criteria applying to the relevant contract..."

21. Applying those principles to the interpretation of the ITT in these proceedings, the question for the court is whether the ITT should be interpreted as including in a clear, precise and unequivocal manner, the requirement that all tenderers submit with their tender a replacement parts statement (RPS) such that it enabled all reasonably well-informed and normally diligent tenderers interpret the ITT as including such a requirement.

22. In *Clinton (Trading as Oriel Training Service) v. Department for Employment and Learning & Anor* [2012] NIQB 2, McCloskey J. in the High Court helpfully observed, helpfully, in relation to the practical application of the *SIAC* test at para. 38:-

"The *SIAC* test exhorts the court to attempt, so far as practicable, to occupy the shoes of the hypothetical tenderer. The test provides some insight into the characteristics and attributes of such a tenderer: well, but not necessarily fully, informed and usually careful and attentive, but not invariably a paragon of diligence. The incorporation of the adjectives 'reasonably' and 'normally' in the test, convey the notion of a tenderer who may be vulnerable to a certain (though not excessive) degree of error, inattention and other human weakness. In other words, the *SIAC* hypothetical tenderer is a terrestrial, rather than celestial, being, hailing from earth and not heaven. In its determination of this issue, I consider that the court should approach the matter not as an exercise in statutory construction or as one involving the interpretation of a deed or contract or other legal instrument. To adopt such an approach would not, in my view, be consonant with the *SIAC* test. Rather, the court's attention must focus very much on the 'industry' concerned, in which the professionals and practitioners are not lawyers."

23. I would, respectfully agree with McCloskey J. that the court in answering the question should attempt to put itself in the shoes of a reasonably well informed and normally diligent tenderer who would be responding to this particular ITT, i.e. a person providing the relevant gas services, and should not do so as a lawyer.

24. Counsel for Gaswise submitted that the Court interpreting the ITT in accordance with the foregoing principles should also take into account the fact, as it contends, that five out of the fifteen tenderers did not submit a RPS which complies with the rule in the ITT. DCC contest the factual assertion that five tenderers did not comply. It accepts that three tenderers including Gaswise did not do so. There is the additional fact that in respect of one such tenderer, it was not excluded in the initial evaluation by the evaluation team of DCC. When the submitted tenderers were inspected by or on behalf of Gaswise in the course of these proceedings, it ascertained that one further tenderer had submitted a RPL and not RPS and that tenderer, Grate Gas, unlike Gaswise, had been admitted to the second stage evaluation. It was, however, placed last in that evaluation. In response, DCC deposed that this was an error made by the evaluation team and now accepted to be such (by two members of the evaluation team) and that the tenderer in question was now being excluded. It was a company which had, in fact, gone into liquidation. However, counsel for DCC did not oppose the Court taking into account, in its interpretation of the ITT, the evidence in relation to the fact that a minimum of three out of fifteen tenderers had not understood the ITT as including a requirement to submit a RPS and two of them had understood the

requirement to be the submission of a RPL. The third tenderer submitted no relevant document.

25. The two further tenders referred to by Gaswise in this connection were BM Services, which supplied a list of replacement parts with an attached statement, and Athena Enterprises, which supplied a RPS that made no reference to cost.

26. Applying the above principles to the interpretation of the ITT, I have concluded that the ITT, including the clarification issued, did not include a clear and precise requirement to submit a RPS which enabled all reasonably, well-informed and normally diligent tenderers to understand it uniformly as including a requirement to submit a RPS. My reasons for doing so are as follows.

27. Prior to the issue of the clarification, the ITT was undoubtedly ambiguous. The relevant rule in relation to replacement parts in para 10.1 in the selection criteria required the submission of a RPS. However, importantly, in my judgment, the ITT, in the 'Instructions to the Tenderers' in relation to the documents to be attached to the Tender document expressly instructed "Please refer to Checklist for Tenderers". This instruction is a clear and precise instruction to refer to the checklist as an *aide memoire* as to the documents which the tenderer must attach to the Tender. A reasonable and normally diligent tenderer in the gas service industry was entitled to rely upon the checklist when putting together the attachments to the Tender document. This conclusion is consistent with the evidence given on affidavit by Mr. Gaughran, a director of Gaswise, who was responsible for preparing the tender submission that he "paid close attention to the Checklist and strictly adhered to it". He also exhibited his copy of the checklist which shows that he ticked each of the required items. It is also consistent with a similar approach taken by another tenderer, Athena Enterprises Ltd., in its tender documents, likewise, ticking off each item in the checklist, though, in that case, it identified in handwriting on the checklist that Item 10 did not require a RPL but required what it terms a "declaration... as instructed by DCC".

