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Case No: 9LS30588,NE90043,NE90063

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
TECHNOLOGY AND CONSTRUCTION COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 27/04/2010

Before :

The Hon.Mr.Justice Ramsey

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Between :

(1) Croft House Care Limited	**Claimants**
(2) Orchard Home Care Limited	
(3) Kelly Park Caring Agency	
- and -	
Durham County Council	**Defendant**

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- -

Eric Owen (instructed by **Cohen Cramer**) for the **First Claimant**
Sarah Hannaford QC (instructed by **Brian Mackenow & Co**) for the **Second Claimant**
Rhodri Williams (instructed by Evershed LLP) for the Third Claimant
Michael Bowsher QC, and Ewan West (instructed by Colette Longbottom Head of Legal and Democratic Services, Durham County Council) for the Defendant

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Judgment

The Hon. Mr. Justice Ramsey:

Introduction

1. This judgment deals with issues of disclosure and inspection of disclosed documents in proceedings relating to public procurement. The proceedings arise out of a procurement process by Durham County Council ("the Council") for the award of contracts for the provision of domestic care services which was subject to the Public Contracts Regulations 2006.

Background

2. The procurement procedure was commenced by a Contract Notice in the Official Journal in October 2008. The Council initially notified the Claimants of the results of the procurement process by letter dated 26 February 2009. Following a challenge by another tenderer, the Council wrote to the parties on 12 May 2009 to say that it was proceeding on the basis set out in an attached document, "Process for Completion of Tender Award". This changed the basis of the evaluation of the tenders and provided that the interviews would be re-run.

3. Following these new interviews the Council notified the tenderers of the revised results of the procurement process by letter dated 21 July 2009. As a result the Claimants, who are three of the tenderers, were awarded contracts for no Demand Zones or for fewer Demand Zones than in the letter dated 26 February 2009.

4. The Claimants allege that there have been breaches of the Public Contracts Regulations 2006 and European law principles and/or that there has been a breach of an implied or tender contract. They seek the suspension of the tender procedure; the setting aside of the Council's decision of 21 July 2009; an order preventing the Council from entering into any contract; an order for the Council to reconsider re-running the tender procedure and/or damages.

5. The three Claimants each issued proceedings which were commenced in or transferred to the Technology and Construction Court in the Newcastle District Registry. Because the proceedings raised matters of importance relating to Public Procurement which is a field of expertise in the Technology and Construction Court it was decided that it would be appropriate for these proceedings to be case managed and heard by a High Court judge as provided in paragraph 3.7.5 of the TCC Guide.

6. At the first case management conference on 11 December 2009 the Council sought an expedited hearing and also particular directions concerning the disclosure and inspection of documents. The Council said that disclosure of certain documents would compromise their legitimate commercial and public interests, in particular its ability to re-run the procurement were that to be necessary. They said that disclosure of some material would also compromise the confidentiality of material provided by or relating to third parties, in particular other tenderers who participated in the procurement. The Council therefore proposed that appropriate arrangements should be put in place now to protect the confidentiality of the interests of the Council and third parties throughout the proceedings.

7. In a witness statement supporting the application Mr Nicholas Whitton, head of commissioning in Adult Well Being and Health at the Council, dealt with the need for an expedited hearing and developed his concerns in relation to disclosure. At paragraphs 47 to 55 he set out those concerns in relation to certain documents relating to the procurement which included not just materials relating to the evaluation and assessment of the Claimants' own tenders and also the tenders of their competitors, but also the actual bid material submitted by their competitors.

8. He said that he had "*grave concerns in this regard. While I can appreciate that the legal advisers to the claimants may need to see documents as part of preparing their submissions, I am concerned that if these documents (or the relevant confidential parts of them) are seen by their clients, it will have irreversible adverse consequences for any future re-running of the Procurement, should that be necessary. If any confidential documents (or parts of them) are to be shared with the claimants themselves, it seems to me essential that anybody who sees them must be prevented from participating in the preparation of any future tender for any re-running of the Procurement or otherwise conveying that information to those preparing such a tender. This would entail setting up a confidentiality ring of the type which is becoming increasingly typical in litigation between competitors. Such ring would be established for the purposes of this litigation and the more sensitive documents or the more sensitive parts of those documents can only be seen by those within the ring and who have undertaking the obligations which flow from membership of the ring.*"

9. Mr Whitton said that the reason why he attached importance to maintaining the confidentiality of existing bids and their assessment was that there were only a limited number of ways of distinguishing a good domiciliary service provider from a poor one. His view was that, if the Council had to disclose the model answers for interview questions, the method statements for all tenderers and/or the interview panel's notes for all tenderers to the claimants they would know exactly how the Council judges answers to questions on:

    (1) Service provision including organisations structure, philosophy, building capacity whist maintaining quality and ensuring continuity of care.
    (2) Human resources including recruitment, selection and training of workforce, communication and management issues.
    (3) Services to individuals including individual needs are identified and met, delivery of services identified in care plans, dignity in care, safeguarding processes and procedures.

