Neutral Citation Number: [2020] EWHC 1018 (TCC)

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS IN MANCHESTER
TECHNOLOGY AND CONSTRUCTION COURT (QBD)

Manchester Civil Justice Centre
1 Bridge Street West
Manchester M60 9DJ

Date: 6th May 2020

Before:

HIS HONOUR JUDGE EYRE QC

- -

Case No: HT-2020-MAN-000003

Between:

RIVERSIDE TRUCK RENTAL LIMTED	**Claimant**
- and -	
LANCASHIRE COUNTY COUNCIL	**Defendant**

AND IN THE MATTER OF:

Case No: HT-2020-MAN-000006

THE QUEEN	
(on the application of **)**	**Claimant**
RIVERSIDE TRUCK RENTAL LIMTED	
- and -	
LANCASHIRE COUNTY COUNCIL	**Defendant**
-and-	
MONKS CONTRACTORS LIMITED	
	Interested Party

- -
- -

Mr. Paul Chaisty QC and Miss. Suzanne Rab (instructed by **Napthens LLP**) for the **Claimant**
Mr. Rhodri Williams QC (instructed by **Ken Watt**) for the **Defendant**

Hearing date: 7th April 2020

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JUDGMENT

COVID-19: This judgment was handed down remotely by circulation to the parties' representatives by email. It will also be released for publication on BAILII and other websites. The date and time for hand-down were 2.00pm on 6th May 2020.

HH Judge Eyre QC:

Introduction.

1. The Claimant is engaged in the supply and maintenance of fleets of tractor cabs and trailers. Lancashire Renewables Ltd ("LRL") is wholly owned by the Defendant and operates the Defendant's waste processing facilities. The Claimant currently supplies the cabs and trailers used by LRL in that task. The existing contract comes to an end in October 2020 and in September 2019 the Defendant commenced the procurement process in relation to a replacement contract for the provision of vehicles from October 2020.

2. The Claimant submitted a tender for the new contract but on 29th November 2019 it was told that its tender had been rejected as failing to comply with the terms of the Invitation to Tender and that the Interested Party ("Monks") was the successful tenderer.

3. In January 2020 the Claimant commenced two sets of proceedings. It issued in the Technology and Construction Court a claim alleging that the Defendant had broken its duty under the Public Contracts Regulations 2015 ("the Regulations") and seeking a declaration and damages in respect of the alleged breaches ("the Procurement Claim"). At the same time it commenced proceedings in the Administrative Court seeking judicial review of the Defendant's decision to disqualify it from the procurement process ("the Judicial Review Claim"). The Claimant does not concede that either set of proceedings was commenced out of time but to guard against a conclusion that they were out of time it issued applications for extensions of time in both claims.

4. HH Judge Stephen Davies ordered that the Judicial Review Claim be transferred to the Technology and Construction Court and be tried with the Procurement Claim. The matter came before me for determination of the applications for extension of time. That hearing was conducted remotely by way of a Skype video hearing. It was not possible to broadcast that hearing in a public court and I directed that it be heard in private because that was necessary to secure the performance of justice. It had been hoped to conduct the oral permission hearing in respect of the Judicial Review Claim at the same time but the practicalities of conducting the remote hearing (in particular initial difficulties in connexion and the additional time taken by such a hearing as opposed to one conducted face to face) meant that was not possible.

5. Monks have chosen not to make any submissions in relation to the Claimant's application for an extension of time in respect of the Judicial Review Claim saying that the questions of whether the claim was issued in time or whether there should be an extension of time are outside their knowledge. However, Christopher Monk, a director of Monks, has provided a statement setting out the steps which Monks have taken and the expenditure they have incurred in preparing to undertake the contracted works. The Claimant takes issue with the necessity for and reasonableness of those steps.

The Parties' Dealings.

6. It is necessary to set out the history of the parties' dealings in some detail.

7. The Invitation to Tender was published on 19th September 2019 and imposed a deadline of 29th October 2019 for the return of tenders. The Invitation to Tender included as a "mandatory requirement" in the Tractor Unit Specification the provision that the Cab Type was to be a "Sleeper Cab" with "Single Bunk, standing height". On 25th September 2019 the Defendant issued a clarification which said as follows in respect of "Evaluation of Schedule 1 Part A – Tractor –Trailer Specifications".

> " Please note that Schedule 1 Part A will be scored on a pass/fail basis …If a Tenderer's Schedule 1 Part A is unacceptable and therefore fails for any of the criteria, their tender submission will be non-compliant and therefore disqualified…."

8. The Claimant's tender was submitted on 28th October 2019 and provided for a cab with an interior height of 1,600mm (equivalent to approximately 5' 3").

9. On 29th November 2019 the Defendant wrote to the Claimant ("the Rejection Decision") saying that it had evaluated the tenders and had found the Claimant's tender to be non-compliant because the interior height of 1,600mm did not "constitute standing height". The letter said that the Claimant's tender had been disqualified at that point as non-compliant. It went on to say that Monks had been the successful tenderer and that LRL would observe a ten-day standstill period until 9th December 2019.

10. The Claimant wrote in response to the Rejection Decision on 2nd December 2019. In that letter the Claimant criticised the "standing height" requirement as "a technicality that at best is ambiguous and open to interpretation". It said that the price of the Claimant's tender would have been the same for a cab with a higher internal height. The letter concluded by saying:

> "We are of the view that the ambiguity of internal cab height …does point to a legal challenge of the tender process…. I am formally requesting that [LRL] do evaluate our submission and consider our opinion that the cab height should have stated a minimum height. We will challenge this if our tender is not considered."

11. The Defendant replied in a letter dated 6th December 2019 saying that the evaluation of the Claimant's tender had been discontinued at the time it was found to be non-compliant. It went on to say that scores had, however, been allocated in the process leading up to disqualification. The letter proceeded to set out at some length the Defendant's position that the interior height set out in the Claimant's tender was not a standing height and that it had been entitled to disqualify the tender on that ground.

12. The Claimant sought an extension of the standstill period to 16th December 2019 and the Defendant agreed to an extension but only until midnight on Thursday 12th December 2019. On that day the Claimant wrote to the Defendant saying that the Claimant had "engaged counsel and will be submitting a claim form to the courts and subsequently the Particulars of Claim later in the week".

13. On 16th December 2019 the Claimant contacted Napthens LLP by telephone with a view to instructing that firm to provide advice and to act in the matter. That resulted in a short letter from Napthens to the Defendant on 16th December

2019 simply saying that the former had been engaged to act for the Claimant. Instructions were taken and on 18th December 2019 the Claimant's solicitors wrote a letter of claim. This set out again the Claimant's criticism of the "standing height" requirement. Under the sub-heading "Grounds for Judicial Review" the Claimant's solicitors said that the decision to exclude the Claimant from the tender process by reference to the height of the cab was "both irrational and procedurally unfair" and thereby susceptible to judicial review. The letter requested sundry items of information including whether Monks' tender was higher or lower than the Claimant's in price terms. The letter requested a reply by 13th June 2020 (that was an obvious typing error for 13th January 2020 and was corrected in a follow up letter on 3rd January 2020) having said:

> "You will doubtless be aware that our client had (sic) to issue its claim form pursuing a judicial review within 3 months of the date on which the grounds for the claim first arose meaning therefore the date is 28th February 2020".

14. Mr. Whittingslow of Napthens accepts that at the time he wrote that letter he was mistaken as to the relevant time limits.

15. The Defendant provided a detailed response by a letter of 10th January 2020 explaining, inter alia, that the price tendered by Monks was £7,878,000 as opposed to the price of £6,991,000 from the Claimant. The scoring of the respective tenders has been disclosed showing the Claimant and Monks scoring at equivalent levels. The Claimant says that the effect of this is that if it had not been disqualified or if it had been given an opportunity to submit a tender for a cab with a greater interior height (which it says that it would have been able to provide at the same price as the cab with the 1,600mm interior height) then it would have obtained the contract as being the Most Economically Advantageous Tenderer. The Defendant does not accept that this follows making the point that if the requirement had been removed the other tenderers could also have submitted revised tenders which might have been at different prices from their existing tenders.

16. On 13th January 2020 the Claimant's solicitors wrote attaching a draft of an application to extend time together with a supporting witness statement. The draft was of an application under CPR Pt 3.1(2) (a) to extend time for commencing judicial review proceedings. Napthens said that the application was being made because having considered the applicability of Regulation 92 of the Regulations they believed that the time limit for issuing the claim was "30 days from the expiry of the standstill period" which would make 13th January 2020 the last day for issuing proceedings. The Defendant replied on the same day. The Claimant places considerable weight on that reply the material parts of which said:

> "While the County Council has no objection in principle to the granting of an extension to the time for issuing a claim for judicial review we do not consider it is appropriate for claims such as this to be brought by way of judicial review proceedings. We would question whether this is permissible in the circumstances particularly in light of the specific procedure provided for under [the Regulations]
>
> "Under the Regulations 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 not within 30 days following the expiration of the standstill period as you aver. In this case the 30 day limit therefore expired on 30th December 2019 at the latest".