28. The more difficult question is whether the checklist, when considered in the light of the clarification issued by DCC, clearly and precisely included a requirement that the document to be attached to the Tender in relation to replacement parts was a Replacement Parts Statement. The clarification issued is set out in full at paragraph 13 of this judgment. The clarification sought was "Will an itemised list of replacement parts be supplied at tender stage?" The answer given does not expressly answer that question with either a 'Yes' or 'No'. Nor does the answer given indicate that there is an error in or a change required to the document listed at Item 10 in the Checklist for Tenderers. Rather, as appears, the answer commences with a restatement of the rule in relation to replacement parts and then states:

"Item 10 in the Checklist for Tenderers relates to the submission of this statement. The City Council will request an itemised list of parts including cost before any contract is signed. The cost of replacement parts does not form part of the tender submission."

29. The clarification given in answer to the question is clear and precise that the cost of replacement parts [emphasis added] does not form part of the Tender submission. However it is not clear and precise in answering the question put as to whether an itemised list of replacement parts will be supplied at Tender stage.

30. Further, whilst the clarification given restates the rule that a tenderer must submit "a statement confirming that an itemised list of parts, including cost will be submitted prior to the award of any contract" it does not further clarify that this statement must be submitted rather than or in place of the existing document listed at Item 10 in the Checklist for Tenderers. Rather, it specified "Item 10 in the Checklist for Tenderers relates to the submission of this statement" [emphasis added]. Item 10 in the Checklist for Tenderers was and remained "itemised list of replacement parts". The clarification given did not state that such list was to be replaced by the statement.

31. Objectively considered, the ITT, including the clarification given, was capable of being construed as contended for by DCC *i.e.* a replacement parts statement should be submitted and not a replacement parts list. However, as appears from the principles set out in this judgment that is not the relevant test for the proper interpretation of the ITT. The ITT, including the clarification given, considered objectively from the perspective of a reasonably well-informed and diligent tenderer in the gas services industry does not, in my judgment, include a clear and precise requirement that a replacement parts statement must be submitted with the Tender document such that all reasonably well-informed and diligent tenderers might understand this requirement uniformly. The ITT, including the clarification, was also open to being understood by a reasonably well-informed and diligent tenderer relying (as he was entitled to do) on the checklist to identify the documents to be attached as meaning that the provision of the document at Item 10 in the checklist, *i.e.* "itemised list of replacement parts", was sufficient to satisfy the rule in respect of the replacement parts criterion.

32. It follows that DCC was in breach of its obligations of equal treatment and transparency in relation to the terms of the ITT. Further that the Court's decisions on the issues as put are that the ITT, properly interpreted and in the light of clarifications issued, did not require the submission of a replacement parts statement and that it was not lawful for the respondent to exclude the applicant by reason of its failure to attach a replacement parts statement.

33. It also follows from the above conclusions that the Court is not required to consider the issue as to whether DCC erred in not also excluding BM Services and Athena Enterprises Ltd. for non-compliance with the replacement parts statement criterion.

### **Turnover Requirement**

34. The parties, through their counsel, identified the issues for determination by the Court relevant to compliance by BM Services with the turnover requirement as being the following:

"(2) Regarding the requirement in the ITT to demonstrate turnover and insofar as same relates to the decision of the Respondent to exclude the Applicant and any relief to which the Applicant is entitled:

(a) Does the Applicant's case regarding the manner in which BM Services relied on the turnover of third parties fall within the grounds?

(b) If so, is it time-barred?

(c) If not, is the Applicant an eligible person to challenge the compliance of BM Services with the Turnover Requirement?

(d) If yes, did the Respondent correctly consider that BM Services met the Turnover Requirement, both in relation to the reliance on third parties and the provision of the requisite statement?"

35. As appears, the issues raised relate to the entitlement of Gaswise to challenge, in these proceedings, the decision of DCC that BM Services complied with the turnover criterion, and if permissible, the validity of the decision made to admit BM Services to the second stage of evaluation upon the basis that it complied with the turnover criterion. Whilst it is not now necessary to address these issues for the purpose of deciding whether Gaswise was or was not lawfully excluded, some at least appear potentially relevant to the question of the appropriate remedy. It is therefore necessary to set out the relevant facts, both in relation to the criterion and how and when it became an issue in the proceedings.

36. The ITT, in the selection criteria, at para. 10.1, included under the heading of 'Economic and Financial Standing' as the third pass/fail criterion:

"Criterion: Turnover during the Past three financial years

Rule: Must submit a statement confirming that your turnover exceeded €250,000 in any of the last three financial years, or pro-rata if more recently established, and that you will provide evidence of turnover and other financial information promptly on request at any time prior to the award decision being made.

Please complete Appendix B."

