



Challenges to procurement decisions

The issues and the pitfalls

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An examination of the grounds to challenge a procurement decision, time limits, remedies and pitfalls for public authorities and contractors.

CHALLENGES TO PROCUREMENT DECISIONS THE ISSUES AND THE PITFALLS

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BACKGROUND

At a glance

- The EU procurement regime requires Member States to have a system of remedies to provide a means of redress if contracting authorities have not fulfilled the duties they owe to economic operators.
- Contracting authorities are under a limited duty to provide information to bidders to enable them to understand who won the competition and why they were unsuccessful.
- The remedies can only be exercised within strict time limits.

Like any system of rules, the EU procurement regime depends on an effective domestic system of enforcement. The regulations governing enforcement of duties have become progressively more comprehensive, and a large body of European and domestic case law has built up. Remedies and enforcement of breaches of duty owed to economic operators have become established features of the public procurement landscape.

Life was made easier for those who wished to challenge procurement decisions by the 2009 amending provisions (SI 2009 No 2992) which included:

- When notifying bidders of the outcome, details have to be given of reasons why bids were unsuccessful; notice of a standstill period has to be given. (Codifying the decision in *Case C-81/98 Alcatel Austria and Others* [1999] ECR I-7671 (1) now at Regulation 87.)
- Introducing an automatic suspension preventing a contracting authority from entering into a contract when procurement decisions were challenged by issuing High Court proceedings.
- Bringing in a new remedy of ineffectiveness where in certain cases the court can set aside a concluded contract and impose a civil financial penalty where a declaration of ineffectiveness was made.

The strengthening of the remedies regime has gone hand in hand with an increased frequency of unsuccessful bidders challenging procurement decisions. In the United Kingdom there have been challenges to almost every aspect of the tendering process.

The first stages of a challenge, in correspondence or in the early days of proceedings, can be crucial so practitioners, procurement officers and tenderers alike should be familiar with key issues so they are well placed to contain a challenge, make sure they are on a sure footing to defend from the outset or, in the case of an economic operator, assess in an informed way whether it should start or pursue proceedings.

The Public Contracts Regulations 2015 ('The Regulations') apply to all contract award procedures commenced after 26 February 2015 (see Regulation 118). The 'process' for challenge appears in Chapter 6 of the Regulations – Regulations 88-104 – and are much the same as under the previous regime.

Apart from consolidating previous amendments, the Regulations also introduce some important changes, such as codifying the case law on modifying contracts during their currency – Regulation 72.

In addition to the introduction of the commencement of the 2015 Regulations, the past twelve months or so have produced many new cases, particularly in the area of lifting the automatic contract-making suspension.

It is hoped that this guide will help established practitioners, procurement officers and tenderers to keep up to date with some key developments but, at the same time, provide newcomers with an accessible introduction to important areas, which in Sharpe Pritchard's experience are the ones most frequently encountered.

THE GROUNDS FOR CHALLENGE

At a glance

- The breach of duty has to cause loss or risk of a loss to be actionable and enforceable.

The obligation on a contracting authority to comply with the Regulations and any other enforceable community obligation is a statutory duty owed to economic operators (principally Regulations 18 and 89). Proceedings for breach of this duty are only actionable where a breach causes or risks causing a loss (Regulation 91). Therefore, (as stated by Moore-Bick LJ in *Lettings International v Newham London Borough Council* [2007] EWCA Civ 1522 (2)) a cause of action will exist if a claimant can show that it has suffered the loss of a significant chance of obtaining the contract. To receive damages, it will be necessary to prove a loss at trial (as discussed later).

The formulation was established earlier in *Matra Communications SAS v Home Office* [1999] 1 WLR 1646 (3). There it was held that a bidder will be able to show a breach of duty will cause him to suffer loss or damage (or risk of loss or damage) if he had a chance (which the law recognised as sufficiently good to merit consideration) that were it not for the breach, the contract could have been awarded to him and the breach caused him to lose that chance.

Enforcement of an actionable breach of duty is exclusively through High Court proceedings (see Regulation 91(2) and that (in effect) also covers Judicial Review claims).

THE COURT'S FUNCTION

At a glance

- The court's function in a challenge is to review the contracting authority's actions.