17. The contract was awarded to Monks on 16th January 2020.

18. The application seeking an extension of time for bringing judicial review proceedings which had been provided in draft to the Defendant was not in fact issued. Instead on 24th January 2020 the Claimant issued the Procurement Claim and the Judicial Review Claim (although the latter is recorded as having been filed on 27th January 2020 I will proceed on the basis that it was lodged at court at the same time as the Procurement Claim) together with the current applications for extensions of time.

19. In 2013 the Claimant had complained to the Defendant about the Defendant's award of a contract to One Connect Ltd which was a joint venture between the Defendant and British Telecom. That complaint had caused the Defendant to refer the matter to the Lancashire police and a criminal investigation codenamed "Operation Sheridan" had been initiated. This resulted in a number of people including the Leader of the Defendant being arrested and interviewed under caution. The Claimant believes that the Crown Prosecution Service is now considering the police file with a view to determining whether or not criminal charges should be laid. It is important to note that at this time no charges have been brought. The Claimant says that it believes that its actions in triggering the police investigation caused an animus against it on the part of the Defendant or at least certain members of the Defendant, including the Leader of the Council, and that this influenced the Defendant's actions in rejecting its tender. The Defendant denies that the earlier complaint had any bearing on its actions in relation to the tender in the procurement exercise with which I am concerned. It says that none of those who were arrested are still employed by the Council and that the Leader of the Council had no involvement in the decision to reject the Claimant's tender. The Claimant maintains its assertion that there are grounds for believing the Leader did have involvement and was motivated to exclude the Claimant from the process. Clearly those factual matters cannot be resolved at this stage. It suffices to note that the Claimant asserts that there are grounds for believing that there was wrongdoing of that form and that the Defendant robustly denies that the actions leading up to Operation Sheridan had any influence on the Claimant's disqualification from the procurement exercise.

The Regulations and the applicable Time Limits.

20. It is common ground that the Claimant is an economic operator and the Defendant a contracting authority for the purposes of the Regulations.

21. Regulation 89 provides that the obligation on a contracting authority to comply with the provisions of parts 1 and 2 of the Regulations and of any enforceable EU obligation in the field of public procurement "is a duty owed to an economic operator".

22. Regulation 91(1) states:

> "A breach of the duty owed in accordance with regulation 89 or 90 is actionable by any economic operator which, in consequence, suffers, or risks suffering, loss or damage."

23. A distinction is drawn between cases where a declaration of ineffectiveness is sought and those where it is not. No such declaration is sought in this case and so the relevant time limits are those set out in regulation 92 in the following terms:

> "(2) Subject to paragraphs (3) to (5), such 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.
> …
>
> (4) Subject to paragraph (5), the Court may extend the time limits imposed by this regulation (but not any of the limits imposed by regulation 93) where the Court considers that there is a good reason for doing so.
>
> (5) The Court must not exercise its power under paragraph (4) so as to permit proceedings to be started more than 3 months after the date when the economic operator first knew or ought to have known that grounds for starting the proceedings had arisen.
>
> (6) For the purposes of this regulation, proceedings are to be regarded as started when the claim form is issued."

24. Regulation 95 deals with the situation where a claim form is issued before a contracting authority has entered into the contract which is the subject of the procurement process. When that happens the authority is to refrain from entering the contract until either the proceedings are determined or an interim order is made under regulation 96.

25. Regulation 97 sets out the remedies which are available where the contract in question has not been entered into while regulation 98 governs circumstances, such as those here, where the contract has been entered into. That regulation provides for declarations of ineffectiveness but all are agreed that is not a permissible course in this case. This means that the only remedy available under the Regulations in the current case is that of an award of damages under regulation 98 (2) (c).

26. The time limits for bringing claims for judicial review claims are governed by CPR Part 54. The usual requirement in judicial review claims is that set out in Pt 54.5 (1) that a claim form must be filed promptly and in any event within 3 months of the decision under challenge. However, Pt 54.5 (6) imposes a shorter time limit where a party seeks judicial review in respect of a challenge to a decision governed by the Regulations. In such cases:

> "the claim form must be filed within the time within which an economic operator would have been required by regulation 92(2) of those Regulations (and disregarding the rest of that regulation) to start any proceedings under those Regulations in respect of that decision."

27. I will deal below with the argument advanced by Mr. Williams QC as to the interplay between that provision and the court's power to extend time under CPR Pt 3.1(2) (a).

The Claims.

28. In the Procurement Claim the Claimant seeks damages and a declaration that the Defendant has committed the breaches of duty set out in the Particulars of Claim. The Particulars of Breach contend that the Defendant's "decision to reject [the Claimant] from the Procurement failed the most basic standards of transparency, equality, non-discrimination, and objectivity." The respects in which it is said that the Defendant breached its duties are as follows.

29. At [49(a)] the Claimant contends that the rejection of its tender was based on considerations which were not sufficiently specified in the tender documentation and which were not objectively or proportionately related to the contract. The details of this allegation are set out at [51] – [66] where it is said that the "standing height" requirement and the consequences of a failure to meet that requirement were not set out sufficiently clearly.

30. At [49(b)] it is said that the evaluation criteria were applied inconsistently. By way of particularisation of this at [67] – [69] it is said that the rejection of the Claimant's tender by reference to the "standing height" requirement was a breach of the duties of equal treatment and non-discrimination.

31. At [49(c)] a breach of the duty of good administration is alleged. This is said, at [70] – [88], to have consisted in a failure to provide sufficient reasons and information to enable the Claimant to determine whether the Rejection Decision was well-founded. It is in this connexion that the Claimant alleges at [80] that it believes that "the Rejection Decision was motivated by undisclosed reasons". It then proceeds to assert that the Defendant was influenced by a desire to penalise the Claimant for the complaint which led to Operation Sheridan. It says that the requirements laid down by the Defendant were deliberately imprecise with a view to using those to exclude the Claimant.

32. At [50] the Claimant says that there was a manifest error of assessment on the part of the Defendant which had the consequence that having unlawfully excluded the Claimant from the process the Defendant awarded the contract to Monks when, as compared to the Claimant, the latter was not the Most Economically Advantageous Tenderer. This allegation is expanded upon at [89] – [101] where the Claimant sets out the respective scores which it and Monks achieved in the evaluation process explaining that those were comparable and that the price of the Claimant's tender was markedly less than that of Monks. It makes the point that in the light of that if the Claimant had not been excluded it would have been the successful tenderer. The crux of the allegation is set out thus at [100]:

> "[the Claimant] does not at this stage contend that the approach to [the Defendant]'s marking of the tenders was inherently unlawful. Rather, it avers that [the Defendant]'s decision to reject [the Claimant] in breach of the obligations noted above infected and impugned [the Defendant]'s decision to award the Contract to Monks"

33. The Claim Form in the Judicial Review Claim identifies the decision to be reviewed as being the "decision to disqualify the Claimant from the procurement process and to award the contract to Monks" and gives the date of that decision as 29th November 2019. Four grounds of review are set out in the Statement of Facts and Grounds. It is of note that the Statement of Facts and Grounds uses "the Decision" as a defined term to refer to the Defendant's decision "communicated by letter dated 29th November 2019 disqualifying the Claimant from its tendering process …and to awarding (sic) the contract instead to Monks". This usage is reinforced at [30] – [32] where under the sub-heading "the decision" the Claimant recites the relevant parts of the Rejection Decision.

34. The first ground of review is that the decision was unlawful by reason of not being conducted fairly and objectively and by being in breach of regulation 18 in that the Invitation to Tender did not specify precisely either what was required to meet the "standing height" criterion or the consequences of a failure to satisfy that requirement.

35. The second ground is that the procurement process was procedurally unfair by reason of the said failures in relation to the "standing height" requirement and the consequences of not fulfilling it.

36. The third ground alleges an unlawful breach of the requirement of equal treatment by reason of the failure to award the contract to the Claimant despite it having submitted the most economically advantageous tender. The Statement of Facts and Grounds sets out the scores attained by the Claimant and by Monks and the prices of their tenders. It then says, at [101], that if the Claimant had not been unlawfully excluded from the procurement the only difference between it and Monks would have been the price offered with the Claimant offering the better price.

37. Finally, the Claimant alleges unreasonableness and/or manifest error. It is said that in disqualifying the Claimant on the basis of the "standing height" requirement the Defendant was taking account of an irrelevant consideration or of one that was being given disproportionate weight. Further it is said that the Defendant took account of an irrelevant consideration which was the Defendant's involvement in Operation Sheridan.

The Issues.

38. The questions I have to determine in respect of both the Procurement Claim and the Judicial Review Claim are:

    i) Whether the claim was issued either out of time so as to fail *in limine* in the absence of an extension or in time so as to have no need of an extension of time.

    ii) Whether there is power to extend time. In relation to the Procurement Claim this depends on determining whether the claim is caught by the prohibition on extension contained in regulation 92 (5). In respect of the Judicial Review Claim the question is the extent to which the general power of extending time contained in CPR Pt 3.1(2) (a) is available.

iii) If there is a power to extend time whether it should be exercised in the Claimant's favour.

