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**Procurement Challenges – Interim Relief under the New Remedies Regime  
and a new Ineffectiveness Remedy**

High Court proceedings brought under the Public Contracts Regulations 2006 (“the Regulations”) challenging a public procurement award or a decision made during the course of a procurement have started to become more familiar to UK lawyers. From 20<sup>th</sup> December 2009 a new remedies regime came into force and it radically changes enforcement of the Regulations in the UK courts and in all member states.

How we stood pre 20<sup>th</sup> December 2009

The Regulations provided a recognisable enforcement structure to UK lawyers. Now all procurement lawyers will have to grapple with a different and less familiar structure.

Challenges often start with r.32.

Under r.32:

- i. A contracting authority had to give notice of its award decision to economic operators who submitted offers;
- ii. Contracting authorities then had to allow at least 10 days (the “standstill period”) between the date it sent its notice and the date on which it proposed to enter into the contract.

Also under 32, an economic operator could ask for information as to why it was unsuccessful in its bid. Provided the request was received by the authority by midnight at the end of the second working day of the 10 day period. The time limit for giving this information was tight. Once a request for the information had been received (within the 2 working day period), the information had to be given at least 3 working days before the 10 day standstill period expired – although that 10 day period was the minimum and could be extended and indeed often was extended by undertakings if a credible challenge was advanced in correspondence. If it was not possible to provide the requested information 3 working days before the end of the standstill period, the standstill period had to be extended.

The Regulations amend r.32 with a new r.32A and subject to how a r.32 Notice is sent, the standstill period could now be longer.

Armed with information about the decision and during this 10 day period (or more if extended) an economic operator had to decide whether it commenced High Court proceedings to seek an injunction to prevent the award. This was necessary because under Regulation 47 (“Enforcement of Obligations”), if the contract had been entered into, the Court only had power to award damages. However, if the contract had not been entered into then the Court had the power to:-

- Suspend the award (by injunction);
- Order the setting aside of the decision complained of

Proceedings under Regulation 47 had to be brought within 3 months [from the date on which the grounds for bringing the claim arose]. However, if an economic operator wanted more than damages then, in effect, that 3 month period for commencing proceedings could be reduced to the minimum 10 day standstill period between sending the Regulation 32 notice and awarding the contract. The Regulations also appear to have removed the mandatory requirement to inform the contracting authority as to the breach before issuing proceedings.

So the process is basically familiar. If an economic operator wanted to challenge a decision about the award of a contract, then it would have to commence proceedings challenging that decision and, absent any undertaking not to award, it would have to apply for interim relief and seek an injunction restraining the award; such an application may be met with a request for a cross undertaking in damages which would/may have the effect of dissuading the challenger from continuing the challenge. However, the Public Contracts (amendment) Regulations 2009 substantially changed the remedies formerly available under r.47 and the basis for securing interim relief in the course of a procurement challenge.

#### Changes to the Position on Interim Relief

Proceedings still have to be commenced promptly and in any event within 3 months (r.47D(2)).

A critical new provision is Regulation 47 (G)(1) which provides that starting proceedings in cases where a contract has not been entered into: “...requires the contracting authority to refrain from entering in to the contract”. Therefore, simply starting proceedings creates, in effect, an “automatic stay” stopping the authority from entering into the contract it has decided to award to a particular contractor. The previous regime’s conventional approach, which required economic operators to apply to the Court for an injunction, has now gone.

This “automatic stay” is subject to the Court’s powers under 47 H (1)(a) which gives the Court the power to bring it to an end.

Procedurally, this means that the injunction onus is reversed and it will be up to the contracting authority to apply to the Court and seek an end to the “automatic stay” arising under r.47 (G).

It would appear that even if an injunction is not sought in proceedings, the automatic stay under r.47 (G) would still arise.

The automatic stay is not a Court ordered injunction so proceeding with the award of a contract will not be a contempt of Court. It will only have the consequences set out in the new regulations.