It is not the court's task to embark on a re-marking exercise. The court's role is instead to review the contracting authority's actions to see whether:

- the rules of public procurement have been applied;
- the facts relied upon by the contracting authority are correct;
- in relation to matters of judgment or assessment, a 'manifest' error has occurred (see the discussion below under 'Challenges Relating to Tender Evaluation'), and in such cases the contracting authority has a 'margin of appreciation' which will only be disturbed where there has been a 'manifest error'. Manifest error does not require an exaggerated description of obviousness, but rather refers to a case where an error has clearly been made. Manifest error is broadly equivalent to the Wednesbury unreasonableness – see *R (Greenwich Community Law Centre) v London Borough of Greenwich* [2012] EWCA Civ 496 (4), *BY Development v Covent Garden Market Authority* [2012] EWHC 2546 (5) and *Woods Building Services v Milton Keynes* [2015] EWHC 2011 (TCC) (6).

These principles are set out in the judgments of Morgan J in *Lion Apparel Systems Ltd v Firebuy Ltd* [2007] EWHC 2179 (Ch) (7) and Silber J in *Letting International Ltd v London Borough of Newham* [2008] EWHC 1583 (QB) (73)¹ and are helpfully summarised in *BY Development* (5). See also *J Varney & Sons Waste Management Ltd v Hertfordshire County Council* [2011] EWHC Civ 708 (8). However, the court may intervene and change scores where there has been a breach of duty amounting to a manifest error, as seen in *Lettings (73) and Woods (6)*.

¹ See in particular at para 115 '... it is not my task merely to embark on a re-marking exercise and to substitute my own view but to ascertain if there is a manifest error, which is not established merely because on mature reflection a different mark might have been awarded'.

THE STANDSTILL PERIOD

At a glance

- There is a requirement to send a notice to participants in the tendering process setting out information on the reason for the award.
- The contracting authority must then allow the standstill period to elapse before entering into the contract.

Once a contracting authority has decided on the award of a contract, it cannot simply sign the contract and instruct the contractor to get on with the work. The outcome first needs to be notified to the other bidders and, in effect, they are given the opportunity of starting proceedings before the contract is entered into. If that is done, the remedies under Regulation 97 are available and they include powers to order that an award decision is set aside and/or documents are amended. In cases where proceedings are issued after the contract has been entered into, then absent ineffectiveness applying, the court only has power to award damages.

The requirement in relation to the standstill period is now contained in Regulation 87. The period begins when the contracting authority sends a 'contract award notice' under Regulation 86. This must set out:

- (a) the criteria for the award of the contract;
- (b) the reasons for the decision including the characteristics and relative advantages of the successful tender and the scores of the addressee's tender and the winning tender;
- (c) the name of the successful bidder; and
- (d) a precise statement of either when the standstill period is expected to end or (in compliance with Regulation 87 minimum time limits) a date before which the contract will not be entered into or the framework will not be concluded.

The standstill period is ten days if the communication of the contract award was made electronically, otherwise fifteen days. If no proceedings are commenced during the standstill period, the contracting authority can go ahead and enter into the contract. If they are commenced, then once the contracting authority becomes aware of that, the automatic contract-making suspension under Regulation 95 applies and it cannot enter into the contract unless it applies to court for an order to end the automatic suspension.

Entering into a contract in breach of the Regulation 87 standstill period may engage the second ground of ineffectiveness under Regulation 99(5) but only if all of the second ground's ingredients are fulfilled as discussed in the next section. It is likely that even if a Regulation 50 contract award notice could be regarded as defective, but still announces a standstill period that allows for proceedings to be commenced before the contract is concluded, then any claim surrounding such a defect – by ineffectiveness – ought to fall away (see para 55 of *Alstom Transport v Eurostar International Ltd and Siemens PLC* [2011] EWHC 1828 (Ch) (9)).

TIME LIMITS FOR CHALLENGES

At a glance

- Proceedings must be commenced within 30 days of the date on which the claimant knew or ought to have known it had grounds for making a claim.
- The court has power to extend this period for good reason subject to an overall time limit of three months.

There is a very strong public interest imperative at work here in having a short time limit for challenging decisions to award public contracts and strict enforcement of that time limit.

The requirement now is that proceedings which do not seek ineffectiveness must be commenced within 30 days beginning with the date when the economic operator first knew or ought to have known that the grounds for starting the proceedings had arisen. The court has power to extend this time limit for 'good reason'.

The meaning of the expression 'knew or ought to have known' was considered by the Court of Appeal in *SITA UK Ltd v Greater Manchester Waste Disposal Authority* [2011] EWCA 156 (10).

The court stated that 'the standard ought to be a knowledge of the facts which apparently clearly indicate, though they need not absolutely prove, an infringement'. The court also held that time does not start afresh upon knowledge of further breaches of the same duty.