There were six such pass/fail criterion under the heading of 'Economic and Financial Standing' under which the following note appeared:

**"Note: If a tenderer proposes to use or rely on the financial resources of entities or undertakings with which it is directly or indirectly linked, whatever the legal nature of those links may be then it must establish that it shall have available to them the financial resources of those entities or undertakings which are necessary for the performance of the contract."**

37. The other economic and financial standing criterion included a Tax Clearance Certificate, profitability, bank details and insurances. These criteria, apart from the Tax Clearance Certificate Requirement, directed the tenderer to complete Appendix B. Appendix B, attached to the ITT, required the insertion of the name of tenderer and sought confirmations under the relevant headings. Insofar as turnover was concerned, the confirmations sought were:

"I confirm that our turnover exceeded €250,000 in any of the last three financial years, or pro-rata if more recently established.

I confirm that I will provide evidence of turnover and other financial information promptly on request at any time prior to the award decision being made."

In each instance, Appendix B required the insertion of 'Yes' or 'No' as an answer to the confirmation sought.

38. Appendix B is included on the checklist as Item 2. Appendix B does not contain any reference to sub-contractors or third parties with whom the tenderer may have links.

39. The Instructions to Tenderers part of the ITT does not include any information relevant to the turnover criterion or other criteria under the heading of 'Economic and Financial Standing'. Counsel for DCC drew attention to para. 29 of the Instructions to Tenderer where, under a heading 'Consortia and Prime/Sub-Contractors', it is stated, insofar as relevant:

"Where a group of undertakings submit a tender in response to this contract notice, the Contracting Authority will deal with all matters relating to this public procurement competition through the entity which will carry overall responsibility for the performance of the contract only ('Prime Contractor'), irrespective of whether or not tasks are to be performed by a sub-contractor and/or consortium members. The Tenderer must clearly set out:

- a. The full legal name of the Prime Contractor together with its registered business address (where applicable), registered business name (where applicable), company registration number (where applicable), telephone and email contact details;
- b. The names of all sub-contractors and/or consortium members who will be involved in the provision of the contract;
- c. A description of the role to be fulfilled by each subcontractor and/or consortium member.

**Please complete Appendix E included in the Tender documents."**

40. Appendix E, under a heading of 'Use of Sub-Contractors' required completion of a number of details including name, address, Tax Clearance Cert Number, RGII Certification details and other information and then stated:

"If a tenderer proposes to use or rely on the financial resources of entities or undertakings with which it is directly or indirectly linked, whatever the legal nature of those links may be, then it must establish that it shall have available to them the financial resources of those entities or undertakings which are necessary for the performance of the contract.

**Please submit a letter on headed paper from such entities confirming that it will provide the necessary financial support as outlined."**

It also contained a similar statement in relation to use of technical resources of others.

41. The turnover criterion was the subject of a clarification but not in relation to the issue in dispute between the parties. The clarification was as to whether the turnover must exceed €250,000 in one of the past three years or whether it related to the combined turnover for the previous years. The clarification given was that the turnover requirement "relates to individual years and does not relate to the combined turnover".

42. There is no evidence before the Court that BM Services completed Appendix B in the format attached to the ITT. The facts upon

which the Court has been asked to consider this issue are a statement provided by BM Services with a heading 'Economic and Financial Standing' produced by the law agent of DCC to the solicitor for Gaswise and exhibited in an affidavit sworn on 12th November, 2013. That document, insofar as relevant to the turnover criterion and its interpretation by DCC states:

**"For the purpose of the Multi Party Framework this Tender will be listed as BM Services**

BM Services have brought in additional personnel (as outlined in our accompanying documentation) and with this increased capacity BM Services are now more than capable of handling this service and maintenance contract.

. . .

#### **Statement of Turnover**

Our combined turnover has exceeded 250,000 in accordance with the **Criterion: Turnover during the past three financial years."**

Four sub-contractors are identified in the accompanying documentation.

43. DCC, in its notice of opposition, pleads that it inferred that 250,000 was an amount in Euros and that the statement provided referred to "the combined turnover of BM Services and its sub-contractors".

44. Gaswise, in the amended statement of grounds delivered on 10th September, 2013, pursuant to an order of the Court of 9th September, 2013, firstly amended the Selection Criteria expressly pleaded at para. 7 of the statement of grounds by including at sub-para. (7) the requirement that tenderers submit a statement in relation to turnover in the terms set out above. This was then referred to as "the Turnover Requirement". In para. 13 of the statement of grounds which set out the grounds upon which relief was being sought, at sub-para. (24) Gaswise had, in the initial statement of grounds, set out as one of the grounds relied upon that DCC "failed to verify compliance of the Successful Tenderers and/or certain of them with the Selection Criterion". It then, in sub-paras. (25) to (27), contended that it had not been provided with the full names of all the successful tenderers, had been informed that an entity entitled "BM Services" had been awarded the contract and contended that no such entity was registered with RGII. By way of amendment on 10th September, it added at sub-para. (28):

"Further, or in the alternative and without prejudice to the foregoing, BM Services did not comply with the Turnover Requirement in the ITT."

