Neutral Citation Number: [2024] EWCA Civ 717

Case No: CA-2024-000080

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS
TECHNOLOGY AND CONSTRUCTION COURT (KB)
Mr Martin Bowdery KC (Sitting as a High Court Judge)
[2023] EWHC 2921 (TCC)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 28/06/2024

Before:

LORD JUSTICE NEWEY
LORD JUSTICE COULSON
and
LADY JUSTICE NICOLA DAVIES

- -

Between:

Lancashire County Council	**Appellant**
- and -	
Brookhouse Group Limited	**Respondent**

- -
- -

Rhodri Williams KC and Tom Walker (instructed by **Lancashire County Council**) for the **Appellant**
Tim Buley KC and James Neill (instructed by **DLA Piper UK LLP**) for the **Respondent**

Hearing date: 12 June 2024

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This judgment was handed down remotely at 10.30am on 28 June 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

LORD JUSTICE COULSON:

1. Introduction

1. This is a procurement dispute under the Public Contracts Regulations 2015 ("PCR15"). The issue between the parties before the judge below concentrated on whether the short time limit (30 days) or the long time limit (6 months), both set out in Regulation 93, applied to the bringing of these proceedings. One unusual feature of this case is that, although Brookhouse (the claimant in the litigation, but the respondent to this appeal) allege that the contract in question was a public contract covered by the PCR15, Lancashire County Council ("the Council"), (the defendant in the proceedings, but the appellant in this appeal), have always maintained that the contract was not a public contract and not covered by the PCR15. However, it is the Council who are relying on a particular part of the PCR15 to strike out the claim. Thus, before dealing with the underlying issue, it is necessary to analyse precisely how the PCR15 were intended to operate in a situation like this.

2. The Background Facts

2. The litigation is concerned with a site known as the Cuerden Strategic Regional Investment Site ("CSRIS"). This comprises 65 hectares of land in the Preston and South Ribble area of Lancashire. CSRIS is jointly owned: the Council own 71% and Brookhouse 29%.

3. In 2012, the Council commenced a competitive tender procedure in respect of the regeneration of public sector assets across Lancashire. They published a Contract Notice in the OJEU on 8 March 2012 and advertised the competition on their website. The aim of the competition was to procure two Regeneration Property Partners ("RPP") to help to deliver this comprehensive regeneration. For these purposes, the bid was geographically divided into two Lots. CSRIS was within the geographical area covered by Lot 2. It was proposed that each of the contracts between the RPP and the Council would be for an initial term of 10 years, commencing in December 2012. There were also options to extend.

4. The procurement was conducted using the competitive dialogue procedure. The deadline for receipt of requests to participate was 10am on 12 April 2012. On 30 April 2012, namely after the stated deadline had expired, Brookhouse wrote to the Council to express their interest in the competition. The Council responded on 21 May 2012 to say that, because the specified deadline had passed, it was unable to consider Brookhouse as part of the tender process. Brookhouse did not challenge that decision.

5. On 6 December 2012, following the conclusion of the procurement exercise, two contracts were awarded by the Council. The contract in respect of Lot 2 was awarded to Eric Wright Group Limited ("EWG") and was entered into on 20 December 2012. A contract award notice was published in the OJEU on 7 January 2013. Although the contract between the Council and EWG has been referred to by a number of different names in the papers, I shall call it the Strategic Partnering Agreement ("SPA"). The

value of the SPA with EWG was said to be £140 million. There was never any challenge to the public procurement exercise that gave rise to the SPA.

6. In 2019, the Council and Brookhouse attempted to agree heads of terms for a proposed development of the CSRIS including that part owned by Brookhouse. No agreement was forthcoming. In a letter dated 15 January 2020, the Council's solicitors explained their preference to use the SPA to enter into a development agreement with EWG. Thereafter there was considerable correspondence between Brookhouse and the Council in which Brookhouse contested the Council's entitlement to award a contract under the SPA. In the letter from the Council's solicitors to Brookhouse's solicitors dated 13 March 2020, they justified their stance in this way:

> "**3. Framework Agreement with Eric Wright**
>
> 3.1. Our client entered into the SPA with EWG on 20 December 2012 pursuant to its powers contained in section 1 of the Localism Act 2011 having conducted a procurement exercise in accordance with the Public Contracts Regulations 2006 ("Regulations") initiated by the issuing of a contract notice in the Official Journal of the European Union on 6 March 2012. This appears to be the same procurement that you refer to in paragraph 3.2 of your latest letter. Crucially, however, the SPA is not a framework for the purposes of the Regulations and it was not procured as one. It is a long-term strategic partnering arrangement for the structured development of public sector assets in Lancashire – one of two such strategic partnering agreements procured by our client at that time.
> 3.2. The SPA was procured properly and lawfully pursuant to the Regulations, and neither your client nor any other person has challenged the validity of the SPA at or since the date that it was awarded to EWG."

7. Subsequently, the Council provided Brookhouse with the details of various development contracts awarded using the SPA with EWG, including one relating to the CSRIS.