The Approach to Identification of the Time for Starting Proceedings under the Public Contracts Regulations in Outline.

39. The starting point is consideration of the provisions of regulations 91 and 92 with the former providing that a breach is actionable by economic operator who "suffers, or risks suffering, loss or damage" in consequence of the breach and with the latter providing that proceedings must be commenced within 30 days of the date when the economic operator first "knew or ought to have known that grounds for starting the proceedings had arisen".

40. It follows that a breach which causes loss or a risk of loss is actionable from the date of the breach. The risk does not have to come to fruition and the loss of which there is a risk does not have to be suffered before proceedings can be commenced. An economic operator who knows or ought to know of a breach which has caused a risk of loss has 30 days from the time of that knowledge to commence proceedings. As Fraser J explained in *SRCL Ltd v NHSE* [2018] EWHC 1985 (TCC), [2019] PTSR 383 this means that time can start running before the conclusion of a procurement exercise and that there can, and potentially should, be multiple proceedings in relation to the same procurement exercise. Fraser J put matters thus:

> "140 Time starts running from the date when a party has all the necessary information to know that it has a claim. This may even predate the result of the procurement competition, which is the earliest that an aggrieved tenderer will know it has been unsuccessful in the procurement. This is again different to the relevant starting date for time running under the Limitation Acts, as that is usually the accrual of a cause of action.
>
> …
>
> "158 …. It is not unusual in procurement cases to have more than one claim form issued in respect of the same procurement competition. Often there will be three different claim forms, sometimes four, and very occasionally more than that. This is a well-known and practised approach in procurement cases. Sometimes new information (for example on how an evaluation was performed) becomes available to a claimant on disclosure, and another claim form is issued on the basis of that new information. The only disadvantage to a claim is the incurring of the fee charged to issue a claim, which most litigants would usually wish to avoid. However, the wish to avoid incurring an issue fee is not a good reason within the terms of regulation 92(4). The same approach of issuing a protective claim form can be adopted if a litigant feels it has the necessary knowledge in advance of the procurement exercise being completed, or here, in advance of the auction being conducted. …"

41. Where an economic operator has a number of different grounds of complaint and asserts a number of different deficiencies in a procurement exercise there can be different dates for the start of the 30 day period under regulation 92 (2) in relation to the different grounds of complaint– see again per Fraser J in *SRCL Ltd v NHSE* at [141].

42. Thus a breach is actionable once it has caused a risk of loss to an economic operator. The proceedings must be commenced within 30 days of the date when the economic operator first knows or ought to have known that grounds for starting proceedings had arisen. In *Sita UK v Greater Manchester Waste Disposal Authority* [2011] EWCA Civ 156, [2012] PTSR 645 the Court of Appeal explained what constitutes knowledge for these purposes. Elias and Rimer LJJ (at [26] and [91] respectively) adopted the test which had been applied by Mann J at first instance namely that:

> "The standard ought to be a knowledge of the facts which apparently clearly indicate, though they need not absolutely prove, an infringement."

43. In the context of the current case it is also relevant to note that at [32] and [33] Elias LJ addressed the question of whether the issuing of a letter of claim (as was required under the regulations then in force) necessarily indicated that the proposed claimant had sufficient knowledge to start time running. He explained that this might not be the case where the writer of the letter was deliberately exaggerating his perception of the facts or was mistaken as to the circumstances or as to the correct test but then said:

> "On any view, a claimant who issues a statutory letter intending it to be a genuine statement of his belief that there has been a breach of the Regulations and that he is proposing to commence proceedings, will find it difficult to deny that he had sufficient knowledge to start time running, at least as regards the breach or breaches identified in the letter."

44. When considering questions of the correct interpretation of the Regulations the court is to have regard to the policy considerations underlying the Regulations and in particular the time limits which they contain. As Fraser J said in *SRCL Ltd v NHSE* at [139]:

> **"**Procurement cases have their own separate time limits, and these are imposed by the PCR 2015, which implement the Directive. They are very short, and deliberately so. There are good policy grounds for such an approach. In *Jobsin Co UK plc (trading as Internet Recruitment Solutions) v Department of Health* [2002] 1 CMLR 44 Dyson LJ said, in relation to an earlier version of the Regulations, at para 33:
>
> `Regulation 32(4) specifies a short limitation period. That is no doubt for the good policy reason that it is in the public interest that challenges to the tender process of a public service contract should be made promptly so as to cause as little disruption and delay as possible. It is not merely because the interests of all those who have participated in the tender process have to be taken into account. It is also because there is a wider public interest in ensuring that tenders which public authorities have invited for a public project should be processed as quickly as possible. A balance has to be struck between two competing interests: the need to allow challenges to be made to an unlawful tender process, and the need to ensure that any such challenges are made expeditiously. Regulation 32(4)(b) is the result of that balancing exercise.'"

Is the Procurement Claim out of Time?

45. The Claimant, through Mr. Chaisty QC, contends that time for the Procurement Claim did not begin to run until 10th January 2020 because it was only then that the Claimant learnt the amount of Monks' tender. It was only then, the Claimant says, that it learnt that but for its exclusion from the evaluation process it would have been the Most Economically Advantageous Tenderer and as such entitled to be awarded the contract. The Claimant's position is that until then it did not know that it had suffered loss as opposed to having suffered the loss of a chance. Alternatively it characterises the proceedings as a challenge to the decision to award the contract to Monks when the Claimant had submitted a better price and says that it was only aware of this on 10th January 2020.

46. The Claimant's skeleton argument said at [36] that:

> "Where the challenge goes to the decision to contract with a particular provider, there is authority that suggests that time does not start to run at the earliest until the authority becomes committed to a particular provider. In a procurement case this will typically be the date of the decision to enter into the contract with the provider after the end of the standstill period".

47. For that proposition the Claimant relies on the decisions in *Smith v North East Derbyshire Primary Care Trust* [2006] EWHC 1338 (Admin), *R (ex p Burkett) v Hammersmith & Fulham LBC* [2002] UKHL 23, [2002] 1 WLR 1593, and *R (ex p Unison) v NHS Wiltshire Primary Care Trust* [2012] EWHC 624 (Admin).

48. In addition, at [39], the Claimant contends that the focus is to be on the remedy sought by a claimant and that this can justify a departure from the general principles. It is said this follows from *R (ex p Nash) v Barnett LBC* [2013] EWCA Civ 1004, [2013] PTSR 1457 where the Claimant says that *Risk Management Partners v Brent LBC* [2009] EWCA Civ 490, [2010] PTSR 349 was distinguished "on account of its `rather special facts'". The Claimant says that the focus in *Risk Management Partners v Brent LBC* was on the remedy which the Claimant was seeking in the procurement claim.

49. It will immediately be seen that the Claimant's contention is contrary to the approach envisaged in *SRCL Ltd v NHSE* of multiple proceedings in relation to the same procurement exercise with proceedings being issued in relation to separate breaches occurring at different stages before the conclusion of the exercise. It is also inconsistent with the wording of regulation 91 with its express provision that a breach is actionable by an economic operator to whom it has caused a risk of loss. It is moreover an elementary principle that the loss of a chance is a loss capable of giving rise to an award of damages. Such a loss was suffered when the Claimant was excluded from the evaluation process. The knowledge that if not excluded it would have won the contract (a point which is not accepted by the Defendant) is relevant to the quantification of the value of the chance which was lost but does not alter the date of the loss.

50. Not only do the Claimant's contentions face those difficulties but they do not, in my judgement, follow from the authorities on which the Claimant relies and are contrary to other authority from which the correct approach to be adopted can be discerned.

51. It is to be noted that *Smith v North East Derbyshire Primary Care Trust* and *R v Hammersmith & Fulham LBC ex p Burkett* were not claims by economic operators for damages under the Regulations. The former case was a judicial review claim by a private individual asserting that the defendant primary care trust's action in engaging a particular care provider to supply general practitioner services was in breach of its duties under the Health and Social Care Act 2001. The latter case involved a challenge on the part of neighbouring landowners to the lawfulness of a grant of planning permission. In cases of that kind it can readily be understood why time for making the public law challenge does not start to run until a definitive decision has been made by the authority in question.

52. *R (ex p Unison) v NHS Wiltshire Primary Care Trust* was similarly not a claim by an economic operator. It was again a public law challenge albeit one based on an alleged breach of the predecessors to the Regulations. Eady J accepted, at [11], that it was legally possible that members of a trade union could be so affected by a breach as to have a sufficient interest to bring a public law challenge by reference to a breach of the regulations but concluded that there was no such interest in that case. The Claimant relied on [47] where Eady J said that "a positive decision to go with a particular contracting party" would constitute a breach sufficient to start time running but that it would not do so if it was "genuinely conditional". However, that does not assist in determining the start of the time period for claims by economic operators under the Regulations. An individual or body seeking judicial review by reason of the unlawfulness of a public body's actions has no need and no entitlement to bring the claim until that body definitively makes the decision in question because until then the aggrieved person or body's rights are not affected (see per Moore-Bick LJ in *Risk Management Partners v Brent LBC* at [250]). That does not, without more, mean that an economic operator has no claim under the Regulations until a contract is awarded to a competing economic operator.