45. Gaswise filed a fourth affidavit of Mr. Gaughran to ground the amendments made on 10th September, 2013, to the applicant's statement of grounds. In it, Mr. Gaughran deposed, at para. 6, that the full identity of the first ranked tenderer, BM Services, was only disclosed by DCC by letter dated 2nd September, 2013, in which it indicated that the first ranked successful tenderer was "Brian Mc Grady (trading as BM Services)". Mr. Gaughran, in the same affidavit, deposes that whilst he does not know Mr. McGrady, his understanding was that Mr. McGrady is a sole trader who operates his business from his own home and that his turnover is likely to be in the region of €50,000 to €75,000 *per annum*. Mr. Gaughran, having referred to the Turnover Requirement, then deposes that he did not believe that Mr. McGrady could have satisfied the Turnover Requirement in the ITT. At the time of swearing that affidavit, Mr. Gaughran was not aware of the statement submitted by BM Services in purported compliance with the Turnover Requirement. He had been made aware by letter of 7th August, 2013, from the law agent of DCC that "the Tender, as submitted by BM Services, consisted of itself as a prime contractor together with several subcontractors".

46. The case sought to be made by Gaswise is that BM Services did not comply with the Turnover Requirement in two respects:

- (i) BM Services is not capable of satisfying the Turnover Requirement on its own; and
- (ii) BM Services cannot rely upon the turnover of its sub-contractors to satisfy the Turnover Requirement.

It follows in its submission that the statement that the "combined turnovers" exceeded €250,000 did not comply with the Turnover Requirement in the Selection Criteria in the ITT.

47. The first issue is whether Gaswise's case, as set out above, falls within the grounds pleaded in the statement of grounds. As set out above at para. 13(28), (13(31) in the amended amended statement of grounds) it expressly pleads as a ground that BM Services did not comply with the Turnover Criterion. That ground is, in my judgment, sufficient to enable Gaswise challenge the decision of DCC to admit BM Services to the second stage of evaluation upon the ground that BM Services did not pass or satisfy the Turnover Requirement. Whilst the amended statement of grounds did not state the reasons for which Gaswise contended that BM Services did not satisfy the Turnover Requirement, no particulars were sought and it is not alleged that DCC was taken by surprise. Two affidavits of Mr. Gaughran set out the reasons for the contention.

48. In the light of that conclusion, the next issue is whether or not such ground is time-barred.

49. Regulation 7(2) of the Remedies Regulations provides:

"An application referred to in sub-paragraphs (a) or (b) of Regulation 8(1) shall be made within 30 calendar days after the applicant was notified of the decision, or knew or ought to have known of the infringement alleged in the application."

The proceedings were commenced on 13th August, 2013, within the 30-day period. The alleged infringement that DCC wrongly decided that BM Services met the Turnover Requirement was made when the amended statement of grounds was filed on 10th September, 2013.

50. The primary submission of DCC is that it made clear in the ITT that a tenderer could rely upon the financial resources of third parties for the purposes of satisfying financial criteria, including the turnover requirement. It submits that by reason of such clear provision and the information given to Gaswise in the letter of 7th August, 2013, that the Tender submitted by BM Services consisted of itself, as prime contractor together with several subcontractors, that Gaswise knew or ought to have known of the infringement it now alleges in relation to BM Services reliance upon its subcontractors for the purposes of satisfying the turnover criterion.

51. Gaswise, in response, disputes the above and refers to the requirement to interpret regulation 7(2) in the light of the decision of the CJEU in *Uniplex v. NHS Business Services Authority (Case C-406/08)* [2010] ECR I-817, where, at paras. 31 and 32, it stated:

"31. It is only once a concerned candidate or tenderer has been informed of the reasons for its elimination from the public procurement procedure that it may come to an informed view as to whether there has been an infringement of the applicable provisions and as to the appropriateness of bringing proceedings.

32. It follows that the objective laid down in Article 1(1) of Directive 89/665 of guaranteeing effective procedures for review of infringements of the provisions applicable in the field of public procurement can be realised only if the periods laid down for the bringing of such proceedings start to run only from the date upon which the claimant knew, or ought to have known, of the alleged infringements of those provisions . . . ."

52. The Court was also referred to the judgment of Peart J. in *Baxter Healthcare Ltd. v. Health Services Executive* [2013] IEHC 413, where he accepted that Regulation 7(2) ought to be interpreted in light of *Uniplex* but pointed out that such judgment does not provide assistance as to what level of knowledge is required by an applicant before the clock starts to run which is a matter for the national Court to decide on the facts of every case and then observed at para. 77:

"But it provides guidance in the sense that it emphasises the objective of an effective remedy, and therefore this Court must decide what point did the present applicant possess sufficient knowledge of facts to enable it to consider that it had reasonable grounds to challenge the decision . . . ."

