**THE HIGH COURT**

**[2015 No. 226 J.R.]**

**IN THE MATTER OF DIRECTIVE 2004/18/EC AND**

**IN THE MATTER OF COUNCIL DIRECTIVE 89/665/EEC, AS AMENDED BY DIRECTIVE 2007/66/EC AND**

**IN THE MATTER OF THE EUROPEAN COMMUNITIES (AWARD OF PUBLIC AUTHORITIES' CONTRACTS) REGULATIONS 2006 (S.I. NO. 392 OF 2006) AND**

**IN THE MATTER OF THE EUROPEAN COMMUNITIES (PUBLIC AUTHORITIES' CONTRACTS) (REVIEW PROCEDURES) REGULATIONS 2010 (S.I. NO. 130 OF 2010) AND**

**IN THE MATTER OF ORDER 84A OF THE RULES OF THE SUPERIOR COURTS 1986**

**BETWEEN**

**RPS CONSULTING ENGINEERS LIMITED**

**APPLICANT**

**AND**

**KILDARE COUNTY COUNCIL**

**RESPONDENT**

**AND**

**ROUGHAN AND O'DONOVAN LIMITED (ROD AECOM) AND AECOM LIMITED**

**NOTICE PARTIES**

**JUDGMENT of Mr. Justice Richard Humphreys delivered on the 15th day of February, 2016**

1. When a public authority awards a contract, it is required by Irish and EU law to give the unsuccessful tenderers the reasons for its decision. But what level of reasons is required? Given that the number of contracts awarded by Irish public authorities probably runs into the thousands annually, it is interesting to note that the question of level of reasons required does not appear to have been fully addressed in previous Irish decisions. There is some European authority on the question, not all of it appearing to be entirely consistent, and I will attempt to synthesise it later in this judgment.

**Facts**

2. On 21st October, 2014, Kildare County Council published a contract notice seeking tenders for engineering consultancy services in relation to the design and delivery of the new Athy southern distributor road. The invitation to tender set out a methodology for the assessment of tenders, and criteria on which the tenders would be scored. These criteria also appear *verbatim* in the notification from the council to the applicant following the conclusion of the tendering process. Mr. Eoin McCullough, S.C., who appeared (with Ms. Catherine Donnelly, B.L.) for the respondent, described the criteria in the invitation to tender as "*extremely detailed*". While it is possible to say that the criteria may provide more detail than some of the other tender criteria which have been put before the court in relation to processes carried out by other authorities, to describe them as "*extremely detailed*" seems to me to be a considerable overstatement.

3. The deadline for receipt of requests to participate was 28th November, 2014. The applicant company, which is a provider of such consultancy services to entities including public authorities, made a submission to the council to participate in the process.

4. On 9th December, 2014, the applicant received a letter from the respondent dated 5th December, 2014, notifying it that its application had been successful in qualifying for stage 2 of the competition which was a "*request for tender*". The applicant was also notified that the overall score received in relation to its request to participate was one hundred marks out of a maximum of one hundred. The deadline for submission of completed tenders was 11th March, 2015. The applicant complied with this deadline.

5. At some point during the process, a date as to which Mr. McCullough had not received instructions, but obviously prior to the announcement of the scores, the council decided, without any basis in the invitation to tender, to change the marking scheme without any apparent notice to the tenderers prior to the submission of their tenders, and substitute a completely different marking scheme. The original scheme envisaged that the winner under a particular criterion would be given 100% under that criterion and runners-up would receive a commensurate score in proportion to their score relative to the winner under that heading. This system painted with a narrow brush and allowed for quite a degree of fine distinction between particular tenderers in relation to any given criterion. The new marking scheme was a much more crude one whereby scores in each criterion were simply marked as excellent, very good, or good and so on, attracting marks of 100%, 80%, 60% and so on respectively. Clearly the new, cruder, scheme created much more subjectivity and a much greater potential for a clear gap to be created between a preferred tenderer and a runner-up. Instead of gradual gradations of loss of marks, a runner-up could experience a sudden drop in scores in increments of 20%. The council's lack of entitlement to change the marking scheme has not been pressed in argument as a ground to quash the competition result, presumably because this action was only commenced after the contract was signed. In principle, such a radical departure from the published scheme would be fatal to the award in a case where the challenge was initiated during the standstill period. In the present case, what is in issue is rather the extent of the reasons, but the fact that the scores announced departed so markedly from the published scoring system is a factor that I can take into account in assessing the adequacy of the reasons actually given.

6. The respondent then assessed and, using the new, unpublished and apparently uncommunicated, system, scored the four tenders

that were received for the final stage, of which the notice parties were the successful tenderer (by way of a joint venture), and the applicant one of the three unsuccessful tenderers. Of importance in the case is the fact that the applicant's tender was more competitive on price than the successful tenderer, by a significant margin. Thus as far as the applicant was concerned, the decision turned on qualitative rather than quantitative assessment.

7. The respondent issued a "*notification of award decision*" by letter dated 2nd April, 2015, to the applicant. This notification informed the applicant that it was unsuccessful in the competition, identified the successful tenderer and the marking scores, under the new marking system, and purported to set out reasons. The reasons were a combination of a repetition of the criteria, a repetition of the scores but phrased in terms of "*good", "very good*", and so on, and a handful of additional words, 16 in total, which contained a vague and general reference to the manner in which the preferred tenderer was superior in qualitative terms to the applicant. Despite being ahead on price, the applicant was held to be behind on quality by a relatively narrow margin.

8. The applicant has helpfully also made available to the court (not exhibited, but admitted by agreement of the parties) copies of the notification letters sent to the other two unsuccessful tenderers. A comparison of the three notification letters is instructive.

9. The applicant, which was in second place in the competition, scored lower than the preferred tenderer on criterion A1. The "reasons" were that "*Your response to this criterion was of a good standard however compared to the successful tenderer it lacked sufficient specific detail on new studies and reports that would be required going forward.*"

10. The third placed tenderer received a letter with precisely the same formula except with the words "*very good*" instead of "*good*". The fourth placed tenderer received an identical formula to the applicant.

11. On criterion A2, the applicant was told: "*Your response to this criterion was of a very good standard however the successful tenderer provided more relevant and specific experiences/lessons learnt in recent public works contracts.*"

12. The third and fourth placed tenderers were given an identical formula with the word "very" omitted.

13. On criterion A3, the applicant was told: "*Your response to this criterion was of a good standard however he successful tenderer offered a more comprehensive approach to ABP oral hearings and measures to maximize the chance of a successful outcome*."

14. The third placed tenderer received an identical formula. The fourth placed tenderer's formula was identical apart from the word "*satisfactory*" instead of "*good*".

15. On criterion A4, the applicant was told: "*Your response to this criterion was of a good standard however compared to the successful tenderer it lacked specific detail on your approach to site management and supervision, including methods for the control of delays and project costs.*"

16. At this point, Ms. Clodagh Lyons, who authored the letters, engaged in a bold and innovative, even startling, departure from the previous, tried and trusted, methodology of verbatim repetition. Rather than inform the third and fourth placed tenderers that "*compared to the successful tenderer it lacked specific detail on your approach to site management and supervision, including methods for the control of delays and project costs" she informed them that "the successful tenderer provided a more detailed approach to site management and supervision and specific methods for the control of delays and project costs."*

17. On criterion B2 the applicant was told: "*Your response to this criterion was of a very good standard however the successful tenderer identified more comprehensive details of risks that may delay the scheme."*

18. The third placed tenderer received an identical response. The fourth placed tenderer was told that their response was of a "satisfactory" standard but that the successful tenderer identified "*a more detailed list of risks*" that may delay the scheme rather than "*more comprehensive details of risks".*

19. Leaving aside therefore terms that merely express in words the numerical scores (satisfactory, good, very good), and minor variations in wording which do not go to substance, it is clear that the same generic reasons were recycled for each one of the losing tenderers. The letters taken together showed the same methodology that Cardozo J., in another context, called the "*type tonsorial or agglutinative, so called from the shears and the paste pot which are its implements and emblem*" (Law and Literature (1925) reprinted in 48 Yale L.J. 489 (1939) at 493; discussed by Arden L.J. at (2012) 128 L.Q.R. 515).