10. He said that this knowledge would give them a significant advantage against other providers and the Council would not be able to design a selection process which eliminated that advantage. In addition, his view was that "*the Council could not find a further series of legitimate areas for distinguishing between tenderers which did not cover those areas. The ability to ask different questions would not be sufficient to eliminate the advantage enjoyed by the claimants. Furthermore if the claimants were to be shown the interview panel's notes for all tenderers and their method statements they would have information about their competitors which would give them an additional advantage. The only way in which the Council could then redress that imbalance would be to release all that information generally as part of a future procurement.*"

11. In those circumstances, he believed that it would be impossible to design and run a process which could make any sensible, rational and defendable selection that distinguished between competitors. He said that "*even if the information released only related to successful tenderers, following the re-run interviews, this would be a considerable body of information encompassing 12 bids. That would allow a near perfect understanding of the Council's requirements in all areas making a design and re-run impossible. This would still be true if the new procurement did not involve an interview because of the comprehensive disclosure of the areas for distinguishing between bids.*"

12. He also said that he anticipated that providers who had scored highly in both assessments would not wish their answers to be disclosed to the claimants who are their competitors not just in this exercise, but potentially in other procurements which may be run by other authorities. He thought it highly unlikely that colleagues running procurements in other authorities would not explore the same areas as those which were part of the Council's exercise.

13. He said that it was "*particularly relevant that our original procurement did not seek to distinguish between bidders on price. We sought to establish a variable hourly rate using market testing at the PQQ stage. After that we took price into account only in the sense that providers were asked to assure the Council that they could provide services at the agreed rate. Those officers who designed the procurement were concerned that if price were taken into account as part of the selection process it would be difficult to eliminate the risk that providers would offer a low price that they could not subsequently deliver. In an exercise of this nature it is essential that incoming providers can recruit and retain a workforce that can take over the packages smoothly and provide continuity of service. The officers were also concerned to ensure that smaller firms could compete with larger ones which is difficult where price is a significant distinguishing factor. The guidance on charging for non-residential social care adds a further complication where hourly rates vary and the introduction of personalisation also makes it difficult to have different hourly rates for the same type of service. I remain convinced that these risks would continue for the future and I would therefore not wish to feature price as a substantial distinguishing factor in any future exercise.*"

14. As a result he said he was concerned that if the Council were ordered to disclose all these documents without appropriate confidentiality provisions so that no person seeing the documents would participate in a future tender, the Council was in danger of being left in a position where it could not design and run a successful procurement exercise for these services. He wished to avoid such an outcome "*not least given the importance and essential nature of the services that are subject to the Procurement.*"

15. At the hearing on 11 December 2009 directions were given leading to a hearing from 10 to 20 May 2010. In relation to disclosure, an order was made for disclosure but it was provided at paragraph 12 that:

    Inspection of documents that the Defendant identifies as containing confidential information is to be restricted to counsel and solicitors for the Claimants pending consideration of confidentiality issues (to the extent they arise) before the Court.

The Defendant is to notify all bidders other than the Claimants as to the procedure to be followed for the disclosure and inspection of documents.

16. A hearing was then arranged to resolve any issues arising from the Council's disclosure. The Council's list of documents was ordered to be provided by 15 January 2010 with copies of the documents to be provided by 22 January 2010. The Council served a list which, in accordance with the order, divided documents into those which were "restricted" and those which were "unrestricted". The restricted documents were, pending the consideration of the Council's concerns as to inspection by the Claimants, only provided to the solicitors and counsel for the Claimants.

17. Subsequently, on 29 January 2010, the Council wrote to the Claimants enclosing a revised List of Documents and some boxes of files containing documents for inspection. They requested that the Claimants should make no further reference to the Council's previous list of documents or any of the documents which were sent to the Claimant during the previous week.

18. However, on 12 February 2010 the solicitor for the Council informed the Claimants of problems with the Council's disclosure, with some documents being omitted and privileged documents being included. As a result, the Council requested that the Claimants should not read privileged documents and should destroy all documentation and related memory sticks previously disclosed, whilst the Council completed the task of reviewing and resolving the position so that proper disclosure could be made.

19. On 15 February 2010 the Council served a second witness statement from Claudine Freeman, a solicitor with the Council, in which she exhibited at CF8 to CF13 documents which were proposed as documents which would be referred to at the hearing fixed to resolve issues arising from inspection of the Council's disclosure.

20. On 15 February 2010 the Council also applied for an adjournment of the hearing, supported by a witness statement from Mr Tristan Meears-White of Watson Burton LLP, who had by then been instructed on behalf of the Council's insurers.