53. Applying those principles to the present facts, the question is when did Gaswise possess sufficient knowledge of the facts to enable it consider that it had reasonable grounds to challenge the decision of DCC that BM Services had passed the Turnover Requirement in the selection criteria.

54. Gaswise submits that it did not have sufficient knowledge of the facts to reach that decision until such time as it became aware of the true identity of BM Services. That submission appears correct on the facts herein. Until Gaswise was made aware of the identity of the tenderer *i.e.* the person either legal or natural which was the tenderer, it cannot be said to have had sufficient knowledge of the facts to enable it consider that it had reasonable grounds to challenge upon the decision taken the basis of a failure by that person to fulfil the Turnover Requirement.

55. The Court has considered the correspondence exhibited between the parties and their respective solicitors between 23rd July, 2013, and 2nd September, 2013. Whilst it is appreciated that there was significant time pressures, nevertheless, the tone of the correspondence does not reflect well on the parties or their respective solicitors. This may have caused a lack of focus. Included amongst the lengthy correspondence, however, was a request from the solicitors for Gaswise in a letter of 8th August, 2013, that DCC furnish them with "the full title and registered addresses of all the 'successful tenderers'". On 23rd August, 2013, the law agent for DCC purported to supply the full names and addresses of the four entities which had been provisionally pre-selected. This letter still named the first named successful tenderer as BM Services at an address. Prior to that date, the correspondence from the solicitors for Gaswise had pointed out that his client had discovered that BM Services was not currently registered with RGII (a mandatory requirement of the ITT) while a company, BM Services Ltd., had been previously registered and that such company was dissolved since 2nd September, 2011. On 30th August, 2013, the solicitor for Gaswise pursued the request for the full title of BM Services and expressly stated to the law agent that it had not been indicated whether this was a trading name or a reference to a limited entity. These latter exchanges primarily took place in the context of service of the proceedings on the successful tenderers.

56. Finally, in response in the letter of 2nd September, 2013, the law agent indicated that his instructions were that "the tender from BM Services was submitted by Brian McGrady (trading as BM Services) of the address already supplied".

57. It is relevant that the exchanges were taking place between solicitors. Gaswise was entitled to the information sought as to the identity of the person, whether he be a natural person, as it transpired, trading under a business name or a legal person *i.e.* a company which was the successful tenderer. Until that information was disclosed, Gaswise cannot be considered to have had sufficient knowledge of facts to enable it consider that it had grounds to challenge the decision in relation to compliance by BM Services with the Turnover Requirement. The information given in the letter of 7th August that the tender of BM Services consisted of itself as prime contractor with several subcontractors was not sufficient in the absence of the identity of BM Services.

58. In the course of the hearing, there was some discussion, in the context of a consideration of para. 29 in the Instructions to Tenderers as to whether the tender from BM Services was a tender by a group or consortium or whether it was an individual tender of Mr. McGrady trading as BM Services, albeit as a prime contractor intending to use and rely upon the four named subcontractors. Counsel for DCC clarified that it was treated as the tender of Mr. McGrady trading as BM Services. Hence, it is Mr. McGrady trading as BM Services who is considered to be the tenderer. It is relevant to the inexplicable reluctance of DCC to furnish the identity of BM Services, that its own 'Instructions to Tenderers' at para. 29(a) requires a Prime Contractor to furnish its "full legal name". In this instance, as ultimately disclosed, that was Brian McGrady or Brian McGrady trading as BM Services.

59. Accordingly, I have concluded that this part of Gaswise's claim is not time-barred.

60. The next issue is whether Gaswise is an eligible person to challenge the compliance of BM Services with the Turnover Requirement.

61. An eligible person is defined in regulation 4 of the Remedies Regulations in the following terms:

"For the purposes of these Regulations, a person is an eligible person in relation to a reviewable public contract if the person -

(a) has, or has had, an interest in obtaining the reviewable public contract and

(b) alleges that he or she has been harmed, or is at risk of being harmed, by an infringement, in relation to that reviewable public contract, of the law of the European Communities or the European Union in the field of public procurement or of a law of the State transposing that law."

62. Gaswise has an interest in being awarded the contract and therefore clearly satisfies para. (a) of Regulation 4. It follows from the conclusion already reached in relation to the unlawfulness of the decision to exclude Gaswise that it is at risk of being harmed by the alleged infringement by DCC in wrongly admitting BM Services to the second stage in the evaluation. It therefore follows that Gaswise is an eligible person to challenge the decision taken by DCC in relation to compliance by BM Services with the Turnover Requirement.

63. The final issue in this section is whether DCC correctly considered that BM Services met the Turnover Requirement, both in

relation to the reliance on third parties and the provision of the requisite statement. Whilst the issue was phrased by the parties in this way, the only point taken by Gaswise in relation to the nature of the statement provided was that it referred to a combined turnover (understood by DCC to mean the combined turnovers of BM Services and its subcontractors) rather than the turnover of BM Services as the tenderer. The Court, accordingly, has not considered any other differences between the statement provided and the requirements in s. 10.1 of the ITT in relation to the Turnover Requirement.