20. The directives and the European Communities (Public Authorities' Contracts) (Review Procedures) Regulations 2010 (S.I. No. 130 of 2010) provide for a "*standstill period*" during which the contract in favour of the successful tenderer will not be signed. Where a notification is provided electronically, as it was in this case, the standstill period is 14 days. The letter therefore notified the applicant that the standstill period would expire at midnight on Friday, 17th April, 2015.

21. The applicant then did nothing tangible for a period of 12 out of the 14 days of the standstill period. Ms. Susan Joyce, on behalf of the applicant then wrote to the council on 14th April, 2015, stating that the applicant was "*extremely disappointed*", pointing out that they were "*the sitting consultant*" (this was a reference to the applicant having done work in relation to the project up to around 2007, when the project was halted to the economic downturn), and pointing out that the tender submitted by the applicant was some €700,000 less than the preferred tenderer.

22. The letter said that "*we…do not understand how such substantial quality scores were lost",* and compared one of the answers to a similar answer in a different but similar tender where a much higher score was provided. The letter noted with appreciation at the actual scores in the competition had been provided "*along with limited feedback*", but noting the marginal difference in scores between the applicant and the successful tenderer, stated that *"[t]he comments provided do not enable us to determine the relative advantages of the preferred bidder and is (sic) not sufficiently transparent as to how such substantial quality scores were lost. We respectively (sic) request more detailed feedback and a de-brief feedback meeting."* It concluded with a statement that the applicant had no alternative but to challenge the outcome pending a satisfactory response.

23. The reply from the council to this correspondence is of some importance also. This letter was issued the following day, 15th April, 2015, on behalf of the council. The letter simply asserts that tenderers were assessed in accordance with the criteria set out in the tender documents, and repeated further information set out in those documents. It asserted that the tenderers were "*assessed and scored appropriately on a comparative basis"*. The council "*cannot comment on the results of a competition undertaken by another contracting authority*". The letter went on to say that *"[w]e are satisfied that we have met our obligations for transparency in connection with this tender process and have provided details on the characteristics and relative advantages of the tender selected*

*compared to your tender submission under the relevant quality criteria."*

24. The applicant replied to this letter on the same day repeating in substance the points previously made and requesting "*a full and independent assessment*" of the tender quality assessment. Of note is a statement in that letter that "*KCC's failure to provide the detailed feedback in a sufficiently transparent manner requested (in our letter dated 14th April) as required under the Remedies Directive has resulted in RPS being unable to understand how such substantial quality scores were lost."*

25. This letter was replied to by a further letter from the council dated 17th April, 2015, which added nothing of substance to their previous replies. It asserted that "*we have fully met our obligations under procurement rules in connection with this tender process*". The letter denied that there was any basis to seek review of the process by the Department of Transport, Tourism and Sport. It notified the applicant (again) that the standstill period expired on that day and that it was the council's intention to proceed with the order of the contract at the earliest convenience.

26. There then followed an attempt by the applicant to interest the Department in ensuring that the contract would not be awarded pending a review. The necessary information would appear not to have been fully communicated by the applicant to the Department until after the signature of the contract on 22nd April, 2015. On that basis, the Department (understandably) saw no advantage to intervening in the matter.

27. Solicitors for the applicant then issued a pre-action letter in accordance with reg. 8(4) of the 2010 regulations on 30th April, 2015, which was replied to by solicitors on behalf of the respondent on 1st May, 2015. The notice of motion seeking relief pursuant to O. 84A of the Rules of the Superior Courts was then issued on 1st May, 2015, outside the standstill period but within the statutory limitation period of 30 days as set out in the 2010 regulations.

**Pleadings**
28. The statement grounding the application lists a total of eighteen reliefs sought, on a total of 83 separate grounds. Unsurprisingly, this generated a notice of opposition containing 55 separate grounds on which the respondent opposes the application. Eight ring binders of material and authorities were handed into court, a surprisingly modest number given the ostensible number of issues.

29. However, despite this wealth of grounds, there is essentially one basic point in the case, namely whether the council provided sufficient reasons for its decision. While the addressing of this issue necessarily involves consideration of a number of sub-issues, I do not think that the number of grounds in this case achieves the sort of focus that assists resolution of this single net issue. In *O'Mahony Developments Limited v. An Bord Pleanála* [2015] IEHC 757, I drew attention to the need for parties to comply with the judgment of the Supreme Court in *Babington v. Minister for Justice, Equality and Law Reform* [2012] IESC 65, in which MacMenamin J. explained the reasons why over-lengthy statements of grounds were undesirable. In *Babington*, the Supreme Court was critical of a statement containing 34 grounds. In *O'Mahony*, the statement I was considering contained 40 grounds. The present application, weighing in at 83 grounds, seems to aim for an undesirable local record.

30. In order to address the question of adequacy of reasons, it is necessary firstly to set out the scheme of the directives, consider the manner in which they have been transposed, examine the purposes of a right to reasons, seek to identify principles regarding the level of reasons required for tender decisions, and finally to apply those principles to the facts of this case.

**The directives**
31. The four relevant European directives are as follows:-

> (i) Council Directive 89/665/EEC of 21st December, 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts.
>
> (ii) Directive 2004/18/EC of the European Parliament and of the Council of 31st March, 2014 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts.
>
> (iii) Directive 2007/66/EC of the European Parliament and of the Council of 11th December, 2007 amending Council Directives 89/665/EEC and 92/13/EEC with regard to improving the effectiveness of review procedures concerning the award of public contracts.
>
> (iv) Directive 2014/24/EU of the European Parliament and of the Council of 26th February, 2014 on public procurement and repealing Directive 2004/18/EC.

32. It is clear from a consideration of the directives that a decision by an awarding authority in relation to a tenderer must be supported by reasons, and furthermore that such reasons are to be provided in two stages. Firstly, a summary of the reasons must be provided automatically, without request. Secondly, on request of an unsuccessful tenderer in certain circumstances, more detailed reasons are required, subject only to specific exceptions for confidential information.

33. The 1989 directive, as amended by the 2007 directive, deals with the initial notification of a summary of the reasons as part of the notification decision.

34. The 2004 directive, as proposed to be replaced by the 2014 directive, deals with the subsequent furnishing of more detailed reasons at the request of the applicant.

35. The overall scheme of the requirement to give reasons in this context, as a matter of European law, is well described in recital 82 to the 2014 directive, which states that "*the information concerning certain decisions taken during a procurement procedure, including the decision not to award a contract or not to conclude a framework agreement, should be sent by the contracting authorities, without candidates or tenderer having to request such information*".

36. Recital 82 goes on to recall that the 1989 directive "*provides for an obligation for contracting authorities, again without candidates or tenderer (sic) having to request it, to provide the candidates and tenderers concerned with a summary of the relevant reasons for some of the central decisions that are taken in the course of a procurement procedure."*

37. Finally, the recital clarifies that "*candidates and tenderers should be able to request more detailed information concerning those reasons, which contracting authorities should be required to give except where there would be serious grounds for not doing so*."

38. The framework of European law, therefore, involves a two-stage process. Initial information being a summary of reasons is to be

provided automatically and without request under the 1989 directive. However, there must also be an entitlement on the part of candidates and tenderers to request more detailed information pursuant to the 2004 directive (or the 2014 directive, which replaced, but in this respect is similar to, the 2004 directive). The contracting authority is then required to give reasons pursuant to that further right of request, unless there are grounds for not doing so as set out in that directive.

39. The scheme of the 2004 directive setting out two separate obligations is very clear when one turns to the terms of art. 2(a) of the 1989 directive and art. 41(2) of the 2004 directive.

40. Article 2(a) of the 1989 directive, as inserted by the 2007 directive imposes an obligation on the awarding authority to provide a "*summary of reasons*" in the notification decision. Recital 3 to the 1989 directive emphasised that the opening up of procurement involved a "*substantial increase in transparency and non-discrimination*", in which context the obligation to provide reasons must be read.