8. On 29 July 2022, the Council entered into a Development Agreement ("the DA") with Maple Grove, a wholly owned subsidiary of EWG. It is the Council's case that they entered into the DA pursuant to the terms of the SPA, and that no competition pursuant to the PCR15 was necessary or required. No Contract Award Notice was published. There was a suggestion that the Council was concerned that the publication of such a Notice would prompt a legal challenge by Brookhouse. In his witness statement dated 27 April 2023, Mr Steve Burns, the Head of Strategic Development, Growth and Regeneration at the Council said at paragraph 17:

> "On 29 July 2022 the Council entered into the Development Agreement (**"DA"**) with Maple Grove, a wholly owned subsidiary of EWG, pursuant to the SPA. No Contract Award Notice was issued. Prior to the DA, Brookhouse had repeatedly challenged the legality of the SPA in correspondence with the Council. As such, the Council was concerned that a Contract Award Notice would simply prompt Brookhouse to issue a claim in respect of the DA. As set out below, there instead followed a further period of correspondence between the parties pertaining to the DA."

9. Despite this apparent concern about Brookhouse's reaction, the Council expressly notified Brookhouse about the DA just a few days later, on 3 August 2022. In my view, the real reason for the absence of a Contract Award Notice became apparent during the course of the oral submissions of Mr Williams KC, on behalf of the Council, when he sought to justify the decision on the basis that the Council was entitled to focus on those bidders, such as Brookhouse, that they knew about, and not risk alerting economic operators more generally to the decision to award the DA to Maple Grove. I return to this point in paragraphs 42 - 43 below.

10. On 8 September 2022, Brookhouse provided a detailed letter setting out their claim against the Council. The Council responded in writing on 22 September 2022. That set out in detail how and why they said they were not obliged to hold a public competition for the DA and could instead rely on the exclusivity provisions in clause 9.1 of the SPA. It is unnecessary to set out any part of the letter because, as Mr Buley KC accepted, the letter explained the Council's position in sufficient detail to allow Brookhouse to know whether or not they had an arguable claim to challenge the direct procurement of the DA.

11. These proceedings were commenced on 20 January 2023.

12. Before going on to identify the pleaded issues, the application to strike out, and the judgment below, it makes sense to set out the relevant parts of the PCR15.

3. The PCR15

13. How the PCR15 work, and their basis in various EU Directives, is explained in some detail in my judgment in *International Game Technology PLC v Gambling Commission* [2023] EWHC 1961 (TCC); 209 Con. L.R. 225, ("*IGT*"). The PCR15 contains detailed rules and procedures concerned with the letting of public contracts, public service contracts, public supply contracts, and public works contracts.

14. Those who can bring claims for a failure to comply with the PCR15 are "economic operators", defined as:

> "Any person, public entity or group of such persons or entities, including any temporary associations of undertakings, which offers the execution of works or a work, the supply of products or the provision of services on the market."

That definition was the subject of detailed consideration in *IGT*. Other definitions that may matter for the purposes of this appeal include a "candidate", defined as "an economic operator that has sought an invitation or has been invited to take part in a restricted procedure, a competitive procedure with negotiation, a negotiated procedure without prior publication, a competitive dialogue or an innovation partnership"; and a "tenderer", defined as "an economic operator that has submitted a tender".

15. Part 2 of the PCR15 describes the various procedures that could be used by the contracting authority when awarding public contracts, set out in detail at Regulations 26-33. Regulation 27 deals with the open procedure. Regulations 28, 29, 30 and 31 concern, respectively, the restricted procedure, the competitive procedure with negotiation, competitive dialogue, and innovation partnership. Each of these

Regulations provides that the procedure commences when "any economic operator may submit a request to participate". Such a request is made, either in response to "a call for competition" or to "a contract notice", both of which emanate from the contracting authority.

16. Regulation 55 is entitled "Informing candidates and tenderers". The relevant parts read as follows:

> "**55. — Informing candidates and tenderers**
> (1) Contracting authorities shall as soon as possible inform each candidate and tenderer of decisions reached concerning the conclusion of a framework agreement, the award of a contract or admittance to a dynamic purchasing system, including the grounds for any decision—
> (a) not to conclude a framework agreement,
> (b) not to award a contract for which there has been a call for competition,
> (c) to recommence the procedure, or
> (d) not to implement a dynamic purchasing system.
> (2) On request from the candidate or tenderer concerned, the contracting authority shall as quickly as possible, and in any event within 15 days from receipt of a written request, inform—
> (a) any unsuccessful candidate of the reasons for the rejection of its request to participate;
> (b) any unsuccessful tenderer of the reasons for the rejection of its tender, including, for the cases referred to in regulation 42(14) and (15), the reasons for its decision of non-equivalence or its decision that the works, supplies or services do not meet the performance or functional requirements;
> (c) any tenderer that has made an admissible tender of the characteristics and relative advantages of the tender selected as well as the name of the successful tenderer or the parties to the framework agreement;
> (d) any tenderer that has made an admissible tender of the conduct and progress of negotiations and dialogue with tenderers."