21. As a result, at the hearing on 16 February 2010 which had been arranged to resolve those issues, amended directions were given for the Council's disclosure with exchange of submissions on "confidentiality" by the Council and the Claimants.

The Council's position

22. In the Council's statement of their proposed approach to confidentiality, they identified two categories of document:

    (1) Material provided by third parties, including other tenderers, over which the Council considered that confidentiality might properly be asserted.

    (2) General material, the disclosure of which would prejudice the Council's ability to re-run a procurement for domiciliary care services, were the Court so to order at the end of the trial.

23. In relation to the first category, the Council accepted that not all material submitted by tenderers would necessarily be confidential and they pointed out that tenderers had been informed that material might be needed to be released in response to requests under the Freedom of Information Act 2000. That was a reference to a provision in the invitation to tender which stated:

> "*7.1 The Council is subject to The Freedom of Information Act 2000 ("Act") and The Environmental Information Regulations 2004 ("EIR").*
>
> *7.2 As part of the Council's obligations under the Act or EIR, it may be required to disclose information concerning the procurement process or the Contract to anyone who makes a reasonable request.*
>
> *7.3 If Tenderers consider that any of the information provided in their Tender is commercially sensitive (meaning it could reasonably cause prejudice to the organisation if disclosed to a third party) then it should be clearly marked as "**Not for disclosure to third parties**" together with valid reasons in support of the information being exempt from disclosure under the Act and the EIR.*
>
> *7.3 The Council will endeavour to consult with Tenderers and have regard to comments and any objections before it releases any information to a third party under the Act or the EIR. However the Council shall be entitled to determine in its absolute discretion whether any information is exempt from the Act and/or EIR, or is to be disclosed in response to a request of information. The Council must make its decision on disclosure in accordance with the provisions of the Act or the EIR and can only withhold information if it is covered by an exemption from disclosure under the Act or the EIR.*"

24. The Council also stated that they were subject to the express obligation under Regulation 43 of the Public Contracts Regulations 2006 (as well as general obligations pursuant to the law of confidentiality) not to disclose information where a bidder had reasonably designated it as confidential. The Council submitted that this provision expressly envisaged that tenders would include confidential information and, certainly in a context in which the same tenderers might be in competition on the same or similar terms in the future, both their pricing information and some aspects of the proposed service delivery submission might be expected to be confidential as they would represent the advantage which that tenderer would seek to establish over that of other tenderers in that and subsequent bids.

25. As a result the Council submitted that these considerations did not permit them to provide unrestricted disclosure of all material submitted by third party tenderers.

26. In relation to the second category, the Council stated that given the nature of the services being procured, there were a finite number of areas that were relevant to any proper evaluation. Furthermore, they stated that the nature of questions that might be asked about those areas were similarly restricted. The Council therefore submitted that, were it necessary to re-run the procurement, they would have very limited, if any, scope for focussing on different areas of evaluation and asking materially different questions either by written response or at interview. They relied on what Mr Whitton said and submitted that it would be impossible for the Council to deliver their

current policy without undertaking an exercise that would be materially the same in design and likely to involve the same tenderers.

27. While the Council accepted that they must have regard to their obligations of transparency, they raised concerns that the disclosure of so much material to all tenderers would have the undesirable effect set out by Deeny J in McLaughlin & Harvey v Department of Finance and Personnel (No 2) [2008] NIQB 91 at [48] where he had to consider the extent to which 186 items of information should have been provided to tenderers. He said:

> "*I consider there is force in the evidence of Mr Rowsell that to have provided these in such detail to the bidders would have in fact undermined the efficacy of the process. One wanted to find the most economically advantageous tender bids. If you provided all 186 items even an incompetent tenderer might manage to and quite possibly would manage to put together a bid which referred to all 186 leaving the panel uncertain as to which the preferable bidder was.* "

28. The Council submitted that, in the present case, the procurement being challenged had not been completed and that the Claimants were competitors in that procurement and likely to be competitors in any future procurement, together with both successful and unsuccessful tenders from this procurement. They stated that if the Council were to disclose all of its desiderata at this stage it risked generating a number of indistinguishable bids. This, they said, would be of no value to the Council and would prejudice the interests of the better bidders who ought to be succeeding in a properly run process.

29. The Council therefore submitted that it was essential that their ability to run a future procurement was not compromised by disclosure in this procurement. They stated that material demonstrating how the Council had evaluated both written and oral responses to the questions that they had posed would seriously inhibit their ability to run a future procurement.