64. The Court must interpret the Turnover Requirement in section 10 of the ITT in accordance with the interpretation principles set out above. Applying those principles to the Turnover Requirement, the relevant question appears to be as follows. Did the ITT include a sufficiently clear and precise requirement or instruction which enabled all reasonably well-informed and normally diligent tenderers to uniformly understand the Turnover Requirement, in the case of a tenderer proposing to be a prime contractor and use subcontractors, as being satisfied by the submission of a statement that the combined turnover of the prime contractor and some or all of its subcontractors exceeded €250,000 in any one of the last three financial years.

65. The submissions made on behalf of DCC in favour of the ITT being so interpreted relied firstly upon the note at the end of the selection criteria relating to economic and financial standing. Secondly, that DCC was entitled or obliged to permit BM Services to rely upon the turnover of its subcontractors to satisfy the turnover requirement having regard to Regulation 55(1) of the Public Contracts Regulations when construed in accordance with Article 47 of the Public Contracts Directive and the judgment of CJEU in *Holst Italia SpA v. Comune di Cagliari* (Case C-176/98) [1999] E.C.R. I-8607.

66. On the first issue, the conclusion of the Court is that the ITT does not provide in clear and precise terms such that all tenderers would construe it uniformly, provisions which enable a tenderer who proposes to tender as a prime contractor and use subcontractors to furnish a statement that the combined turnovers of the tenderer and some or all of the subcontractors exceeded €250,000 in one of the three relevant years for the following reasons.

67. Firstly, para. 10.1 of the ITT in its opening part specifies "...tenderers are required to satisfy the following requirements". The turnover requirement refers expressly to "your turnover". This wording must be interpreted as applying to the tenderer alone. This interpretation is confirmed by the requirement to complete Appendix B. Appendix B requires the insertion of the name of the tenderer and the relevant confirmations required are in terms "I confirm that our turnover. . . " which requires a Yes/No answer. There is no provision in Appendix B for any reference to any third party including a subcontractor. The references to subcontractors in the ITT at para. 6 and in the 'Instructions to Tenderers' at para. 29, each refer to the completion of Appendix E. Appendix E contains no reference to turnover of the subcontractors. Finally, the note at the end of the 'Economic and Financial Standing' criteria in section 10 of the ITT is not in terms capable of being objectively interpreted in a way which clearly and precisely varies the express requirements already referred to which require a statement confirming that the tenderers turnover exceeded €250,000. As appears in the note at the end of these criteria (set out in full at para. 36 above), it indicates that if a tenderer proposes "to use or rely on the financial resources of entities or undertakings . . . it must establish that it shall have available to them the financial resources of those entities or undertakings which are necessary for the performance of the contract". This note does not specify, however, the purpose or purposes for which a tenderer may rely on financial resources of third parties. Also, it requires the tenderer to establish that it have available to them the financial resources of the entities which "are necessary for the performance of the contract". There is no express reference to the use of financial resources of third parties for the purpose of meeting the turnover requirement. Turnover is a financial standing requirement. Turnover refers to the past financial history of the tenderer. Past turnover is not *prima facie* something used for the performance of the contract. Also Gaswise appears correct in its submission that turnover is not something which may be made available by one person to another. It would, of course, be possible in an appropriately worded ITT to permit a tenderer to rely upon the turnover of other specified persons, e.g. proposed subcontractors for the purposes of satisfying a turnover requirement". However, the ITT at issue in these proceedings did not, in my judgment, so provide in a clear and precise manner which would enable all reasonably well-informed, diligent tenderers to so understand it.

68. Accordingly, I have concluded that the Turnover Requirement ITT in this application, properly interpreted in accordance with the principles already set out, required the provision by a tenderer of a statement that the tenderer's turnover exceeded €250,000 in one of the last three financial years.

69. The next issue, having regards to the submissions made on behalf of DCC is whether, notwithstanding the terms of the ITT, DCC was obliged to accept the statement from BM Services that the combined turnover exceeded €250,000 as complying with the Turnover Requirement. It does not appear to be necessary or desirable to now resolve this issue and preferable that it be left over for determination, if necessary, in another appropriate case. The reason for which I consider it not to be necessary, having regard to my earlier conclusions, is that even if the Court were now to conclude that DCC was obliged to permit BM Services to furnish a compliant statement in reliance on the combined turnovers, it must follow from the conclusion on the interpretation of the Turnover Requirement in the ITT that DCC was in breach of its obligations of equal treatment and transparency in the formulation of the Turnover Requirement of the ITT. If it is so obliged, it published an ITT which in its express terms required the provision of a statement that the turnover of the tenderer exceeded €250,000, whereas, in fact, the requirement could in certain circumstances be satisfied by the provision of a statement by a tenderer that the combined turnover of itself and proposed subcontractors exceeded €250,000. The terms of the ITT did not make clear that this could be done so as to enable all tenderers so interpret it uniformly.