The consequences could include a “declaration of ineffectiveness” under the second ground in r.47(K) but only if it turns out that there has actually been a breach of an authority’s substantive obligations – see r.47 (K)(6)(b). Despite that, even if an authority wins at trial and is held not to have been in breach of a substantive regulation, acting in breach of r.47(G) will mean that an authority either will be ordered to shorten the contract that it has awarded after proceedings have been commenced, or a civil financial penalty will be awarded or both (see r.47(N)(2)(b) and (3)).

Amongst procurement lawyers there has been much debate about how the Court will approach an authority’s application to end an automatic stay. Will it address the same questions that would have arisen on an application for an injunction before r.47(G) came in to force? One would think so, but in practice it is easy to see that a judge will be quicker to decide that the balance of convenience favours maintaining the status quo and letting the stay run until trial, ordering where necessary directions designed to bring the proceedings to trial quickly.

#### The New Ineffectiveness Remedy where the Contract has been entered into

This will apply where the Contract has been entered into and will therefore only arise in cases where the award has taken place before proceedings are commenced and is only concerned with specific serious breaches of the Regulations.

Under r.47(J) the ineffectiveness remedies are mandatory in cases where any of the three r.47(K) grounds for ineffectiveness are made out as follows:-

1. Where a contract is improperly awarded without prior advertisement (this would apply, therefore, in cases where a variation really is a new award; or it is treated as Part B but

- actually is a Part A service or the value is incorrectly assessed at being below the advertisement threshold);
2. There has been a breach of the automatic stay under r.47(G) or a further Court order under r.47(H)(B), or any requirement under by r.32(A) - the provision concerning the modified standstill period;
  3. There has been a breach of provisions relating to the award of contracts under framework agreements or dynamic purchasing systems.

Under r.47(J) (*“Remedies where the contract has been entered into”*) a Court must where it has found a breach of duty owed to an economic operator:-

- (i) Make a declaration of ineffectiveness (unless r.47(L) – considered below - requires a Court not to do so);
- (ii) Impose financial penalties where it is required to do so i.e. r.47(N)
- (iii) It *may* still award damages regardless of whether (i) and (ii) above have been applied.

#### Overriding reasons under r.47(L) for not making a declaration of ineffectiveness

This appears to be a narrow exception which requires the Court not to make a declaration of ineffectiveness if it is satisfied that: “overriding reasons relating to a general interest require that the effects of the contract should be maintained”. “...if in exceptional circumstances ineffectiveness would lead to disproportionate consequences”. It is not easy to see obvious examples of how this exception will arise but it may where a works contract for a waste processing facility has been entered into and where the economic operator has already signed up a long list of other users who are depending on the facility.

Another factoring limiting the application of “overriding reasons” is to be found in r47(L)(2) and (3) which prevents economic interests amounting to overriding reasons only if in exceptional circumstances ineffectiveness would lead to disproportionate consequences. Further, “economic interests” “directly linked “to the contract cannot amount to a “general interest” reason that requires the effects of a contract to be maintained.

#### The Consequences of Ineffectiveness

R.47(M) applies where a Court makes a declaration of ineffectiveness. Then, the contract is “*prospectively but not retrospectively ineffective as from the date when the declaration is made and, accordingly, those obligations under the contract which at that time have yet to be performed are not to be performed*”.

What this appears to mean is that the contract is valid until the declaration is made and work done and paid for under the contract up to the declaration holds good. A difficulty may arise in cases where work has been done but not yet paid for. There may be a quantum meruit or restitution claim for such unpaid work.

Difficulties might also arise in cases where a Court at first instance makes a declaration of ineffectiveness but later on an appeal that decision is reversed. What is the status of the contract between the declaration and the appeal? What should an authority do? Should it treat it as ineffective until a higher court says otherwise?

Further, the Court, when making a declaration of ineffectiveness, or at any time after, *may* make an order that it thinks appropriate for addressing the implications of a declaration in the particular circumstances and consequential matters arising from the ineffectiveness (see r.47(M)(3)).