The Claimants' position

30. In response, the Claimants each set out their contentions on those two categories of confidentiality. In summary the position of the claimants was as follows. In relation to the first category, they submitted that the Council was under an obligation under CPR 31.6 to disclose documents which adversely affect their own case, adversely affect another party's case or support another party's case. They stated that there was no principle that confidential documents need not be disclosed and referred to Scientific Research Council v Nassé [1980] AC 1028 and the notes in Civil Procedure at paragraph 31.3.36.

31. The Claimants also referred to the decision in Varec SA v Belgium [2008] 2 CMLR 24 which dealt with the need to balance the principle of the protection of business secrets against the right to a fair trial. They submitted that in this case, as in Amaryllis v HM Treasury (No 2) [2009] BLR 425, the Council was seeking protection of documents which went far beyond business secrets. Whilst they accepted that there was no reason why the identity of tenderers and any financial/commercial information, which was in any event, not relevant to the matters in dispute, could not

be adequately protected by the use of letters instead of names and redaction, they stated that this was not a case in which tenderers submitted prices or revealed secret technical processes and they noted that all tenderers were warned in the tender documents that the Council might need to disclose information under the Freedom of Information Act.

32. In relation to regulation 43 of the Public Contracts Regulations 2006, they submitted that this was a general obligation upon contracting authorities not to disclose information forwarded to it by an economic operator which the economic operator had reasonably designated as confidential. They stated that this duty only covered confidential information in the sense of technical or trade secrets and other confidential aspects of tenders, as confirmed by the decision in Varec. They also stated that this general duty did not override the duty of the Council, as a party to legal proceedings, to give disclosure under CPR Part 31 generally nor the power of the Court to make an order for disclosure whether under CPR rule 31.12 or as part of an order under regulation 47(8) of the 2006 Regulations.

33. In relation to the second category of document the Claimants submitted that difficulties in re-running the procurement were not a valid reason for failure to disclose relevant documents pursuant to the CPR and that there was no justification in law or practice for refusing disclosure on this basis.

34. In respect of the Council's reliance on McLaughlin & Harvey v Department of Finance and Personnel (No 2) they submitted that this was not relevant as the judge was dealing (obiter) with the question of whether it was necessary, as part of the obligation of transparency in the tender documents, to disclose just its 39 sub-criteria or all 186 sub-elements, which he described as pieces of evidence. They said that this was a different question to whether the documents needed to be disclosed in ensuing litigation. They pointed out that in that case, the documents were referred to and quoted in the judgment and yet, nonetheless, the judge ordered the framework to be set aside, thereby requiring the procurement to be re-run, in the subsequent decision in McLaughlin & Harvey (No.3).

35. The Claimants submitted that, even if the court were to consider it necessary to balance the competing interests of the parties, the interests of justice clearly required disclosure. They said that if the position were otherwise, a tenderer in the Claimants' position would be faced with the stark choice of either obtaining adequate disclosure, but being limited to a claim in damages or claiming that the process should be set aside, but being unable to see the relevant documents. This second alternative, they submitted, was not appropriate and would deprive the Claimant's of the right properly to pursue their cases and obtain an effective remedy.

36. Before turning to consider the particular examples of documents I must consider whether the Court should prevent the personnel of the Claimants from seeing copies of the currently "restricted" documents disclosed by the Council, on the grounds that they may come within either of the two categories of confidentiality.

Documents containing confidential matters

37. In relation to the first category, I accept that documents which are produced during the procurement process by tenderers or by the Council as a result of a review of the tenders or the tender interviews will include information which, for a number of reasons, might be categorised as confidential. Whilst the documents do not contain trade secrets such as the designs in Varec, they contain information about the way in which a particular tendering company or organisation operates which might well be an advantage to a competitor. The documents also contain personal information about employees or third parties which is confidential.

38. The fact that documents may contain confidential information in any of those categories is not, in itself, a reason for not providing such documents on disclosure and inspection. However, as was pointed out in Science Research Council v Nassé [1980] AC 1028 the Court in deciding whether to give disclosure must have regard to the fact that any documents are confidential and that discovery would be a breach of confidence, so that the fact that a document is relevant alone is not determinative of the need to give disclosure. Rather, as the House of Lords set out in that case, the ultimate test is whether disclosure and inspection is necessary for disposing fairly of the proceedings. In making this decision the Court should consider whether any special measure, such as redaction or hearings in private should be adopted: See Lord Wilberforce at 1065 E to 1066 B, Lord Salmon at 1072 G to 1073 A, Lord Fraser at 1085 D to G and Lord Scarman at 1089 D to 1090 A.

39. In this case, as set out above, there was a provision for tenderers to designate any information provided in their tender as "Not for disclosure to third parties", if that information was commercially sensitive. I understand that none of the particular documents which have been referred to on this application and which are currently "restricted" were so designated. Whilst the provisions of paragraphs 7.1 to 7.5 of the ITT were based upon release of information under the Freedom of Information Act 2000 and the Environmental Information Regulations 2004, the fact that the tenderers have not sought to so designate the documentation is, I consider, a factor to be taken into account.