41. While a summary of reasons is to be provided at the notification stage, art. 41(2) of the 2004 directive imposes an obligation (repeated in the 2014 directive) to provide, on request, "*the reasons*" for the rejection of a tender and a statement of the "*characteristics and relative advantages*" of the successful tender. There is a hierarchy of reasons depending on whether the request is being made by a mere candidate, any tenderer, or a tenderer whose tender was deemed admissible. In the present case, the applicant is both a tenderer and a tenderer whose bid was deemed admissible. Therefore, it was entitled both to the summary of reasons under art. 2(a) of the 1989 directive and a statement of reasons, including characteristics and relative advantages under art. 41(2) of the 2004 directive, on request. Such request, was, of course, made, as appears from the correspondence referred to above. I would reject the argument advanced by the respondent that the right to reasons does not apply to a tenderer whose tender is deemed admissible. Such an interpretation would run counter to the objective of transparency underlying the directives.

**Regulations effecting transposition**
42. An initial attempt to transpose the 2004 directive took the form of the European Communities (Award of Public Authorities' Contracts) Regulations 2006 (S.I. No. 329 of 2006). Regulation 49(3) of the 2006 regulations provided that following a request, such reasons would be provided as soon as possible and in any event within 15 days. The major difficulty with this provision was that the standstill period was potentially 14 days, and thus a tenderer who requested reasons might not receive them within the standstill period.

43. In Case C-455/08, *Commission v. Ireland*, 23rd December, 2009, the Court of Justice held that 2006 regulations did not adequately transpose the 2004 directive because the time period for furnishing reasons on request could fall outside the standstill period.

44. It should be noted that, separately from this, the European Communities (Award of Contracts by Utility Undertakings) Regulations 2007 (S.I. No. 50 of 2007) provided that the notification of the result of the tenderer would set out the "*principal*" reason or reasons for the decision. Thus, prior to the *Commission v. Ireland* decision, Irish law provided for the two-stage process set out in the directives, namely that more basic reasons were provided in the notification, with further reasons or further detail supplied on request. The defect, of course, was that the period for responding to such a request could bring the response outside the standstill period.

45. In the judgment of the Court of Justice, at para. 34, it was stated that the "*reasons for the decision*" must be communicated in sufficient time to enable the decision to be challenged. At para. 42, it was said that tenderers should be "*fully informed*" of the reasons for a tendering decision.

46. In response to the judgment of the court, the European Communities (Award of Contracts by Utility Undertakings) (Review Procedures) Regulations 2010 (S.I. 131 of 2010) were adopted, setting out a somewhat different approach. Insofar as the regulations applied to a tenderer whose submission was admissible, reg. 6(2)(c)(ii) provided that the notification of the decision would contain a summary of reasons. Regulation 6(3) provided that the summary of reasons, in a case such as the applicant's, would "*comprise*" (that is, would be equivalent to) the characteristics and relative advantages of the successful tenderer and the name of the latter. Regulation 6(5) provided that such reasons may be provided by furnishing the scores in the competition. Regulation 6(7) provided that the awarding authority may withhold information referred to in reg. 6(2)(c) in certain specified circumstances in accordance with art. 41(3) of the 2004 directive:

> *"However, a contracting entity may decide to withhold any information referred to in paragraph (2)(c) regarding the award of a contract, the conclusion of a framework agreement or admittance to a dynamic purchasing system if the release of such information:*
>
> *(a) would impede law enforcement,*
>
> *(b) would prejudice the legitimate commercial interests of economic operators, whether public or private,*
>
> *(c) might prejudice fair competition between economic operators, or*
>
> *(d) would otherwise be contrary to the public interest."*

47. Regulations 5(3) and (4) provided that the standstill period would be 14 days for electronic notification or 16 days otherwise. This, combined with a requirement to state reasons in the notification decision, sought to meet the principal concern in the *Commission v. Ireland* case.

48. However, the regulations of 2010 created a further problem in that they did away with the specific provision for the tenderer to request further information in accordance with art. 41(2) of the 2004 directive. This is a right specifically conferred by European law. It cannot be removed by national legislation. In the present case, Mr. McCullough argues that the right is fully provided for by provision being made in reg. 6(2) and (3) for the reasons to be contained in the notification decision itself. I have no hesitation in saying that such a provision could never be a substitute for a specific legal entitlement set out in expressly in EU law for a tenderer to revert to the ordering authority to seek specific further reasons. Indeed, it is obvious that the directive expressly requires awarding authorities to engage with the specific requests for information made by individual tenderers (which by definition will be bespoke request relating to particular questions formulated by the tenderers in the context of the specific comparative relationship between the particular unsuccessful tenderer and the preferred tenderer), because it severely delimits the grounds on which they can refuse to provide particular information (see art. 41(3)).

49. Furthermore, an individual awarding authority cannot possibly contemplate all of the various matters that may arise in the minds of all possible tenderers, when coming to a conclusion on the tendering process. Any initial statement of reasons on behalf of an awarding authority can only, at best, be that authority's unilateral assessment of the reasons that are likely to be of benefit to a tenderer understanding why the decision was made and whether it should be challenged actionably manifest error need be provided. It is clear that "bespoke" reasons are required because it is the comparison between each individual tender and the ultimate winner that is at issue. The uniform and generic nature of the three notification letters in this case illustrates a fundamental failure to address this issue.

50. That the reasons need to be bespoke to the relationship between the particular unsuccessful tenderer and the successful one is obvious from the object and purpose of the directives. Such a conclusion is recognised by, for example, the guidelines issued by the Crown Commercial Service, in which it is stated at p. 7 that reasons need to be "bespoke" to the individual tenderer (Crown Commercial Service, *The Public Contracts Regulations 2015: Guidance on the Standstill Period)*.

51. To suggest that the giving of reasons (rather than a summary) as a matter of automatic routine does away with the requirement to consider and respond lawfully to any request for additional reasons is as unacceptable an argument as saying that a public body could circumvent its duties under the Freedom of Information Act 2014 by simply publishing all records that it thought were open to disclosure, and then refusing to engage with any FOI request made thereafter. The EU directive envisages a dialogue between the unsuccessful tenderer and the awarding authority, which must be responded to except where specific exceptions referred to above, for example, impeding law enforcement, apply. That dialogue cannot simply be shut down by an awarding authority deciding in advance of any communication from its interlocutor that it has already considered and addressed all matters.

**The purpose of a right to reasons**

52. The recognition of a legal right to reasons, as a matter of natural justice, constitutional law, under the ECHR, and in EU law, reflects and serves a range of important policy objectives.

53. Firstly and most immediately, the reasons must enable the tenderer to know whether it has grounds to challenge the decision by way of judicial review.

54. Secondly, the reasons must enable the court to effectively conduct such a judicial review, if initiated.

55. However in addition to these two primary reasons, there are also a number of further important justifications for an effective right to reasons.

56. Fundamentally, the provision of reasons encourages and supports better administrative decision making. A decision maker is more likely to come to a conclusion that is both correct and seen to be correct if he or she is, at all stages, mindful of the need to explain and support the decision in terms of articulated reasons. A requirement for publication of reasons enhances the decision making process, and encourages more robust thought on the part of the decision maker.

57. Furthermore, a requirement of reasons acts as a promoter of "*transparency*" in the terms of recital 3 to the 1989 directive, or alternatively phrased, as a significant deterrent to arbitrary administrative action or malpractice. Unsound or even improper decisions can readily be cloaked with reassuring bureaucratic language. It is much harder to mask an improper decision if there is a clear standard for the articulation for sustainable and objective reasons.