17. The contracting authority is obliged by Regulation 89 to comply with the provisions of Parts 2 and 3 of the PCR15. That is the 'hook' on which any public procurement claim will hang. Pursuant to Regulation 91, a breach of the duty is actionable by any economic operator which, in consequence, suffers or risks suffering loss or damage. There are then detailed Regulations, from Regulation 92 to Regulation 104, which apply to those proceedings.

18. Since this appeal is concerned with time limits, the following should be noted:

(a) Regulation 92 sets out general time limits for starting proceedings under the PCR15 which, subject to certain exceptions, provides at Regulation 92(2) those proceedings "must be started within 30 days beginning with the date when the economic operator first knew or ought to have known that grounds for starting the proceedings had arisen".

(b) If, as here, the economic operator is seeking a declaration of ineffectiveness in respect of the underlying contract (in this case, the DA), there are two potential time limits, as set out in Regulation 93:

> "**93. — Special time limits for seeking a declaration of ineffectiveness**
> (1) This regulation limits the time within which proceedings may be started where the proceedings seek a declaration of ineffectiveness.
> (2) Such proceedings must be started—
> (a) where paragraph (3) or (5) applies, within 30 days beginning with the relevant date mentioned in that paragraph;
> (b) in any event, within 6 months beginning with the day after the date on which the contract was entered into.
> (3) This paragraph applies where a relevant contract award notice has been published [on the UK e-notification service], in which case the relevant date is the day after the date on which the notice was published.
> (4) For that purpose, a contract award notice is relevant if, and only if—
> (a) the contract was awarded without prior publication of a contract notice; and
> (b) the contract award notice includes justification of the decision of the contracting authority to award the contract without prior publication of a contract notice.
> (5) This paragraph applies where the contracting authority has informed the economic operator of—
> (a) the conclusion of the contract, and
> (b) a summary of the relevant reasons, in which case the relevant date is the day after the date on which the economic operator was informed of the conclusion or, if later, was informed of a summary of the relevant reasons.
> (6) In paragraph (5), *"the relevant reasons"* means the reasons which the economic operator would have been entitled to receive in response to a request under regulation 55(2).
> (7) For the purposes of this regulation, proceedings are to be regarded as started when the claim form is issued."

19. Thus, if Regulations 93(3) or (5) apply, Regulation 93(2)(a) requires that the proceedings must be started within 30 days beginning with the relevant date mentioned in those paragraphs. In any event (so if Regulations 93(3) and (5) do *not* apply), Regulation 93(2)(b) requires that the proceedings must be started within 6 months beginning with the day after the date on which the contract was entered into. Regulations 93(3) and 93(5) are each triggered by the contracting authority, and provide a mechanism which, in certain circumstances, allows the contracting authority to reduce the period of 6 months (which would otherwise apply) to a period of 30 days.

20. The remedies available to an economic operator who wishes to challenge a public procurement depend on the timing of the challenge. Regulation 97 sets out the remedies available where the underlying contract has not been entered into. Regulation 98 sets out the more limited remedies available where the underlying contract has been entered into before the challenge was made. One such remedy will be the grant of a declaration of ineffectiveness under Regulation 99 in respect of the contract entered into by the contracting authority, unless there are general interest grounds under Regulation 100 for not making such a declaration.

21. Regulation 99 sets out the three grounds for a claim for a declaration of ineffectiveness. For present purposes, it is appropriate to set out the first two grounds

only (since the third relates to framework agreements or dynamic purchasing systems which do not arise here):

> "(2)
> *The first ground*
> Subject to paragraph (3), the first ground applies where the contract has been awarded without prior publication of a contract notice in any case in which Part 2 required the prior publication of a contract notice.
> (3) The first ground does not apply if all the following apply:—
> (a) the contracting authority considered the award of the contract without prior publication of a contract notice to be permitted by Part 2;
> (b) the contracting authority has had published [on the UK e-notification service] 1 a voluntary transparency notice expressing its intention to enter into the contract; and
> (c) the contract has not been entered into before the end of a period of at least 10 days beginning with the day after the date on which the voluntary transparency notice was published [on the UK e-notification service].
> (4) In paragraph (3), *"voluntary transparency notice"* means a notice [...] 2 which contains the following information—
> (a) the name and contact details of the contracting authority;
> (b) a description of the object of the contract;
> (c) a justification of the decision of the contracting authority to award the contract without prior publication of a contract notice;
> (d) the name and contact details of the economic operator to be awarded the contract; and
> (e) where appropriate, any other information which the contracting authority considers it useful to include.
> (5)
> *The second ground*
> The second ground applies where all the following apply—
> (a) the contract has been entered into in breach of any requirement imposed by—
> (i) regulation 87 (the standstill period),
> (ii) regulation 95 (contract-making suspended by challenge to award), or
> (iii) regulation 96(1)(b) (interim order restoring or modifying a suspension originally imposed by regulation 95);
> (b) there has also been a breach of the duty owed to the economic operator in accordance with regulation 89 or 90 in respect of obligations other than those imposed by regulation 87 (the standstill period) and this Chapter;
> (c) the breach mentioned in sub-paragraph (a) has deprived the economic operator of the possibility of starting proceedings in respect of the breach mentioned in sub-paragraph (b), or pursuing them to a proper conclusion, before the contract was entered into; and
> (d) the breach mentioned in sub-paragraph (b) has affected the chances of the economic operator obtaining the contract."