40. In relation to the provisions of regulation 43 of the Public Contracts Regulations 2006, the Council is required not to disclose information forwarded to it by a tenderer which the tenderer has reasonably designated as confidential. Regulation 43(2) defines confidential information to include trade secrets and the confidential aspects of tenders. Again, I understand that no tenderer designated any of the documents referred to on this application as confidential under this regulation. In any event, that regulation applies in relation to what is done as part of the procedures for the award of public contracts, rather than what must be done by parties to proceedings under the CPR, including Part 31. Regulation 47 and, in particular, regulation 47(8) of the Public Contracts Regulations 2006 recognises the powers of the Court in respect of enforcement of the obligations.

41. In relation to these proceedings and as set out in paragraph 12 of the Order made on 11 December 2009, the Council contacted other tenderers to make them aware of the fact that disclosure was being given of documentation they had provided to the Council. In her first witness statement of 12 February 2010 Claudine Freeman stated

that she had received written or oral communications from 17 of the tenderers, 12 of whom indicated that they did not wish their confidential information to be disclosed and five of whom indicated that they were not concerned by disclosure.

42. Those who objected and gave reasons indicated that they were concerned with charge rates and with method statements and statements of technical capacity which had been provided as part of their information. They considered that such information was commercially sensitive. As set out above, as the procurement decision was not based on price then I do not consider that such information should form a necessary part of the disclosure. Otherwise the information in the method statement or as to technical capacity is generally information which goes directly to the pleaded case put forward by the Claimants and would need to be disclosed to the personnel of the Claimants so that they can give interviews and provide the evidence necessary to dispose fairly of the claims in those proceedings.

43. The principle as set out in Science Research Council v Nassé requires a balancing exercise. Similarly in Varec SA at paragraph 47 it was said that there had to be balance between the right to confidentiality and the need for the claims to be disposed of fairly. As Coulson J pointed out in Amaryllis v HM Treasury [2009] BLR 425 at [52] the ruling in Varec is simply a case where, in considering the public interest in open administration of justice and the interest in maintaining commercial confidentiality, the facts of that case led the court to find that the commercial confidentiality of the businesses secrets outweighed the other interest.

44. Balancing the right of the third parties to confidentiality against the necessity for the documents to be provided for the purpose of a fair trial, I have no doubt that such material should be provided in this case. Without disclosure of this material to the relevant personnel of the Claimants, they will not be able properly to put forward their case. Therefore, subject to any considerations arising from the second category of confidentiality and subject to certain safeguards, I consider that in relation to the first category of confidentiality the Claimants should be permitted to see such documents as the method statements or information relating to technical capacity provided by the tenderers. In particular, there must be redactions to make the documents anonymous or exclude material which it is not necessary for the personnel of the Claimants to see to give instructions for the purpose of the proper preparation of the pleaded case.

Documents which contain information which would which would prejudice the Council's ability to re-run a procurement

45. In relation to the second category of confidentiality, the Council has raised proper concerns as set out in the evidence of Mr Whitton, in relation to the Council's ability to re-run the procurement process if disclosure of certain categories of documents were to be made to the personnel of the Claimants.

46. Mr Michael Bowsher QC, who appears with Mr Ewan West on behalf of the Council, submits that this case differs from such cases as Harmon CFEM Facades (UK) Ltd v House of Commons (1999) Con LR 1 and Amaryllis (No.2) because in those cases the court was being asked to review, retrospectively, the events which occurred during the procurement process to determine what rights had been infringed and award compensation for any infringements. By contrast he submits that there is no decision

which deals with a case, such as this, where the proceedings are taking place in the context of a public procurement procedure which has not been concluded.

47. The Council accept that documents which are currently within the category of "restricted" documents are important and lie at the heart of any proposed assessment of the merits of one tenderer over another. There is therefore no challenge to the documents being disclosed, in principle, to the Claimants. They say, however, that to permit the relevant directors or personnel of the Claimants to see the documents would undermine the procurement process if it has to be re-run. Rather the Council propose that a confidentiality ring should be established so that the documents could be disclosed to solicitors, counsel and also appropriate representatives, such as business advisors, for each of the Claimants who could give appropriate instructions.

48. The Council submit that the amount of information upon which instructions from a lay client would be required is limited. They say that such matters of principle as the use made of interviews, the weight accorded to them, the alleged use of unadvertised sub-criteria and weighting, the comparative marks awarded to different tenderers in relation to different responses, the information available to interview panel members, the choice of interview questions and the weighting accorded to them are all matters primarily for legal submission. They submit that such information does not therefore need to be disclosed to the directors or personnel of the Claimants.