58. These issues have a special relevance in relation to financial decisions. Leaving aside the present application and simply considering the general matter of the award and distribution of public money, and fully acknowledging the generally outstanding nature of the work performed by both elected representatives and unelected officials in the public interest, it would be naïve to think that corruption or malpractice in the distribution of public funds can be consigned to a bygone historical period laid forever to rest by Tribunals of Inquiry. Studies such as Dr. Elaine Byrne's *Political Corruption in Ireland 1922-2010: A Crooked Harp*? (Manchester, 2012) illustrate the melancholy fact that when there is financial advantage to be had, eternal vigilance as to the process is necessary. Thus, as a matter of public policy, particularly as far as this jurisdiction is concerned, there is a particularly strong imperative for an exacting standard as to reasons for the award and distribution of public money.

59. In *Somague Engenharia S.A. v. Transport Infrastructure Ireland* [2015] IEHC 723, a decision which arose in the context of a review of the award of a public contract under the Utilities Directive 2004/17/EC, transposed by S.I No. 50 of 2007, Baker J. stressed the principles of "*transparency, fairness and objectively ascertained criteria*" in the procurement process (para. 13), and held that in determining issues in proceedings under O. 84A, "*transparency in every part of the process of the competition*" may require the court to have regard to the need for such transparency in terms not just of disclosure of documents but in "*scrutinising the evidence before it*" (para. 56).

60. In addition, the provision of reasons promotes acceptance of the decision. Any feelings of dissatisfaction that an unsuccessful tenderer may have in relation to the process may be significantly assuaged by the provision of a good standard of reasons for the outcome reached and a willingness to engage to explain the outcome. In the present case, it seems to me that a more active approach by the council in engaging with the applicant on foot of its initial requests of reasons of 14th April, 2015 might have produced greater acceptance of the decision ultimately reached. By declining to furnish any further reasons, any feelings of mystification or grievance on the part of the applicant were naturally aggravated. The provision of reasons serves the important policy objective of promoting acceptance of decisions within the community of persons affected. In the case of judicial decisions, it has long been recognised not just that public acceptance of such decisions is necessary (see e.g., *Rooney v. Minister for Agriculture and Food* [2016] IESC 1, per O'Donnell J. at para. 4), but also that the giving of reasons helps to promote such acceptance. The latter point equally holds for administrative decisions.

61. Further, in the tendering context, there is a specific additional reason why the provision of reasons serves important policy objectives, namely that it will have the advantage of helping to improve the overall quality of future submissions.

62. As it was put in the applicant's submissions at para. 57, in order to serve this objective the reasons should "*include sufficient detail to enable the unsuccessful tenderer … proactively to identify its failures sufficiently in order to improve in future procedures*".

63. It is in the interests of awarding authorities that the tenderer offerings they receive are of a high standard. Today's unsuccessful tenderer may be tomorrow's successful one in another competition, so it is important that tenderers learn from the process so that they will be able to put that knowledge to use when they are successful on a future occasion. Whatever entity succeeds in winning any particular contract must then work with the awarding authority, possibly for a prolonged period of time. It is to the benefit of that awarding authority that any tenderer has a detailed understanding and appreciation of the level of service required and the

detailed elements that go into an offering that in the needs of the authority. A requirement for meaningful reasons can only have the advantage of enabling unsuccessful tenderers to raise their standards, thereby benefiting awarding authorities generally into the future.

64. Such an increase in information also obviously has a knock-on benefit for the citizens of the State who are the ultimate beneficiaries of whatever public service is being provided by virtue of the tender.

65. A circular of relevance to this point has been issued by the Department of Public Expenditure and Reform, setting out clearly the desirability of debriefing tenderers after the event for the purpose of helping them prepare for future bids (Circular 10/14: Initiatives to assist SMEs in Public Procurement (16th April, 2014): "In order to prepare for future bids, *it is very helpful for an unsuccessful tenderer to see which aspects of its bid were considered strong by a buyer and which aspects were considered weak. For contracts above EU thresholds … buyers are required to give appropriate feedback to companies who have participated in a public procurement competition. For all other contracts buyers are strongly encouraged to provide written feedback as a matter of good practice"* (para. 9, emphasis added).

66. Another important policy effect of requiring the giving of reasons is that it will reduce the need for aggrieved persons to have recourse to the courts. Mr. McCullough submitted that setting the standard of reasons at a level would reduce litigation was not a valid policy consideration to which I could have regard. On the contrary, it seems to me that the reduction of litigation is an excellent reason for a requirement to give reasons to a level that is sufficiently meaningful to avoid unnecessary court actions. As O'Donnell J. put it in Rooney, *"[l]itigation is not in itself an intrinsically desirable activity"* (at para. 2). The furnishing of meaningful reasons can provide sufficient redress to a losing tenderer so as to render recourse to the courts unnecessary. That can only be of benefit to society as a whole, not to mention other litigants whose cases will then be dealt with more speedily and efficiently.

**On the pleadings, can the applicant rely directly on the directives?**
67. Mr. McCullough argued that on the pleadings, the applicant could not rely directly on the directives in the case of any "*gap*" in the regulations. He submitted that Mr. Shane Murphy S.C., who appeared (with Mr. Paul Brady, B.L.) for the applicant, was essentially making a case that there had been a breach of the 2010 regulations, and was confined to that issue. Inferentially, he was suggesting that Mr. Murphy could not make any complaint regarding the failure to respond to the further request for reasons of 14th April, 2015, because the 2010 regulations contain no transposition of the entitlement to seek further reasons contained in art. 41(2).

68. I cannot accept this submission. Relief (c) in the Statement of Grounds specifically alleges that the respondent is in breach of its obligations under EU law. This is a direct allegation that the respondent has failed to comply with the relevant obligations (which are set out in the directives), rather than simply failed to rely on the 2010 regulations. There is no tenable basis to contend that the applicant has not properly grounded its argument in the pleadings.

**Do art. 2(a) and art. 41 have direct effect?**
69. Insofar as the EU right to specifically seek further reasons and to have that request positively responded to unless specific exceptions apply is concerned, this is a right that derives directly from art. 41(2) and (3) of the 2004 directive. It is not contained in the 2010 regulations. To rely on it, therefore, the directive must be shown to have direct effect. In my view, there can be no question about this. Article 41 and art. 2(a) of the 1989 directive contain clear and unequivocal obligations. They are, therefore, binding on emanations of the State, of which Kildare County Council is obviously one. These obligations have direct effect for the purposes of EU law (see Case C-6/64, *Costa v. E.N.E.L.,* 15th July, 1964).

**What level of reasons is required?**

**(A) Scores alone**
70. Regulation 6(5) of the 2010 regulations states that the provision of the scores alone "*may*" satisfy the obligation to give reasons. However, it is clear from the case law that this can only apply where the reasons are obvious from such scores, which in practice means where the scores relate to purely quantitative assessments as opposed to qualitative ones (see Case T-183/00, *Strabag Benelux N.V. v. Council of the European Union*, 23rd February, 2003 para. 57 where price alone was critical; and also Case T-169/00*, Esedra S.P.R.L. v. Commission of the European Communities,* 26th February, 2002 where a crucial factor, while not relating to the price, was nonetheless quantitative). However, when one moves from merely the measurement of quantitative factors which may well be sufficiently captured by a mathematical score, into the qualitative area, such as all of the factors in the present case other than price, the provision of scores alone cannot suffice (see Case T-165/12, *European Dynamics Luxembourg SA & Evropaïki Dynamiki v. European Commission,* 13th December, 2013). In Case T-57/09, *Alfastar Benelux SA v. Council of the European Union,* 20th October, 2011; the General Court (Seventh Chamber) said at para. 39:

> *"Thus, merely providing the scores awarded in respect of the various award criteria was too abstract a form of reasoning to enable the applicant to determine the specific reasons which led the contracting authority to decide, in the exercise of its broad discretion, that the bid submitted by the successful tenderer was better from the quality point of view than that submitted by the Alfastar-Siemens consortium."*

71. For those reasons, I would entirely reject the suggestion, admittedly only faintly advanced by Mr. McCullough, that reg. 6(5) is in any way a sufficient answer to this claim. The provision of the scores alone could only constitute sufficient reason if the tenderer criteria revolved around price or other purely quantitative measurements. In practice, one would have thought that this could only arise rarely.