70. The further reason for which it appears to me the Court should not now decide the question as to whether DCC was obliged to accept the statement in relation to combined turnover from BM Services, notwithstanding the express terms of the ITT is that it appears to me the resolution of that issue may depend upon the proper construction of the Public Contracts Directive in relation to which a reference under Article 267 of the Treaty on the Functioning of the European Union might be desirable. However, as the issue is not necessary for the determination of the present application relating it would not be appropriate to make a reference or subject the parties to the inevitable delays associated with a reference. The reason for which I consider it is a matter of interpretation of the Public Contracts Directive is that regulation 55 of the Public Contracts Regulations does not expressly permit an economic operator to rely upon turnover of third parties for the purposes of proof of its financial standing. Regulation 55(1) refers to a statement showing "the operator's overall turnover" and regulation 55(2) refers to reliance by an economic operator on the "services of other persons". Turnover does not appear to be on "service". This regulation was, of course, made to give effect to the Public Contracts Directive, Article 47(2) of which refers to "capacities" which would have to be in turn construed in accordance with the decision of the CJEU in *Holst*. It is not clear to me that the decision in *Holst*, of itself, covers the situations at issue here namely a tenderer, which proposes to be a prime contractor and use subcontractors, being entitled as of right to rely upon the turnover of some or all of those subcontractors to satisfy a turnover requirement. In *Holst*, at issue were companies with shareholding links in a corporate group structure where an ability to make available to others financial resources is more obvious.

71. It is clear, however, that there is nothing in the Public Contracts Directive or the implementing regulations which precludes DCC, in a properly worded ITT, including clear and precise terms which would permit a tenderer who proposes using subcontractors to satisfy a Turnover Requirement by the combined turnover of the tenderer and one or more of the subcontractors in any given year.



However, in order to meet the obligations of equal treatment and transparency, the terms of the ITT must be such that all reasonably well-informed and diligent tenderers may interpret such a requirement in a uniform manner.

## Reasons

72. This ground was not pursued at the hearing.

## Remedy

73. The parties are in agreement that under the Remedies Regulations, the Court has a wide discretion in relation to the remedy to be granted to Gaswise by reason of the conclusions reached in this judgment on the issues in the first module in this application. Counsel for DCC drew attention to the express power given to the Court in regulation 9(1) of the Remedies Regulations to “set aside, vary or affirm a decision to which these Regulations apply”. Nevertheless, it is accepted that the discretion given to the Court permits it, in an appropriate case, to grant a remedy which includes the quashing of the competition or award procedure commenced by the relevant ITT.

73. In accordance with the case law of the CJEU, the Court must interpret the powers given it under the Remedies Regulations and apply them in a manner which ensures effective judicial protection of EU rights: *Unibet (London) Ltd. v. Justitiekanslern (Case C-432/05)* [2007] E.C.R. I-2271. The remedy must also be proportionate and in considering what is proportionate, the Court should take account of the position of DCC and other participants in the tender process. The Court must also have regard to the remedies claimed in the statement of grounds, subject to the above principles.

74. Counsel for Gaswise submitted that if the exclusion of Gaswise by the Exclusion Decision was unlawful, that the only effective remedy for Gaswise would be an order quashing the award procedure commenced by the ITT on 18th April, 2013. Counsel for DCC submitted that in this situation, the only remedy to which Gaswise is entitled is an order quashing the Exclusion Decision and that this would be both an effective and proportionate remedy.

75. The Court is aware that DCC, in the course of the litigation, conducted a provisional evaluation of the Gaswise Tender without prejudice to the Exclusion Decision, and whilst the Court has not been made aware of the outcome or detail of that evaluation, it is aware that there is a significant dispute in relation this evaluation. Notwithstanding that the Court is aware of those facts, it does not appear to be a matter relevant to the remedy which the Court should now grant and is not something which the Court has taken into account.

76. I am satisfied that the Remedies Regulations, when interpreted and applied in accordance with the principles set out above, and the amended statement of grounds herein (in particular, para. 12(1)(g), (h) and (v)) give the Court jurisdiction to grant as a remedy an order quashing the public procurement procedure commenced by the ITT published by DCC on 18th April, 2013. The issue is whether the grant of such a remedy is necessary to ensure effective protection of the rights which Gaswise has under EU law and is not disproportionate, having regard to the interests of DCC as the awarding authority and of the other participants, in particular, the successful tenderers.