22. In my view, the significance of the first ground identified in Regulation 99 cannot be overstated. Its purpose is to sanction the direct award of a public contract without a

competition, a process described by the European Court as "the most serious breach of Community Law in the field of public procurement": see *Stadt Halle and RPL Lochau* (Case-2703) [2005] E.C.R.1-1 at [37]. That description is also reflected at Recital 13 of the Remedies Directive 2007/66/E.C.

4. The Pleadings

23. The Claim Form sets out the background facts in some detail. It addresses the relevant legal framework from [36] onwards. At [37] it is averred that the DA is either a public works contract or a mixed contract for works and services and that, either way, it was covered by the PCR15. The Claim Form identifies the Council's alleged duties pursuant to Regulations 90 and 91 and then, at [42] onwards, it alleges that the Council was in breach of the duties owed under the PCR15. The principal claim is for a declaration that, in consequence of the Council's breaches, the DA was ineffective.

24. At [18] of the Defence, it is specifically denied that the DA was a separate public works contract for the purposes of the PCR15. There is accordingly an issue between the parties on the face of the pleadings as to whether the PCR15 apply at all.

25. At [21] of the Defence, the Council notes that the claim is brought under the PCR15 and goes on to rely on Regulation 93(2)(a) to make its case that the proceedings were not started within the 30 day time limit. For this purpose the Council say that, at the latest, by 22 September 2022 (the letter referred to in paragraph 10 above), the Council had informed Brookhouse of the conclusion of the DA and provided it with a summary of the relevant reasons, and that therefore the 30 day time limit expired on 24 October 2022.

5. The Application to Strike Out

26. On 12 April 2023, Brookhouse issued an application to strike out those parts of the Council's defence that relied on Regulation 93(2)(a). By a cross-application, the Council applied to strike out Brookhouse's claim in its entirety on the basis that it was statute-barred. The applications were heard by Mr Martin Bowdery KC, sitting as a Deputy High Court Judge in the TCC ("the judge"), at a hearing on 17 October 2023. By an order dated 20 November 2023, the judge granted Brookhouse's application to strike out paragraphs [21]-[25] of the Council's Defence and dismissed the Council's cross-application.

6. The Judgment Below

27. The judge found against the Council on two central issues. First, at [30] he found that Regulation 93(2)(a) did not apply. He said:

> "30. The shorter time limit in Regulation 93(2)(a) will apply where:
> a) Regulation 93(3) applies where the contracting authority publishes a contract award notice.
> b) Regulation 93(5) applies which means that the economic operator has been given reasons not only of the conclusion of a contract but also "the relevant reasons";
> c) These can only be by virtue of Regulation 93(6) the reasons to which the economic operator was "entitled" under Regulation 55(2);

> d) Regulation 55 only applies where:
> i) A contract has been awarded pursuant to a competitive tender procedure in accordance with the PCRs, so as to engage the obligation on the contracting authority under reg 55(1);
> (ii) A "candidate" or "tenderer" within the meaning of reg 2 as defined above has requested reasons in accordance with reg 55(2);
> (iii) The reasons requested must relate to one of the four matters specified in reg 55(2) which are quite specific;
> (iv) Reasons relating to those matters need to have been provided, so as (inter alia) to start time running under reg 93(5).”

28. Secondly, the judge found that the reasons provided by the Council did not comply with Regulation 55(2). He said:

> “31. The reasons relied upon by the Defendant are the reasons set out in its letter dated 22nd September 2022 as to why no competition at all was conducted for the Contract in question. Those reasons:
> a) were not requested by a tenderer or a candidate and were not given to a candidate or a tenderer. This in itself is fatal to the Limitation Defence.
> b) do not on any analysis constitute a summary of the relevant reasons for the purpose of reg 55(2) of the PCRs. It is simply a written response to the Claimant’s letter before claim. The Defendant’s response does not contain any information that relates to any of the matters specified in reg 55 (2).”

29. These two paragraphs of the judgment below give rise to the two grounds of appeal. The first ground is that the judge was wrong to find that Regulation 93(2)(a), and therefore the 30 day period, did not apply in circumstances where there had been no competition. The second ground is that the judge was wrong to find that the Council had not provided a summary of the relevant reasons, so that again the 30 day period did not apply. As we shall see, these two grounds actually meld into one substantive point.