**(B) The need for narrative comment**
72. Given that the scores alone would be an inadequate answer to the claim, do those scores combined with the sort of brief and non-specific information provided in this case amount to a satisfaction of the obligation to provide reasons and the characteristics and relative advantages of the successful bid?

73. Of course, it is trite law to say that the level of reasons depends on the circumstances. At one level, if a successful tenderer was also the lowest priced tenderer, that provides a reassurance that objective, quantitative, criteria are likely to have been dominant in the decision making process, even if there are also qualitative criteria. Virtually every competition, even every job interview, involves a mix of the quantitative and the qualitative. Where there is a mismatch between the subjective and objective assessment, as sometimes there quite properly will be, there needs to be a heightened awareness of the need to ensure that the outcome is justified by reference to specific reasons.

74. In the tender context, in a case where the loser, in fact, submitted a lower priced offering than the winner, there is a particular need for it to be clearly demonstrated that valid objective reasoning was applied in the selection process. Such was the case in the

present action where the applicant's bid was considerably lower than that of the preferred tenderer. This consideration is reinforced by the decision in Case T-300/07, *Evropaïki Dynamiki v. European Commission,* 9th September, 2010 at para. 72 (a conclusion which was not affected by the determination of the matter on appeal in Case C 560/10 P, 13th October, 2011 where the Court of Justice held at para. 23 that the necessary "*objective reasons*" had been identified in the judgment of the General Court). It was noted in that case that where the price proposed by the unsuccessful tenderer was lower and therefore where quality was the deciding factor, the information concerning the criteria applied is all the more necessary.

75. Related considerations were touched on in Case T 89/07, *VIP Car Solutions v. European Parliament,* 20th May, 2009 [2009] ECR II-1403 at para. 71, where it was said that "*information was all the more necessary as the price offered by the applicant was lower than that offered by the successful tenderer"*.

**(C) The need for comments to refer to specific identified matters**

76. The case closest to the fact situation here, and therefore the one which I have found most useful, is the decision of the General Court in Case T-447/10, *Evropaïki Dynamiki v. Court of Justice,* 17th October, 2012, a case which involves a review of reasons given for a tender decision by the Court of Justice. In that case, both scores and general, succinct, comments were provided, but no reference was identified to particular facts or matters supporting the general comments. The absence of the latter factor led to annulment of the award.

77. At para. 93, it was noted that the Court of Justice gave only general reasons, which were held to be unacceptable.

78. This case dealt with Article 100 of Council Regulation (EC, Euratom) No. 1605/2002 of 25th June, 2002 on the financial regulation applicable to the general budget of the European Communities, as amended by Council Regulation (EC) No. 1525/2007 of 17th December, 2007 (the financial regulation), which is similar to the effect of art. 2(a) of the 1989 directive and art. 41(2) of the 2004 directive.

79. At para. 93, the court held that scores alone were insufficient: "*the scores set out in the two tables could not in themselves constitute an adequate statement of reasons*."

80. As regards the comments provided with those scores, those too were inadequate: "*the Court of Justice's comments on the successful tenders and the applicant's tenders do not disclose in a clear and unequivocal fashion the reasoning followed by the Court of Justice, so as to enable the applicant to ascertain the reasons for the rejection of its tenders"* (para. 94).

81. It was accepted as a matter of principle that "*succinct comments*", provided they were sufficient, were not precluded in order to meet the obligations of the directive (para. 95). But those comments "*must be sufficiently precise to enable the applicant to ascertain the matters of fact and law on the basis of which the contracting authority rejected his offers and accepted those of other tenderers"* (para. 96); and "*[i]n the present case, the Court of Justice's comments did not enable the applicant to ascertain those matters"* (para. 97).

82. What this meant in practice was then spelled out on a step by step basis by the court contrasting the reasons offered with the absence of any specific fact or matter by which that reason could be understood by the losing tenderer, a company called @Lex. To summarise:

> (i) The first comment was that "*efficient schedule management*" militated in favour of that tender. However "*the comment merely reflects the result of the Court of Justice's assessment and does not provide any fact that substantiates that assessment. Consequently, it does not enable the applicant to understand the reasons why @Lex's tender for lot 1 was superior to its tender in this respect*" (para. 98).
>
> (ii) The second comment was that the winning tenderer was preferred by reference to "*the quality of the provision of the requested services*". But "[*s]o vague a comment does not enable the applicant to ascertain the reasons why the Court of Justice preferred @Lex's tender to its own"* (para. 99).
>
> (iii) The next comments referred to "*the concrete presentation of the procedures and methods"* and to "*the details guaranteeing that the tenderer will provide the requested services in an optimal way"*. But it was held that "*[t]he content of its two comments is limited. They are general comments not referring to specific quality criteria. Furthermore, even if those comments reflect the result of the Court of Justice's assessment, they do not enable the matters upon which the Court of Justice based its assessment to be ascertained (para. 100).*"
>
> (iv) The next comment to be discussed was "*the lack of concrete elements for applying the proposed means".* Again the lack of specific facts and matters was crucial. The court held in relation to this comment that *"[i]t therefore recorded a lack of concrete elements in the applicant's tenders but did not set out the elements that it was expecting. … such a comment could have sufficed if the Court of Justice had set out in what way the tenders of the successful bidders contained elements that were more concrete. However, as has been stated above, the Court of Justice's comments on the successful tenders are very general and* do not refer to specific matters" (para. 102, emphasis added).
>
> (v) The next comment was that the losing tender showed "*little indication of the functional competency management in the profession of the Court*". In relation to this piece of bureaucratic gobbledegook, the court politely stated that *"[t]he meaning of this comment is not obvious"* but went on to say that *"[e]ven if it were accepted that the applicant was able to understand that the Court of Justice was criticising it for not having taken the Court's specific requirements into account, this comment would not be sufficiently specific. The Court of Justice failed to state the information that it expected from the applicant's tenders or to indicate the information contained in the successful tenders"* (para. 103).
>
> (vi) The next comment was as to the "*small number of elements guaranteeing the stability of the team*". The court held that "*the content of the comment remains very vague and does not enable the applicant to ascertain what elements the Court of Justice was expecting from it or the elements that justified higher scores for the successful tenders*" (para. 104).
>
> (vii) Similarly, the next comment criticised "*the relative weakness of the procedure which ensures the transfer from development to maintenance, as regard of the criterion of the guarantees regarding acquisition of skills*". The court held that "*its content remains extremely vague. It does not enable the matters upon which the Court of Justice based its assessment to be identified."*

83. The overall conclusion was therefore that "*the Court of Justice's comments did not constitute an adequate statement of reasons*, even if they were read in conjunction with the scores set out in the table" (para. 106, emphasis added).

84. The critical conclusion for present purposes, as apparent from the reasoning I have set out above, was that "*[i]n order to set out the characteristics and relative advantages of the successful tender … the contracting authority must at least mention* the matters which should have been included *in the applicant's tender or* the matters contained *in the successful tenders*" (para. 107, emphasis added).

85. A similar approach was followed in Case T-165/12, *European Dynamics Luxembourg SA & Evropaïki Dynamiki v. European Commission,* 13th December, 2013, the General Court found that general reasons were inadequate: "*However, in order to meet the requirements of Article 100(2) of the Financial Regulation, the contracting authority's comments must be sufficiently precise to enable the applicants to ascertain the* matters of fact and law *on the basis of which the contracting authority rejected their offer and accepted that of another tenderer*" (para. 87, emphasis added).

86. The court observed that the obligation to furnish reasons does not preclude "*succinct comments*" (para. 86) but they must be sufficiently precise. It does not, of course, follow from this that merely because comments are succinct that therefore they are acceptable. The effect of the European decisions appears to me to clearly indicate that the awarding authority must make reference to specific facts and matters by reference to which the successful tenderer was preferable.

87. Separately from the general requirement to give reasons, an unsuccessful tenderer "*may request additional information about the reasons for their rejection in writing*" (Case C-560/10 *P Evropaiki Dynamiki v Commission*, 13th October 2011, para. 12, in the context of analogous requirements of Financial Regulation 1605/2002). It would appear to follow that that request must be responded to positively unless specific listed exceptions apply.