Under r.47(M)(4) such an order under (3) can address issues of restitution and compensation so as to achieve a just outcome in all of the circumstances. The wording here is wide enough to include any contracting counterparty who has lost his contract under the declaration of ineffectiveness but is not a defendant in the proceedings.

Whilst it seems the Court's discretion under r.47(M) (3) and (4) is wide, those powers ought not to be exercised so as to undermine the basic r.47(M) (1) principle as to the consequences of ineffectiveness. Having said that, it would still be possible for the Court to refuse to make a declaration of ineffectiveness under r.47(L) (to avoid disproportionate consequences) and then go on to apply a consequence instead of ineffectiveness at r.47(N), so that the duration of the contract is shortened in order to force the earlier procurement of a new contract.

A further point to bear in mind under r.47(M) is that a contracting authority and its successful economic operator can make a collateral contract under r.47(M)(5) and (6) to regulate the effects in the event that a declaration of ineffectiveness is made. If that is done then under (6) a Court cannot exercise its powers to address the consequences of a declaration of ineffectiveness that are inconsistent with the collateral contract, except in cases where the terms of that collateral contract are in themselves incompatible with declarations of ineffectiveness.

### Civil Financial Penalties and Shortening a Contract

R.47(N) is entitled "*Penalties in addition to, or instead of ineffectiveness*". It is mandatory to impose a civil financial penalty under r.47(N)(1) where a declaration of ineffectiveness is made.

This penalty is also relevant to other situations and the Court must impose a penalty, shortening an awarded contract or both as follows:

- i. Where the Court is satisfied that the grounds for ineffectiveness apply but a declaration is not made because of the general interest ground for not doing so under r.47(L).
- ii. The Court is satisfied that the contract has been entered into in breach of: r.47(G) stay requirement (or r.47(H) order); or in breach of the r.32 “standstill” requirement but no declaration of ineffectiveness has been made.

Some commentators are of the opinion that shortening orders will usually only be used in r.47(L) cases (with or without a financial penalty, depending on the circumstances) and in other cases a civil financial penalty will be imposed.

As for penalties themselves, under r.47(N)(4) they must be “effective, proportionate and dissuasive”.

### Miscellaneous

Practitioners should be aware of a number of new features under the 2009 Regulations as follows:

- i. As mentioned earlier on there is a new “standstill” provision under r.32(A). These provide for more generous time limits than previously existed under r.32.
- ii. Under r.47(F) there is an obligation to serve proceedings on the contracting authority but unusually no time limit is specified. In reality, however, those proceedings will be served promptly in order to ensure that a contracting authority is made aware that the automatic stay under r.47(G) applies. There is also an obligation to send a copy of the claim form to each person, other than the contracting authority, who is a party to the contract. Sending a copy of the claim form to parties to the contract is distinct from the obligation to serve on a contracting authority. No doubt this is to enable the other party to consider whether they should be joining in the proceedings and that participation may be material in working out the consequences of ineffectiveness under r.47(M)(4).
- iii. As with the previous regulations the Court can extend the time for bringing proceedings where there is good reason to do so (r.47(D)(4)) although this latitude does not apply to the special time limits for seeking a declaration of ineffectiveness (r.47(E)). The time limit for seeking a declaration is within 30 days after the date on which the relevant

award notice was published; or after the economic operator was informed that the contract was concluded and given a summary of the relevant reasons for the award as required under r.32(9). In any other case the time limit is within 6 months beginning after the date on which the contract was entered into.

It would appear that the new remedies regime changes the “litigation” balance in favour of economic operators and this shift in the balance may lead to more procurement challenges – particularly where an incumbent contractor has lost a tender for the renewal of its contract. Commencing proceedings may in that event have the effect of extending his contract until those proceedings are concluded.

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**This note is intended to provide a brief overview of the legal principles under discussion.  
It is not intended to be a comprehensive guide or to constitute legal advice.**