77. I have concluded that having regard to the decisions reached in this judgment and on the facts before the Court in relation to this award procedure, that such a remedy is necessary to ensure effective protection of the rights of Gaswise, in particular, to equal treatment and transparency in the award procedure and is not disproportionate. The principal matters which have led me to this conclusion are the following.

78. If the Court were now only to quash the Exclusion Decision, this means to ensure equal treatment and, ignoring the provisional evaluation, that the Tender of Gaswise would now have to be evaluated by the same evaluation team. On the unusual facts pertaining to this award, I have concluded that Gaswise is entitled to an evaluation of its Tender by a fresh evaluation team. The particular facts are, firstly, the admitted difference in treatment by the evaluation team of Gaswise and Grate Gas in determining whether each had met the RPS criterion. The decision taken to admit Grate Gas to the second stage has been determined by Mr. McKenna on behalf of DCC to have been an error. Mr. McKenna was not a member of the evaluation team. He is the Senior Executive Officer responsible for housing maintenance to whom the Evaluation Report was given and a deponent for DCC in these proceedings. He explains his discovery of the error made in relation to the admission of Grate Gas at paras. 9 and 10 of his second affidavit and deposes that the evaluation panel, in admitting Grate Gas, were mistaken. He then states “I have spoken with two of the three panel members, and they have acknowledged that they made a mistake”. There is no evidence before the Court in relation to the attitude of the third panel member nor any evidence as to how the error occurred. Whilst the Court accepts that errors may occur, nevertheless, this significant difference in approach to the positions of Gaswise and Grate Gas, in a relatively small number of tenders to be evaluated, gives rise to a legitimate concern for Gaswise of a potential difference in attitude to it and other tenderers.

79. The Court, in taking this fact into account in relation to the remedy to be granted, has considered the judgment of the General Court of the European Union in *Trelleborg v. European Commission (Joined cases T-147/09 and T-148/09)* 17th May, 2013. The principle in that judgment is that a person relying upon the principle of equal treatment may not rely in support of his claim on an unlawful act committed in favour of a third party. The decision reached by the Court in this judgment that Gaswise was unlawfully excluded from the tender process was not in any way dependent upon the error made in relation to Grate Gas. It is simply the closeness of the positions of Gaswise and Grate Gas and the admitted difference in treatment by the evaluation panel, whether correctly or incorrectly which is now relevant to the exercise of the Court’s discretion.

80. Added to this are the objective facts in relation to the alleged difference in treatment by the evaluation panel of BM Services and Athena Enterprises in relation to compliance with the RPS criterion. As already stated, the question as to whether or not they were lawfully admitted to the second stage of evaluation as having complied with the RPS as understood by DCC does not arise by reason of the decision reached by the Court that the ITT did not include a clear and precise requirement to submit a RPS such that DCC was in breach of its obligations of equal treatment and transparency in relation to those terms of the ITT. Nevertheless, the objective facts adduced in evidence give rise, in my judgment, to a potentially legitimate concern by Gaswise of a further difference in approach by the evaluation panel. The evidence is the evaluation panel did not seek clarification from any person in relation to the RPS criterion. Further, the objective evidence of the documents submitted in purported compliance with the RPS criterion by BM Services and Athena Enterprises is that neither complied with the express terms of the criterion in section 10 of a Replacement Parts Statement in the terms set out in the ITT.

81. The final matter which has informed the Court’s decision to grant the particular remedy is the conclusion reached in relation to the Turnover Requirement. The Court has concluded that the ITT, in its express terms, did not permit BM Services to comply with the Turnover Requirement by the provision of a statement in relation to the combined turnover of itself and one or more of its subcontractors. As stated, it follows from that conclusion that even if DCC was under an obligation to accept the statement as complying with the Turnover Requirement, by reason of the decision of the CJEU in *Holst* and the Public Contracts Directive and Public

Contracts Regulations (which the Court has not determined), it follows that DCC was in breach of its obligations of equal treatment and transparency in the formulation of the Turnover Requirement in the ITT. Further BM Services did not participate in the proceedings.

82. The decision reached on remedy also appears proportionate to the interests of DCC and the other tenderers. If the Court were now, in this module, only to quash the Exclusion Decision, it follows inevitably, having regard to the other decisions reached in this judgment, that there would be further litigation in relation to the decisions made by DCC to admit BM Services and possibly, Athena Enterprises, and potentially litigation in relation to the award of places on the framework agreement.

83. Whilst it is unfortunate for DCC and for certain of the other tenderers that the procedure must recommence, nevertheless, it is the process by which a framework agreement may be put in place for the maintenance and repair of boilers in public housing owned by DCC in an efficient and effective manner, whilst at the same time respecting the rights in EU law of all those involved.

#### **Relief**

84. There will be an order quashing the entire procurement process commenced by the Invitation to Tender published by the respondent on 18th April, 2013 to include the decisions made at the selection and award stages and all other steps taken including the publication of the ITT.