88. While, of course, there are other cases which turn on their own facts and which, in particular circumstances, not all of which are entirely clear from the reports, may not require an exacting standard in every case (see e.g. Case T-437/05, *Brink's Security Luxembourg SA v. Commission of the European Communities,* 9th September, 2009; *Patersons of Greenoakhill Limited v. South Lanarkshire Council* [2014] CSOH 21, at para. 15 (although that was a interlocutory application in which a purely quantitative test was "*[a] key aspect*" of what are referred to as the quality criteria (para. 16) and thus fundamentally different from the present case), the authorities taken together, as well as an interpretation based on the object and purpose of the directives, support the proposition that in a case where qualitative factors are crucial, and particularly where the unsuccessful tenderer offered at a lower price, it is insufficient to refer generally to the manner in which the successful tenderer was superior without also referring to specific respects, examples or facts supporting this general assertion of superiority.

89. In terms of the standards that can be extracted from directives and caselaw discussed above, I would endeavour to summarise the position as follows:

> (a) Where the award turns on quantitative criteria such as price (or other matters capable of similarly transparent quantitative measurement), it may be sufficient to give the scores alone in relation to such quantitative criteria.
>
> (b) Where the award turns on qualitative criteria, there is a heightened obligation to give reasons, particularly where the unsuccessful tenderer offered a more competitive price. In such situations, scores alone are insufficient.
>
> (c) The awarding authority must give reasons as to the relative advantages of the preferred tenderer. That involves a comparison between the preferred tenderer and the particular unsuccessful tenderer to whom the statement of reasons is addressed. To that extent there is a legal requirement for a bespoke statement of reasons.
>
> (d) While brief statements or succinct comments may be sufficient in particular circumstances, it does not follow that because a statement is succinct it will therefore be sufficient.
>
> (e) The contracting authority's comments must be sufficiently precise to enable the applicants to ascertain the matters of fact and law on the basis of which the contracting authority rejected their offer and accepted that of another tenderer.
>
> (f) In order to set out the characteristics and relative advantages of the successful tender, the contracting authority must at least mention the matters which should have been included in the applicant's tender or the matters contained in the successful tenders. The statement of reasons must therefore be sufficiently detailed to explain how the preferred tender was advantageous by reference to particular matters, respects, examples or facts supporting a general assertion of relative advantage.
>
> (g) Separately from the general requirement to give reasons, an unsuccessful tenderer may request additional information about the reasons for their rejection in writing. That request must be responded to positively unless specific listed exceptions apply.

**Application of these principles to the reasons in the present case**

90. The reasons in the present case are extremely formulaic, and not simply because the same reasons are recycled for all three losing tenderers. They are all in a standard form along the following lines:

> (i) Firstly, they state that the offering by the applicant was either good or very good, which is simply a repetition in different words of the score – a score which, in itself, could never in a qualitative context, especially where the losing tenderer was ahead on the quantitative criteria, be sufficient to provide a reason for the reasons outlined above. Those initial clauses add nothing to the score.
>
> (ii) The "reasons" then go on to say, in effect, that the successful tenderer provided material that was more specific, relevant or detailed than that of the applicant, in relation to particular aspects of the tender criteria. These words are the only element of the "reasons" that add anything to the scores and the already-published tender criteria.
>
> (iii) However, in each case, the aspects in which the preferred tenderer was more specific and so on merely repeat the matter set out in the tender criteria and provides no useful information as to in what respect and in relation to what

factual issues the applicant fell short.

91. While Mr. McCullough strongly submitted that extremely lengthy and detailed consideration was given to the formulation of these "reasons", there is no evidence to that effect, and given the substantially identical nature of the reasons as between the losing candidates and the elusively vague and slippery, even obfuscatory, nature of the linguistic barricade erected between the reader and an understanding of what specifically was motivating the decision-maker, this seems unlikely, but if it is correct it does not say much for those composing the reasons. The preparation of "reasons" of this nature is essentially child's play. A reasonably intelligent person brought in off the street, handed the scores and the tender criteria, and tasked with manufacturing reasons why the loser was inferior to the winner, could have come up with bland and uninformative (but plausible) statements along these lines without being allowed to even glance at the content of either the successful tender or the unsuccessful one. Almost by definition, if the score of the successful tenderer is higher than that of the unsuccessful one, it is possible to plausibly assert that the successful tenderer provided more detailed, relevant or specific information. Such a bland, anodyne, bureaucratic, uninformative formula provides virtually nothing of value to its recipient, still less to the court.

92. The most striking and indeed troubling example of this is the first qualitative criterion, where the applicant merely scored a "good" result (60 marks out of 100), as opposed to a "very good" result being 80 marks or an "excellent" result of 100 marks. The criterion involved three elements, an assessment of the work done to date, of potential new studies required, and of the route of the road. The "reasons" made absolutely no reference, good, bad or indifferent, to how the applicant performed in relation to its general assessment of the work done to the date. Nor was there any comment whatsoever on the applicant's analysis of the route of the distributor road. The only comment made of any description beyond wording that merely regurgitated the scores and the tender criteria, was that in relation to new studies required: "*Your response to this criterion was of a good standard however compared to the successful tenderer it lacked sufficient specific detail on new studies and reports that would be required going forward*" (Letter from Clodagh Lyons, Project Engineer, Roads Design, Kildare County Council to Susan Joyce of RPS Ltd. on 2nd April, 2015). The only words in this answer that add anything to the scores and published tender criteria are the words "*lacked sufficient specific detail*". No specific respects, facts or matters are identified by reference to which sufficient specific detail was lacking. Was it the case that the applicant had identified particular reports but did not list specific issues A, B or C that should be included in them? Or was it that its effort to identify future studies and reports was not specific and detailed as to which reports should be commissioned, and should have referred to reports on areas D, E or F? The only thing that one can say with confidence to be "*lack[ing] in sufficient specific detail*" is the council's own statement of reasons. It is a case of: do as I say, not as I do.

93. It is impossible to see from that answer precisely why the applicant lost 40 marks out of 100. In particular, it is impossible to see from that answer why the applicant lost 40 marks as opposed to 20 marks. Indeed, in a multifactor criterion, where only one of those factors is identified as falling short and where the extent to which it fell short appears to be quite mild based on the "reasons" offered, the loss of two whole places in the scoring system, from "*excellent*" at 100 marks down to merely "*good*" at 60 marks, is impossible to explain at any level without the provision of specific details and factual examples. Even then, given the absence of comment in relation to two out of three factors, and only mild comment in relation to the third, a drop of 40 marks is striking and frankly troubling, indeed bordering on the perverse, based on the information currently available to me. Such concerns could only be seriously exacerbated by the apparently unauthorised change in the scoring system during the process, which would have resulted in a much gentler loss of marks than the crude drop of 40 out of 100 that arose here, as well indeed as the lack of any information as to precisely when that change was made (whether before or after the tenders were first looked at), and why. However I do not need to even have regard to that change of marking methodology in order to regard the reasons here as totally inadequate.

94. I inquired during the hearing as to whether the council could have provided a debriefing meeting to the applicant after the expiry of the 30-day limitation period set out in reg. 7(2) of the 2010 regulations, if it was concerned that providing further details and information before the expiry of that period would have compromised the process in some way. Had the council responded to the applicant's request for further reasons by offering such a debriefing meeting after the 30-day period, it may well be that the whole situation might have been defused. On taking instructions, Mr. McCullough informed me that the council's view as that to do so could restart the 30-day period thus giving the applicant a new right of challenge. This proposition is completely unstateable and involves a fundamental lack of understanding on the part of the council as to the scheme of the regulations, as well as a disregard of the Department of Public Expenditure and Reform guidance previously referred to. The 30 day limitation period runs from the date of the notification, not from the date of any subsequent dialogue or provision of information to a tenderer. The approach of hunkering down and saying nothing lest it be used against one is not an acceptable stance for any public service organisation in its dealings with citizens.