53. The decision in *Jobsin v Department of Health* [2001] EWCA Civ 1241, 1 CMLR 44 is instructive. There the claimant had been excluded from the tendering process on 17th November 2000. It brought proceedings alleging that the tendering process was conducted in breach of the then applicable regulations because the Briefing Document by which the process was begun failed to identify the criteria by which the most economically advantageous tender was to be identified. The Briefing Document had been issued on 14th August 2000. The judge at first instance had found that time had begun to run with the exclusion of the claimant on 17th November 2000. However, the Court of Appeal held that was incorrect and that time had begun to run on 14th August 2000 with the issue of the Briefing Document. At [26] – [28] Dyson LJ explained the basis of this approach emphasising the "crucial significance" of the reference in the regulations to risk of suffering loss and requiring the court to have regard to "the essential complaint" lying "at the heart of the proceedings" in the following words:

> "26. I cannot accept that the right of action alleged by Jobsin first arose on 17th November. In my view, it arose on or about 14th August. It is clear that, as soon as the Briefing Document was issued without identifying the criteria by which

> the most economically advantageous bid was to be assessed, there was a breach of regulation 21(3). I do not understand Mr
> Lewis to dispute this. Moreover, it was a breach in consequence of which Jobsin, and indeed all other tenderers too, were then and there at risk of suffering loss and damage. It is true that it was no more than a risk at that stage, but that was enough to complete the cause of action. Without knowing what the criteria were, the bidders were to some extent having to compose their tenders in the dark. That feature of the tender process inevitably carried with it the seeds of potential unfairness and the possibility that it would damage the prospects of a successful tender.
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> 27. Mr Lewis submits that neither the loss nor the risk of loss was caused by the breach of regulation 21(3) until Jobsin was excluded from the tender process on 17th November. I reject that submission for the following reasons. First, it gives no meaning to the words "risks of suffering loss or damage" in regulation 32(2). It seems to me that those words are of crucial significance. They make it clear that it is sufficient to found a claim for breach of the regulations that there has been a breach and that the service provider may suffer damage as a result of the breach. It is implicit in this that the right of action may and usually will arise before the tender process has been completed.
>
> 28. That brings me to the second reason. It would be strange if a complaint could not be brought until the process has been completed. It may be too late to challenge the process by then. A contract may have been concluded with the successful bidder. Even if that has not occurred, the longer the delay, the greater the cost of re–running the process and the greater the overall cost. There is every good reason why Parliament should have intended that challenges to the lawfulness of the process should be made as soon as possible. They can be made as soon as there has occurred a breach which may cause one of the bidders to suffer loss. There was no good reason for postponing the earliest date when proceedings can begin beyond that date. Mr. Lewis suggests that there is such a reason. He points out that if, in a case such as this, the limitation period runs from the date of publication of the tender documents, it will be possible for the contracting authority to rule out any real possibility of a challenge by issuing an invitation in breach of the regulations and then not taking any further steps in relation to tenders until after the three months period has expired. I confess that I find this an unlikely state of affairs, but I can see that it might conceivably happen. If it did, a service provider who wished to bring proceedings might have a good case for an extension of time: it would all depend on the facts. In my view, this cannot affect the plain meaning of regulation 32(2). I would therefore hold that the right of action which Jobsin asserts in the present case first arose on or about 14th August 2000. The essential complaint which lies at the heart of the proceedings is that there was a breach of regulation 21(3), in that the Briefing Document did not identify the criteria by which the DOH would assess the most economically advantageous bid."

54. In *Risk Management Partners v Brent LBC* the Court of Appeal was concerned with an economic operator's claim for damages under the predecessors of the Regulations. The court rejected the argument that time only began to run with the final decision to award the contract under the procurement exercise but also rejected the contention that it began to run when a breach was anticipated.

55. At [242] and [243] Moore-Bick LJ explained thus that a breach of duty sufficient to found a claim can occur at any stage in the procurement exercise and well before a contract is awarded.

> "242. When considering when grounds for proceedings first arose it is necessary to bear in mind that the 2006 Regulations prescribe the procedure which a contracting authority must follow before entering into a contract with a supplier of goods or services. The duty owed in accordance with paragraphs (1) and (2) of regulation 47 is therefore a duty to comply with that procedure. It follows that a failure by the contracting authority to comply with any step in the required procedure involves a breach of duty sufficient to support a claim under the Regulations. Moreover, because the procedure governs the whole process from the formation of the intention to procure goods or services to the award of the contract and is structured in a way that is intended to ensure equal treatment and transparency throughout, a failure to comply with the procedure at any stage inevitably undermines the integrity of all that follows.
>
> 243 It is apparent from regulation 47(7) and (8) that grounds for bringing proceedings may exist well before the procedure reaches the award of a contract, but the regulation does not expressly identify the point at which that will occur…"

56. At [247] and following Moore-Bick LJ addressed the competing arguments that time began to run when a breach was first anticipated and that it only began to run when the contract was awarded at the end of the procurement exercise. The decision in *Burkett* had been relied upon in support of the latter contention. Moore-Bick LJ rejected the former contention but also rejected the latter explaining thus, at [250], the distinction between the approach applicable to cases of judicial review and that governing claims under the Regulations (emphasis added):

> "Although the language of regulation 47(7)(b) mirrors that of CPR r 54.5, I think it is necessary, when considering whether the approach adopted in the *Burkett* case can be applied in the present case, to have regard to the differences in the nature and subject matter of the proceedings. Judicial review is a means of challenging the unlawful exercise of power. That is an important part of the background against which CPR r 54.5 falls to be construed. Moreover, as Lord Steyn observed in the *Burkett* case, para 38 it is in some circumstances possible to challenge a decision that is not final and which, as in that case, has no legal effect. In a case of that kind there are good policy reasons for not requiring a person to challenge a decision which does not affect his rights as a condition of being allowed challenge at a later stage one that does: see Lord Steyn, at para 42. The contrast with a claim under the Regulations is clear: <u>the latter is an action to vindicate private rights in the context of a procedure that in many cases will be still in progress</u>. Moreover, as I have already observed, <u>a failure to comply with the procedure at any stage inevitably undermines the integrity of all that follows. Accordingly, the right of action is complete immediately and cannot be improved by allowing the procedure to continue to a conclusion. Where there has been a failure to comply with the proper procedure the later award of the contract does not constitute a separate</u>

> breach of duty; it is merely the final step in what has already become a flawed process. For these reasons I do not think that the approach adopted in the *Burkett* case can simply be transposed to a claim under the Regulations."

57. Similarly at [255(x)] Hughes LJ summarised the position in these terms:

> "time did not run against Risk in respect of its claim founded upon actual breach (as distinct from any earlier claim which there might have been for *quia timet* relief in respect of an apprehended breach) until the first actual breach, which in this case was in March 2007; note, however, that any failure by a contracting authority to comply with any step in the required procedure involves an actual breach and it is accordingly not open to a putative claimant to await the last in a series of actual breaches and to contend that time runs only from then"

58. The Claimant argued that *Risk Management Partners v Brent LBC* was distinguished in *R (ex p Nash) v Barnet LBC* [2013] EWCA Civ 1004, [2013] PTSR 1457. I do not accept that reading of the latter decision. At [68] Davis LJ (with whose judgment the Master of the Rolls and Gloster LJ agreed) did indeed note that there were "rather special facts" in the former case and that the factual context of the two cases were different but significantly for present purposes explained that Moore-Bick LJ's approach set out at [250] holding that the *Burkett* approach could not be transposed to claims under the Regulations had "resonance" with the latter case.

59. *R (ex p Nash) v Barnet LBC* was a case of a public law challenge to the defendant council's decision to outsource sundry services. The challenge was made on a number of grounds but these included an alleged breach of the predecessor of the Regulations. It is of note for present purposes that *Burkett* was distinguished and emphasis was placed on the need to identify "the actual decision by reference to which the grounds of challenge first arose." At [59] Davis LJ expressly approved paragraph 41 of Underhill J's first instance judgment which was in the following terms (emphasis added):

> "Mr Giffin developed those points clearly and cogently, but I do not accept them. I do not believe that *Burkett*'s case is authority for the proposition that in every situation in which a public law decision is made at the end of a process which involves one or more previous decisions -what I will refer to as "staged decision-making"- time will run from the date of the latest decision, notwithstanding that a challenge on identical grounds could have been made to an earlier decision in the series. In my judgment it is necessary in such a case to analyse carefully the nature of the latest decision and its relationship to the earlier decision(s). I believe the true position to be as follows. If the earlier decision is no more than a preliminary, or provisional, foreshadowing of the later decision, *Burkett*'s case does indeed apply so that the later, "final", decision falls to be treated as a new decision, the grounds for challenging which "first arise" only when it is made. But if the earlier and later decisions are distinct, each addressing what are substantially different stages in a process, then it is necessary to decide which decision is in truth being challenged; if it is the earlier, then the making of the second decision does not set time running afresh. I accept that the distinction may in particular cases be subtle, but it is in my view nonetheless real and important."