The difficulty that contractors face in deciding whether to take action in relation to a breach of the rules is illustrated by *Turning Point v Norfolk County Council* [2012] EWHC 2121 (11). The council were seeking bids for a contract for the provision of drug and alcohol treatment services. The claimant, TPL, considered that it had not been given enough information about transferring staff to price their bid properly. It submitted various clarification requests but did not receive all the information it considered was needed. On 9 February 2011 it submitted a bid and qualified it by stating

that it had not priced for TUPE costs. On 12 March 2011 the council notified TPL that it had rejected its tender as it was qualified and therefore non-compliant. On 28 March 2011 TPL commenced proceedings, arguing that the lack of clarity and failure to provide information meant that the tender process was unfair and unlawful. The council asked the court to strike out the claim on the basis that it was not commenced within the permitted time limit. The court agreed. TPL must have had knowledge of the relevant breach, the failure to disclose relevant information, by 9 February at the latest. This case is an example of time running and expiring before the outcome of the tender was known (see also the decision in *Mears Ltd v Leeds City Council* [2011] EWHC 40 (QB) (12) as an example of grounds arising before a tenderer is eliminated and it also gives a useful summary at paragraph 70 of previous decisions concerning the principles of when time starts running). *Turning Point* (11) also serves as a reminder that there is no general rule that time cannot start to run until an unsuccessful tenderer is given reasons why it failed. The claim was therefore out of time and can start running from receipt of an invitation to tender as was also the case in *Matrix- SCM Ltd v London Borough of Newham* [2011] EWHC 2414 (Ch) (13). TPL asked the court to extend time on the basis that it had commenced proceedings promptly and that it was unrealistic to have expected it to issue proceedings before the outcome of the tender process was known. The court declined to extend time. A 'good reason' would need to be something beyond the control of the claimant, such as illness of the bid team members (see also *Mermec UK Ltd v Network Rail Infrastructure* [2011] EWHC 1847 (TCC) (14) for a discussion on extending time). The effect of this case is that, when faced with an apparent breach during the course of a procurement exercise, the bidder will either have to commence proceedings, thus bringing to a halt a

competition that it might win, or accept it and continue to participate in the process.

Although a permission for judicial review case to challenge a decision to outsource a significant amount of local government services, *R(Nash) v LB of Barnet* [2013] EWCA Civ 1004 (15) is relevant to the question of when the grounds for starting proceedings first arose. Here, the council decided in 2010 to procure the outsourcing. It published OJEU notices in March and June 2011, and decided to award in December and January 2013. Proceedings were started in January 2013 on the basis that the grounds for bringing the claim arose when the final decision was made to award. At both first instance and in the Court of Appeal it was held that all of the claims (except one) were time barred because the challenge in substance was to the earlier decisions to procure. Of importance to future cases is the decision at both levels that *R (Burkett) v Hammersmith & Fulham LBC* [2002] 1 WLR 1593 (16) is not authority for the argument that in every case where a public law decision is made at the end of a decision-making process, but there are one or a number of previous decisions, time will only run from the date of the latest decision. If the later decisions are distinct and concern different stages in the process, then it is necessary to decide which decision is being challenged. If it really is an earlier decision, then making a subsequent decision in the same process does not start time running afresh. In the context of this procurement *Burkett* (16) was distinguished and that is likely to be so in most procurement cases which involve multiple decisions in one single procurement process.

D&G Cars v Essex Police Authority [2013] EWCA Civ 514 (17) is of interest as it represents a pitfall when it comes to amending a claim. Here the claimant sought permission to amend in order to plead new claims of bias, tender rigging

and bad faith which only emerged when disclosure had been given. The claimant sought to introduce those new claims by amendment (arguing they were not time barred as they were based on the same facts and not a new cause of action) after expiration of the 30-day time limit from the date of the facts in the originally pleaded causes of action. Permission was refused on the grounds that they were new causes of action which were time barred. It is not clear why the claimant did not seek to amend on the basis that the time limit did not start running until the claimant received the relevant disclosure – being the date when it knew or ought to have known that the grounds for bringing the claim had arisen. Also, in *DWF LLP v Secretary of State for Business, Innovation and Skills* [2014] EWCA Civ 900 (18) the Court of Appeal allowed an amendment to Particulars of Claim based on undisclosed criteria. The amendment was prompted by disclosure. The court held that the original pleadings had to be construed by reference to what the reasonable reader thought they meant and the key reader was the defendant. On that basis the amendment to the original pleading did not change it by introducing a new claim but moved from an inference of transparency to pleading it in definite terms. Interestingly, this case also indicated a reluctance to treat claims as to lack of equal treatment (mentioned in the original claim) and transparency as different. Rather, they can and do overlap and co-exist.