7. Common Ground and the Central Issue on Appeal

30. It is sensible to set out first the common ground. It is agreed that, for the purposes of the application below and this appeal, the PCR15 apply to the facts of this case. The assumption is that Brookhouse can bring themselves within the first ground of Regulation 99, and claim a declaration of ineffectiveness because “the contract has been awarded without prior publication of a Contract Notice.”

31. It is also common ground that Brookhouse were an “economic operator” for the purposes of PCR15, but that they were not a “tenderer”. During the course of his oral submissions, Mr Williams suggested - for the first time - that Brookhouse were a candidate or, alternatively, what he called a “would-be candidate”. I deal with those submissions in paragraphs 49 - 59 below.

32. There are often arguments about the sufficiency of the reasons provided by a contracting authority to an unsuccessful candidate/tenderer. The leading case is *Sita UK Ltd v Greater Manchester Waste Disposal Authority* [2011] EWCA Civ 156 [2011] 2 CMLR32, in which this court approved the test formulated by Mann J at first

instance, namely that "the standard ought to be knowledge of the facts which apparently clearly indicate, though they need not absolutely prove, an infringement". At [30] Elias LJ rejected the contention that time did not run (under what is now Regulation 92(2)) until a claimant knew that it had "a real likelihood of success". He drew a distinction between knowledge of "the detailed facts that might be deployed in support of the claim" and of "the essential facts sufficient to constitute a course of action", indicating that the knowledge of the latter rather than the former would be sufficient to start the 30 day period.

33. However, as Mr Buley concedes, no similar dispute as to sufficiency of reasons arises here. Mr Buley accepted that, certainly no later than the letter of 22 September 2022 (see above), Brookhouse had sufficient reasons, in the public law sense, to bring a claim. His argument is that this would only be relevant if the general time limit of 30 days in Regulation 92(2) applied, and nobody was arguing to that effect. Instead, this was a claim for a declaration of ineffectiveness, and therefore the relevant time limits were those set out in Regulation 93.

34. It was agreed that the 30 days were only applicable under Regulation 93(2)(a) if either Regulation 93(3) or 93(5) had been triggered. It was also agreed that Regulation 93(3) had *not* been triggered, because there had been no Contract Award Notice. Mr Buley argued that, since there had been no competition at all, Regulations 93(5) and (6) could not apply either, so that the only applicable time limit was the 6 months referred to in Regulation 93(2)(b). That was what the judge found. On that basis, time started to run the day after the DA was entered into, namely 30 July 2022. The 6 months would have expired on 30 January 2023. The proceedings were therefore commenced in time.

35. Mr Williams argued that a wider interpretation of "the relevant reasons" in Regulations 93(5) and (6) was required in cases such as this, where there had been no public competition and that, since the Council had provided Brookhouse with sufficient information for them to know whether they had a claim or not no later than 22 September 2022, the applicable time limit was the 30 days starting on 23 September 2022. If that argument was right then the proceedings were commenced out of time.

36. I propose to address this central issue in two sections. First, I deal with the proper operation of Regulations 55, 93 and 99 of the PCR15, and secondly I go on to address the other specific points made by Mr Williams on behalf of the Council.

8. The Proper Operation of Regulations 55, 93 and 99 of the PCR15

37. In my view, the primary answer to this appeal lies in an understanding of the proper operation of Regulations 55, 93 and 99 of the PCR15. They must be considered in reverse order, because the starting point is the claim for a declaration of ineffectiveness under Regulation 99. The claim for such a declaration here is under the first ground set out in Regulations 99(2)-(4), because there was no prior publication of a contract notice. The second ground could never have applied because it only arises where a contracting authority has entered into the underlying contract, despite the operation of a standstill period or the automatic suspension: it presupposes that there has been a competition, and that the contracting authority has then, for

whatever reason, jumped the gun and awarded the contract, despite the standstill period and/or any suspension of the contract award.

38. I consider that those two, very different, grounds for a declaration for ineffectiveness are directly mirrored in Regulation 93, which is headed "Special time limits for seeking a declaration of ineffectiveness" and therefore relates directly to Regulation 99. Regulations 93(3) and (4) are concerned specifically with the first ground for a declaration of ineffectiveness. If there has been no contract notice (i.e., no announcement of the start of a public procurement process), an economic operator will have 6 months to challenge the direct award of a contract. But the contracting authority can reduce that to 30 days if it issues a Contract Award Notice under Regulation 93(3), thereby notifying any economic operator who might have been interested in the underlying contract that it has in fact been awarded to someone else. In this way, where there has been a direct award, the contracting authority can reduce the 6 month time limit to a period of 30 days, starting from the day after the date on which the contract was published.

39. As I have said, the second ground for a declaration of ineffectiveness under Regulation 99(5) only arises where there has been a competition, but the contracting authority has then let the contract before it was entitled to. In those circumstances, the contracting authority can again reduce the 6 months long-stop period by complying with Regulations 93(5) and 93(6) and informing the economic operator about the conclusion of the contract, and providing a summary of the relevant reasons. If the contracting authority takes that course, the 30 days starts on the day after the date on which the economic operator was informed of the conclusion or, if later, was informed of a summary of the relevant reasons.