60. Thus even in cases of public law challenges to procurement decisions the *Burkett* approach that time runs from the final decision is not necessarily applicable. Still less can it be the case in claims brought by economic operators under the Regulations.

61. My understanding of the effect of those authorities is that:

    i) There can be multiple challenges in respect of a single procurement process. That is because there can be multiple decisions which are in breach of the contracting authority's duty and which cause loss or the risk of loss to the economic operator.

    ii) Time can begin to run at different dates in respect of different breaches.

    iii) It is not correct to say that the date of the contracting authority's entry into a contract with a competing economic operator is typically the date when time begins to run for a claim by an economic operator (as opposed to an individual or body bringing a public law challenge). Indeed, the converse is the case and typically time will have begun to run at a stage rather earlier than the entry into the contract because it is at that earlier stage that the authority's breach of duty causing loss or a risk of loss is likely to have occurred.

    iv) The court has to consider what decision is in truth being challenged or is being said to be the relevant breach of duty. If the claim is in reality founded on an earlier decision of the authority then a later decision giving effect to it does not set time running again.

    v) Where there are a series of breaches time runs from the date of knowledge of each breach and not from the end of the series.

62. In the light of that analysis I return to the Claimant's contention that time only began to run on 10th January 2020 when it learnt the price of Monks' tender. This argument cannot be sustained. It is true that 10th January 2020 was the date when the Claimant knew the potential value of its claim. It was then that the Claimant was able to conclude that pursuit of the claim might be worthwhile commercially. Nonetheless the breaches on which it relies had occurred before then; those breaches had caused loss or at the very least the risk of loss; and the Claimant knew or ought to have known that grounds for starting proceedings had arisen well before 10th January 2020. The Claimant had said on 2nd December 2019 that the circumstances of the Defendant's actions pointed to a legal challenge to the tender process; on 12th December 2019 it said that counsel had been engaged and that proceedings would be commenced within a week; and on 18th December 2019 a detailed letter of claim was sent from solicitors threatening proceedings. The assessment of Elias LJ in *Sita UK v Greater Manchester Waste Disposal Authority* quoted at [43] above is apposite here and in the light of that correspondence it is not open to the Claimant to say that it did not have the necessary knowledge until 10th January 2020.

63. The Claimant's contention based on a start date of 10th January 2020 having been rejected it is necessary to analyse the separate elements of the Procurement

Claim with a view to determining the breach of duty on which each is founded and the date when the Claimant had the requisite knowledge of each.

64. The first element of the claim is the contention at [49(a)] and particularised at [51] – [66]. The breach set out at [49(a)] is that the rejection of the Claimant's tender by reference to the "standing height" requirement was based on considerations which were not sufficiently specified in the tender documentation and which were not objectively or proportionately related to the contract. The particulars of that alleged breach at [51] – [66] in fact assert a breach occurring at a stage before the Rejection Decision. So at [51] the Claimant says that the Defendant breached its duty "by not formulating the evaluation criteria with sufficient specificity" and at [66] the Claimant refers to the Defendant having "breached its basic obligation of transparency and objectivity by failing to disclose its requirements with sufficient clarity". It is to be noted that [66] then asserts that this failure meant that it was not open to the Defendant to reject the Claimant's tender by reference to criteria which had not been stated with sufficient clarity.

65. For the Defendant Mr. Williams says that this part of the claim is based on an alleged breach of duty in the compilation of the Invitation to Tender and that the breach occurred on 19th September 2019 or at the latest on 25th September 2019 when clarification was provided. Mr. Williams says that the Claimant had the relevant knowledge at that time (through having received the Invitation to Tender and the clarification) and so this aspect of the claim is not only out of time but is outside the three-month period when an extension can be granted. There is considerable force in this contention as the alleged deficiency in the Rejection Decision is dependent on the deficiency alleged in the Invitation to Tender. Moreover, it would have been open to the Claimant to commence proceedings on having received the Invitation to Tender on the footing that the document was insufficiently precise. Taking an approach which arguably errs in the Claimant's favour I will treat this part of the Procurement Claim as alleging two breaches. One relates to the terms of the Invitation to Tender and the other relates to the rejection of the Claimant's tender based on the deficient criteria.

66. The Defendant is right to say that the first of those alleged breaches occurred at the time of the Invitation to Tender or at the latest on 25th September 2019. That was when, on the Claimant's case, the Defendant set in train a procurement exercise based on criteria which were not adequately formulated. Moreover, it was then that the Claimant had the requisite knowledge. Mr. Chaisty argued that the Claimant did not have the necessary knowledge at that time because it did not regard the "standing height" requirement as ambiguous and itself interpreted that in a particular way. However, that misstates the matter of which a claimant has to have knowledge for time to begin running. What is necessary applying the test formulated by Mann J is knowledge of "the facts" which indicate an infringement. A party will know such facts even if he does not know their legal significance (see in that regard per Dyson LJ in *Jobsin v Department of Health* at [33]). The Claimant knew as of 25th September 2019 that the Defendant was treating the "standing height" requirement as a mandatory requirement. It now says that for the Defendant to do so was a breach of the obligation of

transparency and objectivity. It follows that at 25th September 2019 the Claimant had knowledge of the facts which showed there had been a breach of that duty. On that basis this element of the claim is out of time and is a matter in respect of which an extension of time cannot be granted. Even if that is wrong then the Claimant had such knowledge on 29th November 2019 when its tender was rejected by reference to that requirement and so would be out of time but within the period when an extension could be granted.

67. The second of the breaches alleged in this part of the Particulars of Claim is the action of the Defendant in rejecting the Claimant's tender by reference to those deficient criteria. The Claimant knew of that at the time of the Rejection Decision of 29th November 2019. In that regard it is of note that the Claimant's letter of 2nd December 2019 referred to the "ambiguity" of the "standing height" requirement as being the aspect of the tender process which pointed to a legal challenge. Thus this element of the claim is out of time but within the period when an extension could be granted.

68. The next element of the claim is the allegation at [49(b)] and particularised at [67] – [69] that the Defendant was in breach by applying the evaluation criteria inconsistently. The breach said to have been manifested by the rejection of the Claimant's tender by reference to the "standing height" requirement. That breach occurred at the time of the Rejection Decision and the Claimant knew of it then because it knew that its tender had been rejected and had been rejected by reference to the "standing height" requirement. It follows that time began to run on 29th November 2019 and the claim is out of time in this regard albeit within the period when an extension could be granted.

69. At [49(c)] and [70] – [88] the Claimant alleges a breach of good administration by way of a failure to provide sufficient reasons and information to enable the Claimant to decide whether or not the Rejection Decision was well-founded. Such information should have been provided at the time of the Rejection Decision. Accordingly, the breach alleged here also occurred on 29th November 2019 and the Claimant had the requisite knowledge at that time.

70. The final element of the claim is the allegation raised at [50] and particularised at [89] – [101] that the Defendant committed a manifest error which impugned the outcome of the procurement exercise. This element is also based on the Rejection Decision as is shown by the extract from [100] quoted at [32] above. The contention is that the exclusion of the Claimant was unlawful and that as a consequence the entire procurement process from thereon was flawed. The breach alleged is accordingly the rejection of the Claimant albeit the Claimant then proceeds to set out the consequences of that breach for the process as a whole. It follows that here also the breach occurred on 29th November 2019 and the Claimant had knowledge of it at that time.

71. I have already explained at [62] above that the Claimant's discovery on 10th January 2020 that it had put forward a lower price than Monks does not alter the timeline and that the Claimant had the requisite knowledge well before then. Similarly the timeline is not affected by the knowledge the Claimant has subsequently obtained as to the progress of Operation Sheridan and/or of the participation of the Leader of the Council in a meeting where the procurement

exercise was signed off. At its highest this is material explaining the Defendant's motive for committing the alleged breaches but the alleged breaches relate to actions which took place on the dates set out above and the Claimant had the requisite knowledge before it learnt of the further progress of Operation Sheridan.

Is there Power to extend Time in this Case?

72. It follows that to the extent that the claim alleges a breach of duty in relation to the form of the Invitation to Tender it is not only out of time but outside the period within which an extension can be granted. The larger part of the claim alleges breaches occurring at the time of the Rejection Decision. The claim is out of time in that regard but the three month limit imposed by regulation 92(5) has not passed and an extension can be granted if appropriate.

The Approach to be taken when considering an Application to extend Time for a Claim under the Public Contracts Regulations.

73. Regulation 92 (4) gives the court power to extend the relevant time limits when it "considers there is a good reason for doing so".

74. The question of whether such a good reason exists in a particular case has to be considered in the light of the policy considerations underlying the strict time limits imposed in the Regulations (see [44] above).