Another ‘pitfall’ is illustrated in *Travis Perkins Trading Company Ltd v Caerphilly County Borough Council* [2014] EWHC 1498 (TCC) (19), which highlighted the potential problem of whether the brief details in the issued claim form (being the proceedings which stopped the time limit running) are wide enough to match what is later pleaded in Particulars of Claim. If not, and the Particulars introduce new claims not covered in the Claim Form, then those claims might be time barred and

susceptible to being struck out. On the other hand, *DWF* (18) is a good example of how an early thoughtful pleading can still anticipate issues after a claim has been issued and after the limitation period had expired so they can be adapted by amendment in order to lend detail to claims made from the outset.

A Scottish decision in *Nationwide Gritting Services Ltd v The Scottish Ministers* [2013] ScotCS CSOH 119 (20) might seem like an ‘inroad’ into the strict application that the time limit (as per *Mermec* (14) for example) runs from when the claimant had possession of the basic facts which would lead to a reasonable belief that there is a claim. However, an important distinguishing feature was that the claimant in *Nationwide* (20) was not a disappointed tenderer but only an economic operator in the same field of activity (supplier of de-icing salt) who had heard rumours of a direct award without the publication of a contract notice or contract award notice. It made some enquiries and some information was given, and the Ministers claimed that the information given was sufficient to make time run. That argument was rejected and it was held that the claimant had mere unsupported suspicions that the defendant may have acted unlawfully and had no hard information.

A further possible ‘inroad’ is to be found in the CJEU’s judgment in Case C-538/13 *eVigilo Ltd v Priešgaisrinės apsaugos ir gelbėjimo departamentas prie Vidaus reikalų ministerijos* (12 March 2015) (21) running from the date of knowledge of the contents of procurement documents (as in *Turning Point* (11)). It was held that if published award criteria could not be interpreted the same way by reasonably well informed and normally diligent tenderers (as per *SIAC Construction Ltd v Mayo County Council* [2002] All ER (EC) 272 (22)) time does not run from the date of publication of the award criteria but from the later date

when exhaustive information relating to the reasons for the award decision are given.

Also, in the context of limitation, it is not enough to issue proceedings, they also have to be served within 7 days after the date of issue (see Regulation 94(1) and (5)). There is no power under the Regulations to extend this time. The requirement to serve was considered in *Heron Bros Ltd v Central Bedfordshire Council* [2015] EWHC 604 (TCC) (23) but is subject to appeal.

DECLARATIONS OF INEFFECTIVENESS

At a glance

- There are three grounds of serious failure to observe the rules, on which the court has power to declare a contract ineffective.
- The ineffectiveness remedy nullifies any future obligations in the contract and comes with a financial penalty.

Before 2009 a contracting authority knew that once it had awarded a contract, whatever the shortcomings in the procurement process, the only remedy available to an economic operator was an award of damages. That changed when the 2009 amendments introduced a mandatory remedy which requires that a declaration of ineffectiveness must be made where any of the following three grounds set out in Regulation 99 are made out (save for limited exceptions in Regulation 100).

The first ground concerns a failure to publish a contract notice (Regulation 99(2)). The first ground can be disapplied completely by following the steps at Regulation 99(3) and (4).

The second ground will apply if all four conditions are satisfied (Regulation 99(5)):

- (i) The contract must have been entered into in breach of the standstill period requirement (under Regulation 87) or the automatic stay (whether imposed by Regulation 95, or re-imposed under Regulation 96(1)(b)).
- (ii) There must have been some other substantive breach of Regulation 89 or 90 (something more than a breach of a procedural requirement).
- (iii) The breach under (i) above must have deprived the tenderer of the possibility of starting proceedings in respect of that breach.
- (iv) The breach at (ii) above must have affected the chances of the tenderer obtaining the contract.

The third ground relates to frameworks and dynamic purchasing systems.

The most likely ground for a declaration of ineffectiveness seems to be the first one – failing to advertise. Indeed the first UK ineffectiveness judgment in December 2015 concerned the first ground. That judgment was delivered in a Scottish case (on a summary judgment application) - *Lightways (Contractors) Limited v Inverclyde Council* [2015] CSOH 169 (77), which concerned a street lighting contract awarded under a framework agreement which required a mini-competition. Amey Public Services LLP won that mini-competition. That was a JV 2/3rd owned by Amey UK Group. However, Amey LLP was not one of the suppliers under the framework although a different subsidiary was - Amey OW. Lightways argued that the Scottish equivalent of the first ground of ineffectiveness applied. The court agreed and held that difference was not “clerical”. Amey LLP and Amey OW were quite distinct legal entities – the latter did not even have a presence in Scotland and was not invited to participate in the mini-competition. Importantly, the court rejected the council’s argument that declaring the contract ineffective would breach the principle of proportionality because that cannot be relied upon in cases where the authority has exceeded its powers.