49. The Council also submit that the Court should approach the question of how documents are to be disclosed and inspected by balancing the principle that the Claimants are entitled to a fair hearing with the public interest that there should be a fair, competitive procurement process for the Council's domiciliary care services.

50. Ms. Sarah Hannaford QC who appears on behalf of the Second Claimant, and whose submissions were adopted by Mr Eric Owen on behalf of the First Claimant and Mr Rhodri Williams on behalf of the Third Claimant, submits that the only fair way in which disclosure can proceed is for documents currently in the "restricted" category to be moved to the "unrestricted" category. She accepts that there would have to be redactions and that there should be limits on the way in which copies of documents are seen and reviewed by the representatives of the Claimants.

51. She submits that the key documents need to be reviewed by the directors and personnel of the Claimants so that they can give instructions on such matters as what they would have done had they known of the matters which are now disclosed and are said to be unadvertised sub-criteria and weighting. Equally matters disclosed at interview and the relative importance of answers and the weighting attached to them are all matters on which the directors and personnel of the Claimants involved would be the only relevant people to give instructions.

52. She submits that the nature of the Claimants, being small, family businesses, does not permit them to isolate directors or personnel or make it feasible to engage the services of another representative such as a business advisor. She submits that a confidentiality ring could not be set up because the Claimants are small family run businesses with a small number of personnel who help to manage the businesses. In such circumstances she submits that this is not a case where one or more directors could be included in a confidentiality ring so as to permit disclosure and inspection by those individuals

because all the relevant people were involved in the tender and would need to be involved in any re-tendering.

53. In relation to the concerns raised in Mr Whitton's evidence and in the Council's submissions as to the difficulties of re-running a tender exercise, she submits that there are other methods of carrying out the procurement exercise and I was referred to a number of possibilities including other arrangements, such as using price as a criteria or posing different questions with different model answers or adopting one of a number of other procurement strategies. For instance it was suggested by Mr Williams for the Third Claimant that the Council could proceed not by a tender procedure but could adopt a system of personalisation of care services by direct payments to individual care users, as set out in Department of Health documents and as had recently been adopted by Edinburgh City Council.

54. The case as pleaded by the Claimants in relation to failings in the procurement process essentially criticises the decision of the Council to re-run only the interview stage and to change the weightings given to the pre-qualification questionnaires, invitation to tender and interview stage. They also say that the way in which the re-run interviews were conducted was unfair, that unadvertised sub-criteria and weightings were introduced, that the panel lacked experience and that the panel did not have knowledge of the information which had previously been submitted in writing as part of the procurement process.

55. The evidence before me, particularly in the witness statements of Paul Saunders, director of the Third Claimant, James Creegan, director of the First Claimant, and Judith Mackenow on behalf of the Second Claimant, confirms the fact that the Claimants are small family run businesses. They have appointed managers to carry out the day to day running of the businesses but the tender submissions for this procurement were prepared by the directors and the interviews were attended by the directors, assisted by a small number of staff. In such circumstances I do not see how the directors and personnel could be excluded from seeing the documents and yet provide proper instructions on the allegations. This is not a case where there are large organisations where one or more directors could be included in a confidentiality ring so as to permit disclosure to and inspection by those individuals. Neither is it the case that some third party business advisor could see documents within a confidentiality ring and provide proper instructions on their behalf. Such an advisor would not know their business and could not properly assess the documents, particularly as he would not be able to discuss them with the directors or personnel of the Claimants.

56. The issues in this case relate to lack of fairness and transparency of the tender process. It is therefore necessary for the relevant directors and personnel to be able to comment on and say what effect certain matters, such as allegedly unadvertised sub-criteria, would have had on their tenders. They cannot properly and fairly give instructions for the preparation of their case if they do not have access to the documents from which those matters arise. They need to say what they would have done had they known of the unadvertised sub-criteria, what the answers given by other tenderers meant, whether they were important factors in the context of the particular services, what the effect of feedback was on the tenderer's ability to improve their scores and so on. These are just some examples of the difficulties which I consider would be

encountered if only the solicitors and counsel had access to the currently "restricted" documents.

57. I do however accept that a number of allegations can be dealt with by the Claimants' legal teams without the need for the directors and personnel of the Claimants to see the names of the other tenderers, other information by which they might be identified, the individual marks awarded and the name of the person carrying out the evaluation on behalf of the Council. Submissions can be made on these aspects of the case without the directors or personnel of the Claimants having access to those parts of the underlying documents.