75. In *Mermec UK Ltd v National Rail Infrastructure Ltd* [2011] EWHC 1847 (TCC) Akenhead J explained, at [23(b)]:

> "It is perhaps unhelpful to try to give some exhaustive list of the grounds upon which extensions should be granted but such grounds would include factors which prevent service of the claim within time which are beyond the control of the claimant, these could include illness or detention of the relevant personnel. There must however be a good reason …"

76. In *Perinatal Institute v HQIP* [2017] EWHC 1867 (TCC) Jefford J emphasised the breadth of the sort of factors which could amount to a good reason and noted that the test was one of requiring a "good reason" and not "exceptional circumstances".

77. Fraser J in *SRCL v NHSE* emphasised the importance of rapidity in procurement cases and the difference between the approach taken to the extension of time for judicial review claims and that taken to the extension of time in procurement cases (see [153]). He explained, at [149], that "`good reason' should, ordinarily, relate to some factor that has an effect upon the ability of a claimant to issue". Then, at [154], Fraser J explained the applicable principles in these terms:

> **"**In my judgment, the following principles apply where an extension of time is sought under regulation 92(4):
> (1) There must be a good reason for extending time.
>
> (2) One of the matters that the court will consider is whether there was a good reason for the claimant not issuing within the time required, such as an illness or

> something out of the claimant's control which prevented the claimant from doing so.
>
> (3) It would be unwise to list or seek to limit in advance what factors should be considered to have relative weight to one another in that exercise.
>
> (4) The court will take a broad approach in all the circumstances of the particular case.
>
> (5) The categories are not closed or exhaustively listed in the cases. Lack of prejudice to the defendant is not a determinative factor."

78. Although the categories of good reason are not closed or exhaustively listed regard is to be had to *Jobsin v Department of Health* where, at [33], Dyson LJ explained that commercial considerations on the part of the claimant were not a good reason for this purpose. That was so even though in that case there were "strong commercial reasons why it would have been reasonable for [the claimant] not to start proceedings until the tender process had been completed."

79. I turn to consider whether, in the light of those principles, there is a good reason for the extension of time in this case.

Should Time be extended for the Procurement Claim?

80. In his witness statement of 24th January 2020 Mr. Whittingslow of the Claimant's solicitors put forward four "excuses for applying out of time" while making it clear that the Claimant did not accept that it was out of time. A number of further factors have been advanced in Mr. Chaisty's skeleton argument and in his oral submissions. I must consider whether individually or standing together they constitute a good reason for extending time having regard to the principles set out above. I also have regard to the chronology from which it will be seen, first, that the Claimant had threatened proceedings on 2nd December 2019 and had said on 12th December 2019 that proceedings would be commenced within a week; and, second, that the proceedings were eventually issued on 24th January 2020.

81. The first matter relied on in Mr. Whittingslow's statement is the intervention of the Christmas and New Year holiday period. He says that this shortened the time available for bringing proceedings meaning that the claim would have been needed to have been filed by 20th December 2019 to meet the 29th December 2019 and he says that this was "impossible in all the circumstances". For the Defendant Mr. Watt has pointed out that the court offices were open for business on 23rd, 24th, and 30th December 2019. I conclude that the intervention of the holiday period is not a good reason for extending time in the circumstances of this case. It was or should have been readily apparent to the Claimant that there would be a period of time when the court offices would be closed and that should have prompted greater urgency on its part. The contention that the holiday period provided a good reason for extending time would carry considerably greater weight if the proceedings had been commenced immediately after the break period. If the Claimant had issued its claim form in the first week of January 2020 then it may well be that the closure of the court offices and the taking of leave by those involved in preparing the claim might

well have operated as a good reason for extending time but it cannot assist in respect of proceedings which were not started till 24th January.

82. The next contention is that the Claimant acted reasonably in spending the first week of the 30 day period in seeking to explore alternatives to litigation by asking the Defendant to reopen the tender process. It is, of course, reasonable and proper for parties to seek to avoid litigation. However, in the context here the correspondence in that regard cannot be seen as a good reason for extending time for the commencement of proceedings. The Claimant had challenged the exclusion of its tender by the letter of 2nd December 2019 and had stated that there would be a "legal challenge" if this was not done. The Defendant replied in detail on 6th December 2019 maintaining its stance and explaining its position. That was well within the time limit for commencing proceedings. In those circumstances the fact that the Claimant did not issue proceedings immediately after receiving the Rejection Decision but instead gave the Defendant an opportunity to reopen the process is not a good reason for the extension of time now sought.

83. The third matter put forward is the contention that until it knew the amount of Monks' tender which it learnt on 10th January 2020 the Claimant "did not have all the information that enabled it to fully formulate" its claims because until then it did not know that if it had not been disqualified it would have won the contract. I have already explained why the Claimant's argument that it did not have the requisite knowledge to bring the claim until this date is unsustainable. The knowledge that Monks' tender was at a higher price than the Claimant's was relevant to the potential value of the Claimant's claim. It was relevant to the question of whether it was commercially worthwhile for the Claimant to bring proceedings. However, that does not mean that the fact that the Claimant only learnt of this in January 2020 is a good reason for extending time. To the extent that the Claimant delayed starting proceedings until after it knew that its claim might have a substantial value then it was choosing to delay because it wanted to avoid the expense of proceedings from which there might be little to be gained. That was not a factor having any impact on the Claimant's ability to commence proceedings as opposed to the very different question of whether it was worthwhile for the Claimant to do so. Accordingly, this does not amount to a good reason for extending time.

84. The last of the factors listed by Mr. Whittingslow is that it is said that the Claimant "acted reasonably promptly after receiving the pricing information on 10th January 2020". It is open to question whether the actions after 10th January 2020 were reasonably prompt when seen in context. An interval of a fortnight before proceedings were issued would not generally be regarded as a long delay but it has to be seen in the context of the Regulations which require a claim to be started within 30 days of the economic operator having the requisite knowledge and also in the context that in this case the time for commencing proceedings had expired on 30th December 2019. The Claimant's actions after 10th January 2020 were not tardy but they were not marked by a great sense of urgency. In any event the fact that a claimant acts promptly at a time after the initial time limit has expired is not a good reason for extending time. Delay in commencing proceedings at that stage would be a factor against extending time

but that does not mean that the absence of delay or even prompt action is a good reason for extending time. The position is that the comparatively prompt action after 10th January 2020 means that there is no additional delay to count against the Claimant if there are other matters amounting to a good reason for extending time but it does not of itself amount to a good reason.

85. The Claimant contends that the Defendant's letter of 13th January 2020 created a legitimate expectation that the Defendant would not take issue with an application for an extension of time and that this is a good reason for the grant of an extension. That argument was mainly advanced by reference to the extension of time for the Judicial Review Claim but it was also relied on in relation to the Procurement Claim. I will consider the letter's relevance to extension of time for the Judicial Review Claim below but it does not assist the Claimant at all in relation to the Procurement Claim. In the letter the Defendant said in terms that the time period of 30 days began to run with the Claimant's date of knowledge and that the relevant period had "expired on 30th December 2019 at the latest". The letter simply cannot be read as giving rise to a legitimate expectation that the Defendant would not resist an application to extend time for the Procurement Claim nor as suggesting that the Defendant would not take the point that the claim was out of time. It states quite the reverse and indicates that the Defendant will say that a claim based on the Regulations is out of time if such a claim is brought.

86. The Claimant cited *R (ex p Huddleston) v Lancashire CC* [1986] 2 All E R 941. It contended that the Defendant had broken the obligation of candour identified in that decision and invoked this breach as a good reason for granting an extension of time. The assertion was that the breach lay in the response, or rather the alleged lack of response, by the Defendant to the letter of 18th December 2019. In that letter the Claimant's solicitors talked of a proposed judicial review claim; asserted that the time for bringing such a claim would expire on 28th February 2020; set out eight matters in respect of which information was sought; and requested a reply by 13th January 2020. The Defendant replied on 10th January 2020 giving a detailed response to the request for information.

87. The Claimant says that the Defendant should have realised that the Claimant was mistaken as to the appropriate proceedings (namely referring to judicial review proceedings rather than a claim under the Regulations) and as to the relevant time limit (namely three months rather than thirty days). It says that the Defendant should have responded promptly telling the Claimant of the error and pointing out that the time limit for bringing a claim under the Regulations was fast approaching. This contention cannot be sustained. *R (ex p Huddleston) v Lancashire CC* is authority for the proposition that when a public law challenge is put to the decision of a local authority or other public body then that authority or body should respond in a non-partisan manner and should "put its cards on the table" so as to enable a proper assessment to be made of the lawfulness of its decision. The argument advanced by the Claimant goes considerably further than that. That argument involves the Defendant being criticised for failing to point out the true position in response to a letter of claim in circumstances where the Claimant was represented and where the Claimant's lawyers were asserting a claim on a particular basis. It amounts to saying that the Defendant should

have responded with unsolicited advice saying that instead of considering a judicial review claim the Claimant should consider a claim under the Regulations and pointing out the time limit for doing so. In essence it is being said that the Defendant should have advised the Claimant as to the best way in which to bring a claim against the Defendant. There was no obligation on the Defendant to act in that way and its failure to point out the errors of the Claimant's lawyers was not a breach of its obligation of candour or of any other duty. The Defendant is not to be criticised for its response to the letter of 18th December 2019 and there is nothing in its response or in its failure to respond in the way which the Claimant contends it should have done which can be a good reason for extending time.