95. On my count with which Mr. McCullough did not disagree, there were only 16 words in the "reasons" that added anything whatever to the invitation to tender and the table of scores. By any standard, this is a flimsy and threadbare attempt to explain the decision.

96. It is important to ask how the reasons perform against the seven purposes of the right to reasons which I have set out. In that regard I find as follows:

(i) The reasons do not provide the applicant with sufficient information to enable it to challenge the decision. They are bland and uninformative, and crucially lack any specific respects, facts or matters against which the conclusion of relative advantage can be tested.

(ii) The reasons come nowhere near enabling the court to assess the validity of the decision. An inquiry into those reasons could not commence without considerable further clarification. Confronted with these reasons as a basis for the decision, I would not be able to even being to assess any hypothetical challenge without, in effect, having to immediately ask the respondent: "*Sorry, what do you mean?*"

(iii) The empty formulations used in the notification decision do not promote better decision-making. If largely content-free platitudes such as these are permitted as meeting the threshold of showing the characteristics and relative advantages of the successful tenderer, there will be no effective standard for the decision-making process because reasons of this nature can be generated no matter what the circumstances. Reasons of this sort, that the winner was more relevant, more specific, more detailed, than the loser, unharnessed from specific facts, can be contrived in virtually any situation.

(iv) These "reasons" fail to promote transparency as required by recital 3 of the 1989 directive for the same reason. In the absence of facts to which the reasons relate, they could cloak almost any outcome.

(v) The reasons do not promote acceptance of the decision. I consider that a professional entity in the position of the

applicant would reasonably feel dismissed with slight and uninformative reasons of the kind offered.

(vi) The reasons could not meaningfully have assisted the applicant in improving its next offering.

(vii) Not only were the reasons not in themselves sufficient to dissuade a hypothetically reasonable litigant from recourse to the courts, but the council rejected reasonable requests for clarification or de-briefing which might alternatively have had that effect.

97. I also have regard to the fact that no difficulty has been identified on the evidence in this case as to why more meaningful reasons could not have been provided. There is no evidence that considerations of commercial sensitivity other reason permitted by the directives would have arisen. Not only that, but Ms. Joyce in her affidavit of 30th June, 2015 has alluded to a number of examples whereby other awarding authorities in Ireland have, without difficulty, provided much more meaningful reasons, and in particular, reasons that in many instances relate to or set out specific facts and instances where there was a better performance by the preferred tenderer. By "instances", I do not, of course, refer to bland, laconic generalities such as a mere repetition of the tender criteria, but rather the specific individual matters in respect of which the preferred tenderer performed to a higher standard.

**Discretionary factors**
98. Mr. McCullough urges me to exercise a discretion against the grant of relief on the grounds of the vagueness of the relief sought by Mr. Murphy, and delay on the part of the applicant.

99. As to the vagueness of the relief sought, I do not think that this could possibly be a valid or rational ground for exercising any form of discretion against an applicant. It is ultimately the role of the court to fashion the appropriate remedy in the circumstances and facts as found in order to redress any breach of rights, especially given the wide discretion afforded by O. 84A.

100. As regards delay, it is true that the applicant did not institute proceedings during the standstill period. However this is not fatal to the granting of any relief. To so hold would be to conflate the standstill period with the limitation period, contrary to the clear wording and intention of the legislative scheme. Had Mr. Murphy been pressing for an order that could have affected the rights of the successful tenderer, being the joint venture by the notice parties who did not appear at the hearing, questions of the effect on such third parties of a failure to initiate the proceedings earlier might have arisen. However, no such considerations arise given that the thrust of his application related to declaratory relief and an order requiring the furnishing of further reasons. In respect of these reliefs, there was no delay in the legal sense. The limitation period was 30 days and the action was initiated within that period. Intolerable uncertainty would be introduced into the law if there was some requirement that, in the absence of significant prejudice to third parties, a failure to institute an action at an earlier stage in a limitation period, particularly an extremely short one, could amount to a basis for denying all relief whatever. In this case, there is no prejudice to the council, let alone significant prejudice. It is not a major imposition on them to be required to state better reasons than those provided.

101. Indeed, it is hard to escape the view that the council's attitude to the applicant has generally been officious and dismissive. By this I do not mean that it intended to be, or conceived of itself as being, dismissive. I am sure it did not. That is really the problem. A person who intentionally disregards the legitimate perspective of another may well be capable of doing better the next time. The same cannot be said for the person who is not even aware that they have done so. The council failed to properly consider the matter from the point of view of a losing tenderer such as the applicant. Objectively, an expert professional firm of consulting engineers in the position of the applicant would reasonably feel dismissed by being at the receiving end of the sort of platitudinous responses generated by the council. Their initial statement of "reasons" was minimal and bland, at best. Their attitude to the perfectly reasonable and lawful requests by the applicant for further reasons, and indeed for a debriefing meeting, was absolute rejection at all stages. The justification offered in court for refusing to consider a debriefing meeting even after the expiry of the limitation period was entirely misconceived and unstatable. Even if there had been any delay in the legal sense, relevant to the reliefs I discuss below, which there was not, the overall attitude, approach and conduct of the council in all the circumstances has been such that I would never have regarded any such delay as in any way amounting to a reason for exercising any discretion, insofar as it could be capable of being exercised, against the applicant.

**The jurisdiction of the court to grant relief**
102. At one stage, Mr. McCullough appeared to be faintly questioning the court's jurisdiction to grant appropriate relief under Order 84A. However, it is clear that O. 84A r. 3(xi) gives a very wide scope to the court in making any one or more of a whole variety of orders, whether declaratory, mandatory, injunctive or other in order to serve the interests of justice in an application of this kind. There is no merit to the suggestion that the court lacks jurisdiction to make an appropriate order.

**Conclusions as to the flaws in the process**
103. Having regard to all the evidence and material before me, including information provided by counsel by agreement and the additional documents admitted by consent and all submissions made, I conclude the process, and the reasons offered in particular, was severely flawed for a number of separate and independent reasons, as follows:

(i) The council had no legal entitlement to change the marking system in the course of the competition in the manner in which it did. I am not granting relief on the basis of a lack of entitlement to make that change as such, but rather having regard to the fact that to have done so significantly devalues the ability of the council to rely on the "scores" so produced as supportive of its purported reasons in this case.

(ii) The council's issuing of formulaic and in almost all material respects identical letters to the three unsuccessful tenderers was a breach of its obligation to give individual reasons for the tenderer being unsuccessful. The requirement for "relative" advantages to be specified requires an individual consideration and formulation of the advantages of the winner relative to the particular unsuccessful tenderer concerned.

(iii) Irrespective of whether the council's notification to the applicant would have complied with the duty to give a "summary" of reasons in EU law, it failed to comply with the statutory transposition of that duty to give a statement of the characteristics and relative advantages as part of the notification decision without request. This requires a more detailed statement than that provided, and in particular requires reference to the main particular respects, facts or matters by which the vague and generic considerations referred to by the council (such as that the winner had, or the applicant lacked, detail or relevance) could be judged. No such particular facts appear in the notification decision. Reasons of this sort include some concrete element in which an understanding of the result can be anchored.

(iv) The council failed to give sufficient reasons to enable the applicant to know why it has not been successful.

(v) The council failed to give sufficient reasons to enable the court to assess the validity of the decision.

(vi) The reasons failed to comply with any of the other purposes for which reasons are appropriate in the tendering context.

(vii) Independently of its duties under the regulations, the council failed to appreciate that it has a separate and directly effective duty in EU law to respond positively (unless specific exceptions apply) and within 15 days to any requests for further reasons made by an unsuccessful tenderer.

(viii) The council failed to furnish such reasons or information despite being obliged by directly-effective EU law to do so, subject only to the very limited grounds for refusing to provide such further information as required by the directly-effective provisions of art. 41 of the 2004 directive. Its letters of reply, refusing to engage on these matters, are fundamentally flawed.

(ix) The council fundamentally misunderstood the regulations in offering as a reason for not holding a de-briefing meeting with the applicant, the consideration that to do so, or to furnish further reasons in the course of doing so, would re-start the 30-day limitation period to challenge the award.