9. The Council's Basic Case: Analysis and Conclusions

40. At its broadest, the Council's basic case is that, although there had been no competition, "the relevant reasons" should be given a wide interpretation so as to cover an explanation to a hypothetical economic operator (who would have been involved in the competition, had there been a competition to be involved in) as to why there had in fact been no competition at all. Mr Williams said that, regardless of the specific words in Regulation 55(2), the test for "the relevant reasons" should be capable of being satisfied if the economic operator knew why there had been no competition and the underlying contract had been awarded directly. In my view, this argument must fail for four principal reasons.

41. First, it entirely ignores the proper construction of Regulation 93, when it is read in conjunction with Regulation 99. Since there had in fact been no competition here, the second ground for a declaration of ineffectiveness could not arise. It was only the first ground that was applicable. In those circumstances, the Council could have reduced the long-stop period of 6 months to 30 days, but only if they had published a relevant Contract Award Notice. Since they deliberately chose not to do so, the 6 month period was not reduced. Regulation 93(5) was irrelevant because that presupposed, particularly with its express reference to Regulation 55(2), that there had actually been a competition. It related to the second ground for a declaration of ineffectiveness, which does not arise here.

42. Secondly, as this case shows, there are sound policy reasons behind this construction of Regulations 93 and 99. As I have noted, it is common ground that the Council could have issued a Contract Award Notice, thereby reducing the relevant period to 30 days. They chose not to because they took a tactical decision to "focus", as Mr Williams put it, only on the economic operator (Brookhouse) of which they were aware (paragraph 9 above). They knew that a Contract Award Notice would alert other economic operators and they did not want that to happen.

43. In my view, on the assumption we must make that the PCR15 apply to this case, that decision was a flagrant breach of the Council's obligations under the PCR15 in respect of transparency, fairness, and the requirement to treat each economic operator equally. Although Brookhouse were told that the DA had been let, it does not appear that any other economic operators were informed. The Council were therefore in breach of their obligations under Part 2 of PCR15, in respect of any other economic operator that might have had standing to bring a claim. Mr Buley described the Council's reasoning and decision in this respect as "astonishing", and I am bound to agree with him. In those circumstances, it would be wholly wrong to construe Regulations 93(5) and 93(6) in a way which would allow the Council to avoid their wider obligations to all relevant economic operators, much less to do so by ignoring the fact that Regulation 55(2) presupposes that there had actually been a public competition in the first place.

44. Thirdly, I reject Mr Williams' argument that the words in Regulation 93(6), which refer to the reasons which the economic operator "would have been entitled to receive", in some way envisaged the provision of reasons to a hypothetical economic operator who had never been involved in any competition (because there had never been such a competition). Regulation 55(2) sets out the reasons which a contracting authority would provide to an unsuccessful candidate or tenderer "on request from the candidate or tenderer concerned". In other words, the information in Regulation 55(2) would not ordinarily be provided by the contracting authority unless they were asked for it. Regulation 93(5), which is designed to allow a contracting authority to reduce the time limit from 6 months to 30 days in particular circumstances, therefore puts the onus on the contracting authority to provide this information voluntarily, even if it had not been requested. That is why Regulation 93(6) refers to the reasons which the economic operator "would have been entitled to receive"; they are the reasons to which they would have been entitled, had they made a request. In order for the contracting authority to trigger the 30 day period, they have a positive obligation to provide the information that they would otherwise only have had to provide on request. There is therefore no question of this Regulation extending to a hypothetical economic operator.

45. Fourthly, a fair summary of the information in Regulation 55(2) is that it is the sort of information which the unsuccessful candidate or tenderer would require in order to know why its request to participate, or its tender, had been rejected; the reasons why they had been "unsuccessful". There is nothing in Regulation 55 that requires the provision of reasons explaining why there had been no public competition in the first place; on the contrary, Regulation 55 pre-supposes that there has at least been a call for competition, and that the unsuccessful candidate or tenderer has been involved from the initial stage in the competition (Regulation 55(2)(a)), all the way through to the receipt and consideration of competitive tenders (Regulations 55(2)(b)-(d)). It is

all about why the candidate or tenderer has been unsuccessful in a competition, and not at all about why there has not been a competition at all.

46. In one sense, the proof of this pudding is in the eating. The letter of 22 September 2022 (paragraph 10 above) did not give any of the reasons identified in Regulation 55(2). It could not do so, because there had been no competition.

47. For all those reasons, I reject the Council's basic contention, because it ignores the proper construction (and operation) of the PCR15.

10. The Council's Other Specific Arguments

48. The Council made a number of other submissions in support of their case that the applicable time period was 30 days. Some of those were made for the first time during oral argument. I deal with each below.