88. At [54] in the Claimant's skeleton argument Fraser J's commendation of a "broad approach" was invoked and the court was urged to take account of two matters of public interest. The first is said to be the strong public interest in "ensuring that public bodies do not pay over the odds for supplies and services". In that regard the Claimant asserts that the award of the contract to Monks has caused £1m more of public money to be spent than was necessary. The second is said to be the benefit to the local community in Lancashire of the contract being awarded to the Lancashire-based Claimant rather than conducted through Monks' Swedish contractor. In his oral submissions Mr. Chaisty also said that there was a public interest in ensuring that light was thrown on the question of whether the decision to disqualify the Claimant was influenced by a desire to punish the Claimant for triggering the Operation Sheridan investigation.

89. Although public interest can be relevant when a court is considering whether to extend time for judicial review proceedings it is not a relevant factor when considering whether there is a good reason for extending time in a procurement claim. Such a claim is not a public law remedy. It is a private claim by an economic operator seeking redress for the alleged breach of a duty owed to that operator and which has caused the operator loss or the risk of loss. There is a general public interest in ensuring that those who suffer loss through the breach of legal duties owed to them are able to obtain redress through the courts. In my judgement the relevance of public interest goes no further than that in these circumstances. Moreover, that general public interest in the provision of redress for legal wrongs is to be balanced against the public interest in the rapid processing of tenders for public projects and in the speedy resolution of disputes arising out of the tendering process (see per Dyson LJ in *Jobsin v Department of Health* at [33]). The strict time limits laid down in the Regulations show where Parliament has drawn the balance between those competing public interests.

90. It follows that general considerations of the kind set out by the Claimant can have no relevance to the question I must address of whether there is a good reason for extending time. In any event the public interest asserted by the Claimant is not self-evident. The Claimant says that there is a public interest in public bodies avoiding unnecessary expenditure but granting an extension of time for the Procurement Claim would not prevent that (assuming for the sake of the argument that more is being paid than is necessary). The grant of the contract to Monks is not being challenged in the Procurement Claim and that

contract will remain in place even if the claim succeeds. The effect of the Procurement Claim continuing and of the Claimant succeeding in the claim, if it were to do so, would be that the Defendant would pay damages to the Claimant in addition to paying what is said to be an excessive price to Monks. That would be of no benefit to the public in Lancashire or more generally. Similarly the respective benefits of jobs being created or retained in Lancashire or elsewhere cannot be a consideration for the court in the context of a claim for breach of duty under the Regulations. The asserted public interest in investigating whether the Rejection Decision was influenced by a reaction to the Claimant's complaint which led to Operation Sheridan also does not advance matters. The Defendant robustly denies that the Rejection Decision was influenced by any such reaction and to the extent that there is a public interest in ensuring proper conduct on the part of public bodies private proceedings under the Regulations are not an apt way of achieving that.

91. The Claimant says that there would be no prejudice to the Defendant or to any third party if the court were to grant an extension of time. The Claimant accepts that this is not determinative of the question but says that it is a relevant factor when the court is taking a broad approach. I will deal with the competing contentions as to whether prejudice has been suffered when I consider the potential extension of time for the Judicial Review Claim. It will be seen that the Defendant and Monks challenge the Claimant's contention that an extension of time will not cause prejudice. It suffices here to say that the absence of prejudice even if it were to be shown by the Claimant would not be a good reason for extending time. In *SRCL Ltd v NHSE* Fraser J did not expressly say that prejudice or its absence could be never be relevant to the question of an extension of time for proceedings under the Regulations. However, it is of note that, at [153], he included the existence of prejudice in his summary of the factors to be taken into account when considering whether to extend time for judicial review proceedings and omitted it from the immediately following list of the principles governing the extension of time under the Regulations. In addition he said that he did not regard the absence of prejudice as of any relevance in that case. In my judgement the fact that prejudice would be caused by an extension of time is capable of being a factor against the grant of an extension. However, care will be required before it can be said that there is prejudice which should operate as a factor against the grant of an extension in a particular case. The relevance of prejudice as a factor militating against an extension and the matters which constitute prejudice are likely to be very different in cases where an economic operator seeks damages under the Regulations and no other remedy and in those where the quashing of a decision is sought by way of judicial review. However, it does not follow from the proposition that the existence of prejudice can be a factor against the grant of an extension that the absence of prejudice amounts to a good reason for granting an extension. The position is akin to that which I have described above in relation to the promptness of the application. Just as delay would operate as a factor against granting an extension so would the presence of prejudice and just as promptness in applying does not amount to a good reason for granting an extension similarly the absence of prejudice is also not a good reason.

92. Finally, Mr. Chaisty urged me to have regard to the merits of the claim as a factor in favour of the extension of time. There has been no application to strike out the Procurement Claim and so I will proceed on the basis that it is a claim which is reasonably arguable. I am not, however, in a position to assess the merits in any more depth than that and it is apparent that the claim is strongly resisted by the Defendant. I do not regard the merits of the claim here as being a good reason for extending time.

93. None of the matters set out by the Claimant amounts of itself to a good reason for extending time. I have also considered them as a combination of factors taking a broad approach to see whether in the circumstances seen as a whole there is a good reason for extending time. In that exercise it is relevant that the Claimant was not pointing to matters outside its control as having prevented it from commencing proceedings in time. The reality is that the Claimant failed to start the Procurement Claim in time because it adopted a mistaken view of the appropriate line of challenge and of the applicable time limits and because it was not minded to commence proceedings until it knew whether or not it would have been the successful tenderer if it had not been excluded because until then there was a prospect that the proceedings would not be worthwhile commercially. None of that amounts to a good reason for an extension and I have concluded that even when the matter is viewed in the round there is no good reason for an extension and so the application for an extension must fail.

Is the Judicial Review Claim out of Time?

94. The Claimant contended that the Judicial Review Claim was not out of time and that time only began to run on 10th January 2020 for the reasons already rehearsed in relation to the Procurement Claim and in particular that it was only on 10th January 2020 that the Claimant learnt that its tender was at a better price than that of Monks.

95. For the reasons I have already given that argument must fail. In the context of the Judicial Review Claim it is relevant to note that the claim form gives the date of that decision being challenged as 29th November 2019 and identifies the decision to be reviewed as being the "decision to disqualify the Claimant from the procurement process and to award the contract to Monks". The Claimant had knowledge of those matters on 29th November 2019 and having identified the decision of that date as the one being challenged it cannot say that time ran from a later date.

The Approach to be taken when considering an Application to extend Time for a Judicial Review Challenge to a Procurement Decision.

96. Mr. Williams argued that the effect of CPR Pt 54.5 (6) was that where a judicial review claim related to a procurement decision the court's power to extend time under CPR Pt 3.1(2)(a) could only be exercised in circumstances where an extension of time for a procurement claim would have been given under regulation 92(4). This would have the effect that an extension could only be granted if the claimant had shown a good reason of the kind considered above in relation to procurement claims.

97. I do not accept that contention. Pt 54.5 (6) relates expressly to the time for filing a claim form. It is relevant when deciding whether a claim form challenging a procurement decision has been filed in time but it does not purport to affect the court's general power to extend time limits. It is not necessary to interpret Pt 54.5 (6) as having the effect for which Mr. Williams argued and there are a number of matters which indicate it is not an appropriate course. A procurement claim is a private action under which an economic operator seeks redress for the breach of a duty owed to it by the contracting authority. Conversely a judicial review claim is public law claim where the question is the lawfulness of the decision under challenge. As Eady J envisaged in *R (ex p Unison) v NHS Wiltshire Primary Care Trust* there will be occasions when persons or bodies who are not economic operators for the purposes of the Regulations have sufficient interest to seek judicial review of a procurement decision and to do so by reference to unlawfulness under the Regulations. As Fraser J pointed out in *SRCL Ltd v NHSE* at [153] the approach to the extension of time in judicial review cases is different from that which is to be adopted to the extension of time for claims under the Regulations. If Pt 54.5 (6) was intended to have the effect of requiring the latter approach to be applied to judicial review claims that would have been spelt out expressly.

98. It follows that the application for the extension of time of the Judicial Review Claim is to be considered in the light of the principles governing the extension of time for judicial review claims generally albeit doing so in the context of a procurement process where there is a particular public interest in the speedy resolution of disputes.

99. The Claimant referred me to the Divisional Court decision in *R (ex p Croydon LBC) v Commissioner for Local Administration* [1989] 1 All E R 1033 at 1046G where Woolf LJ said:

> "While in the public law field, it is essential that the courts should scrutinise with care any delay in making an application and a litigant who does delay in making an application is always at risk, the provisions of RSC Ord 53, r 4 and section 31(6) of the Supreme Court Act 1981 are not intended to be applied in a technical manner. As long as no prejudice is caused, which is my view of the position here, the courts will not rely
> on those provisions to deprive a litigant who has behaved sensibly and reasonably of relief to which he is otherwise entitled."