(x) In failing to de-brief the applicant otherwise than by inadequate written information, the council also failed to have due regard to relevant considerations, in particular the Department of Public Expenditure and Reform guidance circular.

104. Given the foregoing findings, it is necessary to turn to the question of remedies.

**Remedies**

105. I must declare that the rights of the applicant have been infringed, and must also at a minimum quash the refusals to provide further reasons, set out in the letters of 14th and 17th April, 2015. I would not quash the notification of award letter to the applicant because that would have the effect of re-starting the limitation period to challenge the award itself, which is a remedy that should properly be sought within the standstill period and not, as here, outside that period.

106. In order to rectify this breach of rights, it is appropriate and necessary to make a mandatory order compelling the council to furnish the reasons sought by the applicant and required by the 2010 regulations and art. 41 of the 2004 directive, which must include in respect of each criterion, the specific facts and matters in respect of which the winning tenderer was more comprehensive, detailed or relevant as the case may be, subject only to a right not to give such specific details if the exceptions as set out in art. 41(3) of the 2004 directive apply.

107. The court clearly has jurisdiction in a reasons case to require the furnishing of further and adequate reasons where the original reasons are held to be inadequate: *Hurley v. Motor Insurers' Bureau of Ireland* [1993] I.L.R.M. 886.

108. In accordance with the spirit of art. 41(2), such reasons must be provided within 15 days of the date of this judgment.

109. Clearly there can be no retrospective creation of reasons. The new letter of reasons must be confined to the actually significant specific facts which exemplify the general descriptions previously given, as those specific facts existed in the minds of those who assessed the tenders at the time the contract was awarded. When furnishing the reasons, the council must confirm that the officials who assessed the tenders have confirmed that these were the significant specific matters to which they had regard on the date of the award, if that be the case. If any one or more of those officials is not prepared to make that statement, the council must also inform the applicant of this when furnishing the new letter of reasons.

110. There was some debate at the hearing as to whether, in the event of such an order being made, the court should retain seisin and adjourn the matter until after the furnishing of reasons. In my view the court has jurisdiction to do so in any judicial review relating to inadequacy of reasons, including in the O. 84A context where a wide suite of options must arise given that the range of remedies available is not confined to any particular list set out in that order. In *English v. Emery Reimbold & Strick Ltd.* [2002] EWCA Civ 605, Lord Phillips M.R. was of the view that in a civil leave to appeal application on a reasons ground, the court could adjourn the application and allow additional reasons to be sought in the meantime before then considering those additional reasons (para. 25). Not an exact analogy perhaps but certainly helpful in the present context.

111. I consider that again, the interests of justice are the most significant considerations. To fail to review the reasons prior to making a final order would potentially be simply to set the scene for a further round of litigation. I have already referred to O'Donnell J.'s comment in *Rooney* that litigation is not an inherently desirable activity. The court must husband its resources (see *Talbot v. Hermitage Golf Club* [2014] IESC 57) if for no other reason than that unnecessary litigation has a knock-on effect on other litigants. It appears to me that the simplest and quickest way to bring to finality the question as to the extent of the reasons required is for me to retain seisin of the matter and finalise the proceedings only after giving the applicant an opportunity to form a position on the compatibility of the actual reasons that will be offered with the principles set out in this judgment, and after resolving such conflict (if any) thereby arising, including if necessary any conflict as to the scope of application of art. 41. To do so will also reduce delay in finalising this matter. There has already been too much delay in complying with the legal requirement for adequate reasons. Appropriate reasons should have been provided in the notification of award, and in addition the request for reasons first made on 14th April, 2015 should have been properly responded to subject to art. 41, by 29th April, 2015. Reasons are time-sensitive matters in the sense that it is harder with the passage of time to be confident that the reasons being articulated after a delay are those that were present in the mind of the decision-maker at the time. Furthermore the tenderer is entitled to the benefit of the reasons in assisting it in the context of ongoing competitions. Delay defeats that entitlement.

112. Mr. Murphy did not strongly press any other remedy, such as a declaration that the award was ineffective. Given that the present action was not commenced until after the contract was signed, I would, in any event, have been reluctant to make any order that could interfere with the contract. However, the fact that the action was commenced after the end of the standstill period and indeed, after the signature of the contract, does not take away in the slightest from applicant's entitlement to declaratory relief and to a mandatory order for the furnishing of reasons. The action was properly commenced within the statutory limitation period and, while the applicant not having moved sooner might potentially and in particular circumstances be a difficulty in relation to other forms of relief, it is certainly not a bar to orders of the type I propose to make, being orders which do not affect the rights of the successful tenderer. As I am retaining seisin in this matter I am not however making any final conclusion as to the reliefs to be granted or finally refusing any reliefs at this stage. I will grant certain reliefs and adjourn the balance of the proceedings until the furnishing of proper reasons.

113. Mr. Murphy also claimed what, in effect, amounted to a declaration that the standstill period had not expired, because his client had not been furnished with valid or sufficient reasons. I would reject that contention on the basis of the need for legal certainty. The standstill period is a period of 14 or 16 days from the date of the notification. That period runs even if the notification is lacking in some way as to reasons, unless the notification is itself quashed (which as I have mentioned above, would normally only arise if the challenge is initiated within the standstill period itself). Otherwise, there would be intolerable uncertainty as to when the period commenced or indeed expired.

**Issues regarding transposition**

114. Before setting out the order to be made in this case, I might observe that the case has highlighted certain shortcomings in the State's transposition of the directives. To summarise the main issues in this respect, I would suggest that it might be desirable for the following aspects to be considered by the executive:

(i) The provision that scores alone may suffice could more appropriately be expressly confined to cases where the assessment is quantitative, as it is apt to mislead as currently framed.

(ii) It would facilitate the avoidance of problems such as this one if the obligation to consider specific requests for further information or reasons, as set out in the directives, was expressly transposed.

(iii) In that context, for the purpose of giving full effect to the right to request further reasons as enshrined in EU law, there are serious grounds for the conclusion that the standstill period should not commence until after a reasonable time (such as 7 days) being given to a tenderer to compose a request for further reasons, plus the 15 day period to respond to that request, plus a further short period to enable application to be made to the court. That would suggest to me that the standstill period should coincide with the limitation period, and both should be set at 30 days.

**Order**

115. For the reasons set out in this judgment, I will make the following orders:-

(i) An order of *certiorari* removing for the purpose of being quashed the letters of 15th and 17th April, 2015 refusing to provide further reasons to the applicant.

(ii) A declaration that the respondent has contravened the rights of the applicant under the European Communities (Public Authorities' Contracts) (Review Procedures) Regulations 2010 and Directive 2004/18/EC of the European Parliament and of the Council of 31st March, 2014.

(iii) An order requiring the respondent, within 15 day of the date of oral pronouncement of this judgment to provide to the applicant written reasons including the characteristics and relative advantages of the successful tenderer in accordance with this judgment, and in particular to set out, subject to art. 41 of Directive 2004/18/EC, the principal specific facts and matters by reference to which each general description of each characteristic or relative advantage as set out in the notification letter can be judged.

(iv) An order requiring the said letter of reasons include a statement that the officials who assessed the tenders have confirmed that the facts and matters so set out were the significant specific facts and matters to which they had regard in deciding on the reasons set out in the notification of award letter to the applicant, if that be the case, and that if any one or more of those officials is not prepared to make that statement, requiring the respondent to also inform the applicant of this in the said letter of reasons.

(v) An order adjourning the balance of this matter to a date after the expiry of that period prior to the finalisation of the proceedings, and directing that the court will retain seisin of the matter which will include seisin for the purpose of resolving any issues regarding the implementation of this judgment by the respondent including, in the event of an issue arising as to reliance on art. 41(3) of Directive 2004/18/EC, whether the respondent is entitled to withhold reasons on that basis, as well as for the purpose of dealing with such other reliefs (if any) as may be appropriate at that point and any further or consequential matters.