58. Whilst I accept that Mr Whitton has identified potential problems in re-running the procurement process, I am less than convinced that the disclosure of material to the Claimants will give rise to such insurmountable difficulties that there will be no practical way of carrying out a fair procurement process, should the process need to be re-run. Indeed Mr Bowsher did not submit that re-running the procurement process would be impossible. Rather, the Council raise concerns that, if, for instance, it became necessary for them to have to disclose to all tenderers in a future re-run of the procurement process, all the information which they accept they have to produce on disclosure, then in any future re-run of the tender the Council would not be able to differentiate between the tenderers because the tenders would all be similar. The submission by the Council that this would make the tenders indistinguishable because the tenderers would all have a full understanding of the Council's requirements is not, in my judgement well-founded.

59. First, the reality is likely to be that tenderers would make submissions which relied on their strengths based on a better understanding of what the Council required rather than putting forward methods or capabilities which they did not possess. Secondly, if despite that, tenderers merely put forward unsupported statements of methods and capabilities then any proper interview process should be capable of exposing that situation. Thirdly, much of the material in the documents for the earlier tender is unlikely to assist the tenderers because they will have to base the new tender on the particular documents produced for that tender. Fourthly, if the effect of the provision of the documents is to provide the tenderers with a better understanding of the Council's requirements then I do not see that this is detrimental to fair and transparent tendering where that is precisely one of the aims of the statutory regime.

60. I accept that, as was said by Denny J in McLaughlin & Harvey v Department of Finance and Personnel (No 2), if too many pieces of information are put forward in a tender that may make the tender assessment more difficult. That difficulty would need to be and could be overcome by a proper interview process and I do not accept that it would cause any insurmountable difficulties. Rather, that is a matter which would have to be taken into account when the Council were, if necessary, re-running the tender process.

61. On this basis how should the Court approach the question of disclosure and inspection of the documents? In my judgment, there is, as Mr Bowsher submits, a need to balance the Council's interests in having an effective competition for the provision of services, with the need for there to be fair competition and the need for the Claimants to be able to pursue a remedy in these proceedings.

62. As the decision in Varec shows there must be a balance between a number of interests. Member States are required to ensure that award decisions can be reviewed effectively: paragraph 32. The objective of public procurement Directives is the opening up of public procurement to undistorted competition in all Member States and the maintenance of fair competition in the context of contract award procedures and that is an important public interest: see paragraphs 34 and 50. In that case the further interest was in the principle that business secrets should be acknowledged as such: paragraph 49.

63. In the context of Varec the business secrets were the plans of the proposed track link and its constituent parts. The two tenderers were in dispute about the intellectual property rights to those plans. As was stated in the judgment at paragraphs 47, 50 and 51:

> "*47. The adversarial principle means, as a rule, that the parties have a right to a process of inspecting and commenting on the evidence and observations submitted to the court. However, in some cases it may be necessary for certain information to be withheld from the parties in order to preserve the fundamental rights of a third party or to safeguard an important public interest.*
> ...
> *50. Finally the maintenance of fair competition in the context of contract-award procedures is an important public interest, the protection of which is acknowledged in the case law cited at [47] of this judgment.*
> *51. It follows, that, in the context of a review of a decision taken by a contracting authority in relation to a contract-award procedure, the adversarial principle does not mean that the parties are entitled to unlimited and absolute access to all of the information relating to the award procedure concerned which has been filed with the body responsible for the review. On the contrary, that right of access must be balanced against the right of other economic operators to the protection of their confidential information and their business secrets.*

64. I have already noted that, as Coulson J said in Amaryllis v HM Treasury, Varec was simply a case where, on the facts, the commercial confidentiality of the businesses secrets outweighed the other interest.

65. I also accept that, as illustrated by the European Court decision in Fabricom SA v Belgian State [2005] 2 CMLR 25 the principle of equal treatment lies at the centre of public procurement and any necessary re-running of the procurement process would have to take that into account. However on the basis of the material before me I do not consider that, with appropriate safeguards the disclosure of material in this case would mean that a procurement process could not be devised which enabled equal treatment.

66. I have therefore come to the conclusion on the facts of this case that the need for an effective review of the procurement process, including as part of that review, the need in this case under CPR Part 31 for documents to be disclosed to and inspected by the directors and personnel of the Claimants if there is to be a fair hearing, is dominant in the balancing exercise which I have to perform. I do not accept that there is any

insurmountable difficulty or impracticality in the Council re-running, if necessary, the procurement process though they will certainly need to review that process in the light of any decision which has then been made by the court and the extent to which information has been provided to and reviewed by some potential tenderers and not others. That however is all part of the necessary decision which the Council would have to make when deciding on the principles and details of any new procurement process.

67. What is not acceptable is that a party should be precluded from an effective remedy because of concerns that, if the remedy is granted, there may be difficulties in re-running the procurement process. Whilst in some cases it might be necessary and permissible to impose a confidentiality ring, that is not a solution which can apply to the Claimants in the circumstances of this case. Such a process would be unfair to the Claimants who are small family businesses without large and elaborate administrative structures and where the appointment of a person to act within the confidentiality ring is not a practical possibility.