100. That passage does not, when properly considered, mean that the sole question is whether the delay had caused prejudice to the defendant because such a reading would overlook Woolf LJ's qualification that he was considering the case of a claimant who had behaved "sensibly and reasonably". In any event the approach to be taken has developed since 1989 (as explained by Fraser J in *SRCL v NHSE* at [153]). A wide range of factors are potentially relevant to the question of whether there should be an extension of time in any particular judicial review claim. I will set out below considerations of potential relevance in the current case but all are to be considered in the light of the fact that a party seeking an extension of time is seeking to bring a claim outside the time limit imposed by the CPR and so must establish a proper ground for an extension being granted.

101. The potentially relevant considerations for current purposes are:

i) Whether there is a reasonable objective excuse for the claim having been commenced out of time.

ii) The presence or absence of prejudice to the Defendant and/or third parties.

iii) Whether the public interest requires that the claim be allowed to proceed. This was a potent consideration in *R (ex p Greenpeace) v Secretary of State for Trade and Industry* [2000] 2 CMLR 94 and is a factor on which the Claimant places reliance in the current case. In considering the public interest account is to be taken of the merits (see per Maurice Kay J at [76]). However, it is to be noted that *Greenpeace* was a particularly strong case. There the judge had heard full argument on the merits and had come to the clear conclusion that the regulations in question were unlawful. That conclusion related to the lawfulness of regulations of general application and Maurice Kay J explained that his finding as to their lawfulness was a "matter of substantial public importance." In addition when considering the impact of public interest and whether it calls for an extension of time account must be taken of the counterbalancing strong public interest in the speedy resolution of disputes relating to public procurement exercises

Should Time be extended for the Judicial Review Claim?

102. I need not repeat my assessment set out at [80] – [84] above of the matters put forward by Mr. Whittingslow. It suffices to say that they did not constitute a reasonable objective excuse for the judicial review claim being commenced out of time.

103. Similarly, I will not repeat the reasons given at [86] and [87] above for rejecting the Claimant's argument that the Defendant should have responded to the Claimant's letter of 18th December 2019 by giving unsolicited advice that the Claimant was mistaken as to the relevant time limit.

104. It was in the context of the Judicial Review Claim that the Claimant placed greatest weight on the Defendant's letter of 13th January 2020 and in particular on the statement that the Defendant had no objection in principle to the grant of an extension of time for the issuing of such a claim. The Claimant's skeleton argument referred me to a wealth of authority addressing the question of when a public body's words or actions have given rise to a legitimate expectation that it will act in a particular way. I did not find those of assistance here. Those authorities were dealing with cases in which a legitimate expectation had been created that the authority in question would act in a particular way and where acts or decisions inconsistent with that legitimate expectation were subject to challenge on public law grounds. The circumstances here are different and the question is not one of a legitimate expectation arising from the 13th January 2020 letter. The Claimant's contention is in reality a different and simpler one namely that the court should have regard to the fact that at that time the Defendant said that it had no objection in principle to an extension of time and

should take account of that particularly when assessing the force of the Defendant's current objection to an extension of time.

105. Viewed in that light the Defendant's letter has some relevance but it is a limited relevance. The grant or refusal of an extension of time for judicial review proceedings is a matter for the court and permission to bring a claim out of time is needed even if the parties are agreed that an extension of time is appropriate. Moreover, the words relied on by the Claimant must be seen in context. The indication that there is no objection in principle to an extension of time is the first part of a sentence the remainder of which makes the point that the Defendant does not consider that judicial review proceedings are appropriate. The next sentence then questions whether the bringing of such proceedings is "even permissible in the circumstances". The Defendant was making it clear that it did not regard judicial review proceedings as appropriate and the letter certainly could not be read as a concession that the Defendant would not resist the bringing of such proceedings.

106. There are two further difficulties for the Claimant. The first is that at the date of the Defendant's letter time had already expired. The second is that the Claimant does not suggest that it delayed action in response to the letter. It is of note that it is the Claimant's case that it acted reasonably promptly at that time and Mr. Whittingslow asserts in terms that the Claimant acted promptly after it received the information about the Monks price on 10th January 2020. The situation might well have been rather different if the Defendant had said that it would not object to an extension of time and if that had caused the Claimant to delay in issuing proceedings (particularly if this had been said before the expiry of the time limit). That is not the case here. Here the Claimant's failure to issue the Judicial Review Claim in time came before the Defendant's letter and was unconnected with it.

107. In those circumstances there was no reasonable objective excuse for the failure to issue the Judicial Review Claim in time. As with the Procurement Claim the reality is that the claim was issued out of time because the Claimant failed to appreciate that the relevant time limit was 30 days from 29th November 2019.

108. The Claimant contended that public interest warranted an extension of time. In support of that contention Mr. Chaisty relied on the approach taken in *R (ex p Greenpeace) v Secretary of State for Trade and Industry.* However, as I have already explained that was a case where the public interest considerations in favour of extending time were particularly compelling. I do not find the position here analogous. I have summarised at [88] –[90] the public interest considerations on which the Claimant relies. The asserted public interest in avoiding the waste of public money and in preserving jobs in Lancashire is not a public interest of the kind which would warrant the extension of time for a judicial review claim. The control of impropriety in the sense of addressing the concern that the exclusion of the Claimant was motivated by an improper animus amounting to a vendetta is a public interest consideration which might be capable of warranting an extension of time in a case where there are sufficient grounds for believing that there had been such impropriety. However, this is very far from being such a case. No charges have been brought arising out of Operation Sheridan and there are no grounds of any substance for believing that

the disqualification of the Claimant was motivated by the alleged improper animus. The Claimant's assertion in that regard is no more than suspicion and speculation.

109. The Defendant says that the delay in commencing the judicial review proceedings has caused prejudice. In that regard the Defendant points to its action in entering the contract with Monks but also to the effect on Monks. In his witness statement Christopher Monk explains the work which Monks have done and the expenditure they have incurred in relation to the contract. In short staff, including technicians and an operations manager, have been engaged and orders have been placed for vehicles (albeit the latter were placed after the commencement of proceedings).

110. The Claimant criticises the Defendant's entry into the contract with Monks on 16th January 2020 after the Claimant's claim had been intimated and goes so far as to say that the Defendant moved precipitately to grant the contract in order to forestall potential redress for the Claimant. In relation to Mr. Monk's statement Mr. Whittingslow says on instructions that the steps taken by Monks were neither necessary nor reasonable and contends that they would not have been needed if the contract had been awarded to the Claimant adding the allegation that they are indicative of the unsuitability of Monks as the provider of these services.

111. The criticism of the Defendant's action in entering the contract with Monks on 16th January 2020 is without substance. The Claimant knew of its disqualification from the exercise and of the Defendant's conclusion that Monks were the successful tenderer on 29th November 2019. The Defendant extended the standstill period by 2 days. The Claimant sent a letter threatening legal proceedings on 2nd December 2019. On 12th December 2019 the Claimant said that proceedings would be issued within the week. Despite that proceedings were not issued. The Defendant replied in detail to the letter of 18th December 2019 on 10th January 2020. On 13th January 2020 the Defendant responded to the Claimant's letter seeking an extension of time by saying that judicial review proceedings were not appropriate (indeed questioning whether they were " even permissible") and saying that time had expired for a claim under the Regulations which would otherwise have been the appropriate course. The Claimant's letter of 13th January 2020 had been accompanied by a draft application for an extension of time which the Claimant chose not to issue. In those circumstances the Defendant's entry into the contract with Monks nearly seven weeks after the Claimant had been told that Monks were the successful tenderer cannot be criticised as being precipitate.

112. It is not suggested that Monks have not in fact taken the steps set out in Mr. Monk's statement. It follows that there is a very real risk that Monks would suffer prejudice if the decision excluding the Claimant were to be quashed. I cannot conclude that the actions of Monks were unreasonable or unnecessary and the somewhat general assertions of Mr. Whittingslow (conveying indirectly the views of his clients) to the contrary cannot justify such a conclusion. On the face of matters the actions of Monks appear to have been entirely appropriate in the context where they had been awarded a contract which required the fleet of vehicles to be up and running for October 2020. It is entirely understandable

that Monks had to engage staff and to order vehicles well in advance. The fact that the Claimant would not have needed to do this if it had been awarded the contract is wholly immaterial.

113. It follows that at the very lowest there is a real risk of prejudice to Monks by reason of the delay in the commencement of the proceedings. That is a factor operating against the grant of an extension. Even if the position had been that the risk of prejudice was not present the absence of prejudice caused by the delay would not of itself justify an extension of time.

114. In those circumstances there is no basis on which it would be appropriate to extend time for the commencement of the Judicial Review Claim.

Conclusion.

115. The effect of this is that both claims are out of time and that in neither case is an extension of time appropriate.