10.1 Were Brookhouse a "Candidate"?

49. In his oral submissions, Mr Williams argued that Brookhouse were "a candidate" under PCR15, and that therefore they were entitled to the reasons identified at Regulation 55(2)(a). He said that, both in 2012 (when their expression of interest was ruled to be out of time), and in 2022 (when they set out their position at length in the correspondence before and after the award of the DA), they had requested to participate in, respectively, the procurement of the SPA, and the award of the DA to Maple Grove. Thus he argued that Brookhouse fell within Regulation 55(2)(a). Mr Williams expressly conceded that Brookhouse could not rely on Regulation 55(2)(b)-(d) in any event.

50. I reject the submission that Brookhouse was a candidate, which was not made below and did not feature in the Council's skeleton argument. First, Regulation 55(1) makes clear that it concerns the provision of information to an "unsuccessful" candidate or tenderer where there has been at least the start of a public procurement competition. That is not this case: in the absence of a competition, it cannot be said that Brookhouse had been "unsuccessful".

51. In 2012, Brookhouse was not a candidate because its expression of interest was too late, and therefore null and void. Further, the definition of candidate in PCR06 (the applicable definition at the time of the 2012 procurement) expressly *excluded* "any economic operator which has been informed of the rejection of its application and the reasons for it". That therefore excluded Brookhouse, who had been given that information in May 2012 (paragraph 4 above). In any event, even if they had been a candidate, they had the relevant reasons in May 2012, but they made no difference because the 2012 procurement was never challenged.

52. As to 2022, Brookhouse could not have been a candidate because there was no competition. Under Regulation 55(2)(a), the information to be provided to an unsuccessful candidate concern "the reasons for the rejection of the candidate's request to participate". As I have indicated at paragraph 15 above, a "request to participate" has a specific meaning and effect under Regulations 28 onwards. A request to participate can only be made following a call for competition or a contract notice, both provided by the contracting authority. Since the Council provided neither

here, there could not be a request to participate under the PCR15. So again, Brookhouse were not a candidate in 2022 either.

10.2 Were Brookhouse a "Would-be Candidate"?

53. In the alternative, Mr Williams argued that Brookhouse were what he described as a "would-be candidate", in the sense that they would have been a candidate if there had been a call for competition. He said that that then meant that they fell within Regulation 55(2)(a).

54. Again, I am bound to reject that submission. The definition of a "candidate" is set out at paragraph 14 above. It means an economic operator that has sought an invitation following a call for competition, or has been invited to take part in such a competition. It is a definition rooted in the actual occurrence of events happening at the early stages of a public competition. The definition does not include economic operators who would have sought an invitation if they had known that there was a competition (which there was not). In short, a "would-be candidate" is not a creature known to the PCR15 and does not fall within the relevant definition.

55. In support of his argument, Mr Williams relied on that part of my judgment in *IGT* which set out the somewhat tortuous history of the PCR15. He relied in particular on the definition of a contractor in PCR06 as a person "who sought, who seeks, or would have wished, to be the person to whom a public works contract is awarded…" He prayed this in aid of his submission that a candidate could include a "would-be candidate".

56. It seems to me that this argument fails at every level. First, it relies on a definition in PCR06 which has been superseded by PCR15: "contractor" is no longer a relevant entity under the PCR15 and is not a defined term. Although Mr Williams argued that the change of wording was somehow irrelevant, I profoundly disagree: the court's task is to construe the meaning and effect of certain Regulations in the PCR15, not the effect of older, different Regulations with different and (in some instances) superseded terms.

57. Secondly this argument also ignores the fact that, at Regulation 32 within PCR06, there was a definition of "candidate" which is effectively the same as the present definition ("applied to be included amongst the economic operators to be selected to tender or to negotiate the contract"). It therefore envisaged that a candidate would request to be included in an actual competition; it did not include someone "who would have wished" to be a candidate. Regulation 32 PCR06 is the immediate predecessor of Regulation 55 of the PCR15.

58. Thirdly, and more generally, I should say that I consider that Mr Williams' belated reliance on *IGT* was misplaced. That was a case solely concerned with standing, and there is no dispute here that Brookhouse have the necessary standing. One example of how *IGT* concerned a very different legal issue is my analysis of *Grossmann Air Service, Bedarfsluftahrtunternehmen Gmbh & Co. KG v Republik Oesterreich* (Case C-230/02). That was relevant in *IGT* because, although I considered that, primarily, the only economic operators with standing to bring a public procurement challenge were those which had been involved in a competition, I expressly accepted that there were exceptions to that, such as *Grossmann*, where the economic operator did not

participate in the tender because it believed that the specification documents were biased in favour of another economic operator.

59. But that is irrelevant here. Brookhouse do not need to rely on the *Grossmann* exception, because Regulation 99 expressly covers their position, and it is in any event agreed that Brookhouse have the necessary standing to make this claim. So *IGT* offers no real assistance in the present case.