Summary and Conclusion

68. It follows that in this case, subject to safeguards in relation to the manner in which the currently "restricted" documentation should be made available to the Claimants, neither the confidentiality of the documents nor the potential difficulties of re-running the tender process justify not making those documents available to the relevant directors or personnel within the Claimants' organisations.

69. However I consider that there should be safeguards to limit the access by the relevant directors and personnel to the documents so that they only have the access necessary to enable them to read them and give instructions. Accordingly, the individual directors or personnel of the claimant companies shall be permitted to read the following documents and provide instructions but on the basis that they are read either in the solicitor's office or in the presence of their solicitor and they are not to be provided with copies or make notes other than notes which are provided to their solicitors.

70. The Orders which I make in relation to the particular documents are as follows:

(1) The tenderers' submitted Pre-Qualification Questionnaires [Exhibit CF8]

These documents were produced by each of the tenderers as part of the tender process. They consist of a number of sections and only certain sections are relevant to the proceedings. The copies of those documents to be made available to the directors and personnel of the Claimants must be made anonymous by certain redactions to deal with confidentiality issues and matters which can be dealt with as legal submissions, without the need for instructions.

As a result, these documents are to be made available in relation to Section H: TUPE, Section I: Quality Management, Section J: Technical Capacity, questions 1 and 2, only. The documents are to be redacted so as to remove any information which would facilitate identification of the tenderer or which is not necessary to give relevant instructions to solicitors to prepare the case.

(2) The tenderers' submitted Invitation to Tender documents [Exhibit CF9]

These documents were also produced by each of the tenderers as part of the tender process. They consist of a number of sections and only certain sections are relevant to the proceedings. The copies of those documents to be made available to the directors and personnel of the Claimants must be made anonymous by certain redactions to deal with confidentiality issues and matters which can be dealt with as legal submissions, without the need for instructions.

As a result, these documents are to be made available in relation to the questions and answers supplied for Method Statement 1 – Service Provision (questions 1.1 to 1.7), Method Statement 2 – Human Resources (questions 2.1 to 2.4) and Method Statement 3 – Services to Individuals (questions 3.1 to 3.4) and the submitted Project Plan. Those answers are to be redacted so as to remove any information which would facilitate identification of the tenderer or which is not necessary to give relevant instructions to solicitors to prepare the case.

(3) The handwritten evaluation of technical questions, project plan and interview January 2009 [Exhibit CF 10]

These documents were produced by the Council in relation to each of the tenderers, as part of the tender process. The copies of those documents to be made available to the directors and personnel of the Claimants must be made anonymous by certain redactions to deal with confidentiality issues and matters which can be dealt with as legal submissions, without the need for instructions.

These are to be made available with the redaction of "Name of Organisation", "Evaluator name", scores in manuscript and any information which would facilitate identification of the tenderer or which is not necessary to give relevant instructions to solicitors to prepare the case.

(4) The handwritten evaluation of project plan and interview notes January 2009 [Exhibit CF 11]

These documents were also produced by the Council in relation to each of the tenderers, as part of the tender process. The copies of those documents to be made available to the directors and personnel of the Claimants must be made anonymous by certain redactions to deal with confidentiality issues and matters which can be dealt with as legal submissions, without the need for instructions.

These documents are to be made available with the redaction of "Name of Organisation", "Evaluator Name", scores in manuscript and any information which would facilitate identification of the tenderer or which is not necessary to give relevant instructions to solicitors to prepare the case.

(5) The handwritten evaluation of project plan and interview notes June 2009 [Exhibit CF 12]

These are similar to the notes referred to in (4) above.

These documents are to be made available with the redaction of "Name of Organisation", "Evaluator Name", scores in manuscript and any information which would facilitate identification of the tenderer or which is not necessary to give relevant instructions to solicitors to prepare the case.

(6) The Council's guidance for interview panel members May 2009 [CF 13]

This document contains material upon which the instructions of the directors and personnel of the Claimants are needed.

This document is to be made available without any redaction.

(7) The Council's document [pages 234 to 239 of the bundle for the CMC on 19 March 2010]

This document contains material upon which the instructions of the directors and personnel of the Claimants are needed.

This document is to be made available without any redaction.

71. In relation to the documents set out above the parties are to agree a procedure by which any redacted versions of documents are prepared by one party and submitted to the other parties so that agreed redactions can be made. In the event of any disagreement over the scope of redactions, the matter is to be referred to the court for decision on the basis of written submissions.

72. It is intended that the decision on the seven categories of documents should be applied, as appropriate, to any other category of restricted document which the Claimants wish their directors or personnel to read so as to provide instructions. In the event that there are categories of document to which the decision cannot be applied by agreement, the matter should also be referred to the court for a decision on the basis of written submissions.