10.3 The Procurement Act 2023

60. As already noted, PCR15 is the product of various EU directives going back to 1989. Following Brexit, Parliament decided that the UK should have its own, standalone procurement regime, as now encapsulated in the Procurement Act 2023. The part of the Procurement Act dealing with time limits is s.106, which provides as follows:

> "**106 Time limits on claims**
> (1) A supplier must commence any specified set-aside proceedings before the earlier of—
> (a) the end of the period of 30 days beginning with the day on which the supplier first knew, or ought to have known, about the circumstances giving rise to the claim;
> (b) the end of the period of six months beginning with the day the contract was entered into or modified.
> (2) A supplier must commence any other proceedings under this Part before the end of the period of 30 days beginning with the day on which the supplier first knew, or ought to have known, about the circumstances giving rise to the claim."

61. Mr Williams argued that, since it had not been suggested that the Procurement Act was making any significant changes to the time limits in PCR15, he could rely on s.106 in support of his argument that what mattered under Regulations 93(5) and (6) was when Brookhouse first had sufficient information to bring their claim, not "the relevant reasons" as defined in Regulation 93(6).

62. Again, there are a number of reasons why I am unable to accept that submission. First, it is always potentially dangerous to try and construe a previous piece of legislation by reference to a subsequent one. That is particularly the case where, as here, the PCR15 was driven by various European Directives, and often copied them out word-for-word, whilst the Procurement Act 2023 had no such imperative, and uses many terms and concepts which are entirely new. Moreover, I consider that the wording of s.106 is plainly different to the regime in Regulation 93 dealing with the 30 day time limit, in cases where there is a claim for a declaration of ineffectiveness. The key expression "the relevant reasons" does not feature in s.106 at all. In my view, s.106 amalgamates parts only of Regulations 92 and 93. It omits others. It may have an effect which the Council likes, but it is not based on the words of PCR15. For these reasons, I consider it to be a wholly unsafe guide to what the PCR15 actually mean.

10.4 Alstom Transport v Eurostar International Limited & Anr [2011] EWHC 1828 (Ch)

63. Mr Williams relied on *Alstom*, a case where the 30 day time limit was applied despite the fact that it was assumed that the contract in question had been materially varied, such that there should have been a fresh competition.

64. I derive no assistance from *Alstom*. It was dealing with a wholly different case on the facts, in which there had been a call for competition and where reasons had been given as to why Alstom had been unsuccessful. Mann J rejected the submission that there could never have been a summary of reasons because of the material variation. He found that the actual giving of reasons triggered the 30 days, and it mattered not that there was subsequently a material variation. In my view, his reasoning at [69], which is based on the premise that "tenderers and candidates are entitled to assume that once they are part of the process, they will get the information referred to in Reg 33(2)", supports Brookhouse's argument that entirely different considerations apply where there has actually been a process. It is all very far removed from the facts of this case.

10.5 The Principle of Rapidity

65. Finally, Mr Williams sought to rely on the principle of rapidity. He said that PCR15 had to be construed with that principle very much in mind.

66. I agree that the principle of rapidity is an important element of public procurement law: see *SITA*. Mr Buley did not dispute that. But the real issue here is relatively straightforward. It was in the Council's hands as to whether the tight 30 day timetable was imposed on Brookhouse, and any other economic operator. They could have achieved that by issuing a Contract Award Notice under Regulation 93(3)(3). They chose not to do so for reasons which I have already criticised. It was therefore entirely their responsibility that the relevant period remained 6 months, not 30 days.

10.6 The 'Merits' Point

67. Lastly, Mr Williams advanced a "merits" argument in paragraph 47 of his skeleton argument, based on the premise that the effect of Brookhouse's case and the judge's decision was that, where a party has not taken part in a procurement process, the 6 month limitation period would automatically apply. He then takes some examples to demonstrate how absurd or unfair this might be. In my view, these arguments are based on a completely false premise. That is not what the judge decided and not what the PCR15 provide.

68. An economic operator who has not taken part in a public procurement process, because there was no process in which to take part, and only finds out later that there was a direct contract award, is at a huge disadvantage. It must inevitably be granted longer to bring a claim than a candidate or tenderer who was involved all the way through and had been provided with all the necessary information to know why its bid had not been successful. That is the justification for the 6 month period. But an economic operator who did not know about the proposed contract could still be limited to 30 days *if* the contracting authority chooses to publish the Contract Award Notice envisaged in Regulation 93(3). So (contrary to the Council's suggestion) the 6 months is not automatic. But if the contracting authority decides not to issue a

Contract Award Notice, because it does not want to alert economic operators generally to the direct award of the contract, then that contracting authority can hardly complain at the application of the longer period.

69. An economic operator who declined to take part in a process which does take place will have no standing to bring a claim, unless it can bring itself within the *Grossmann* exception or something similar. So the argument about time limits would not arise at all.

11. Conclusions

70. For the reasons that I have given, I consider that, on the assumption that the PCR15 applied to the present case, the applicable time limit was 6 months. That is a conclusion based primarily on the proper construction of the relevant parts of PCR15, and also on a rejection of the other arguments put forward by the Council to try and get round that straightforward construction. In those circumstances, if My Lady and My Lord agree, I would dismiss this appeal.

LADY JUSTICE NICOLA DAVIES

71. I agree.

LORD JUSTICE NEWEY

72. I also agree.