In *Eurostar* (9), the court was concerned with notices in a utilities procurement and decided that the test to be applied in considering whether there was an absence of a proper contract award notice was ‘mechanistic’ and to be decided on the particular facts in each case. However, that did not mean publishing a notice any time before the conclusion of the contract would cure the failure to advertise. If the advertisement was capable of being related to the procedure, that was sufficient. In *Eurostar* (9) a ‘qualification notice’ at the commencement of the procurement was held to be sufficient to provide requisite notice so as to exclude

the first ground even though the required contract notice had not been published. So, if a notice was published a little late – say, in an open procedure where insufficient time was allowed for submitting tenders – the first ground would probably not be available. In contrast, if there was a serious breach of the requirements relating to content and or timescales which deprived the notice of practical value, then it is possible that the first ground would be available.

With regard to the second ground, the court noted that ineffectiveness was intended to apply where proceedings could not be brought to prevent a contract from being entered into. However, in *Eurostar* (9), the claim was started before the contract was awarded so it could not be argued that the claimants had been deprived of an opportunity of bringing proceedings. The claim was therefore struck out.

The consequences of the making of a declaration of ineffectiveness are set out at Regulation 101. Importantly, the contract is prospectively (not retrospectively) ineffective from the date of the declaration. So future obligations yet to be performed are not to be performed. In addition under Regulation 102, where a declaration is made, the court must order a civil financial penalty, payable to the Minister of the Cabinet Office. The amount of the penalty is at the discretion of the court and the overriding consideration for deciding the amount of the penalty is that it must be effective, proportionate and dissuasive (see Regulation 102(4) and (5)). Further penalties under Regulation 102(3) can also be awarded if the Regulation 102(2) circumstances apply.

SPECIAL TIME LIMITS FOR COMMENCING PROCEEDINGS THAT SEEK A DECLARATION OF INEFFECTIVENESS

At a glance

- 30 days from publication of contract award notice or bidder being informed of contract award and reasons it was unsuccessful.
- No proceedings can be commenced after the longstop date of six months after the contract was entered into.

In the case of a contract awarded without publication of a prior contract notice, the time limit for seeking a declaration of ineffectiveness is 30 days from publication of a contract award notice, where that notice contains the contracting authority's explanation as to why it considered that no prior contract notice was required.

If the contracting authority has informed the bidder of the conclusion of the contract and provided a summary of the reasons why it was unsuccessful, the 30-day time limit begins on the day after the bidder was informed of the conclusion of the contract or, if later, the relevant reasons for the award. In all other cases the limit is 6 months from the date the contract is signed.

SAFEGUARDS AGAINST APPLICATIONS FOR DECLARATIONS OF INEFFECTIVENESS

At a glance

- Contracting authorities can protect themselves by publishing notices and telling the economic operator about the conclusion of the contract.

There are two means by which contracting authorities can protect themselves against possible applications for declarations of ineffectiveness. These are voluntary transparency notices (under Regulation 99(3) and (4)) and contract award notices (under Regulation 50).

If a contracting authority awards a contract and considers that the EU procurement rules do not apply (such as in cases where a current contract is to be varied), it may publish a notice describing the nature of the contract, the details of the economic operator to which the contract was awarded and a justification of the decision of the contracting authority to award the contract without the prior publication of a contract notice. This is known as a voluntary transparency notice or voluntary ex-ante transparency notice (VEAT). Once this has been done, and the authority has, following the publication of the notice, waited ten days before entering into the contract without a challenge having been commenced, then the court will not be able to make a declaration of ineffectiveness.

The ECJ considered the requirements behind a valid justification in a VEAT in Case C-19/13 *Ministero dell'Interno v. Fastweb SpA* (11 September 2014) (24). This decision made it clear that publication of a VEAT only removed the risk of ineffectiveness where the contracting authority believed in good faith, and having first exercised requisite due diligence (including possibly taking legal advice), that the award did not need to be advertised. On the other side of the coin, a deliberate and intentional infringement of the

requirement to advertise would mean that a VEAT did not make the contract immune from being declared ineffective.

If a contract is entered into and a contract award notice is published in the Official Journal and that notice includes justification of the decision of the contracting authority to award the contract without prior publication of a contract notice (Regulation 93(3) and (4)), then the six-month longstop time limit for starting proceedings for ineffectiveness is reduced to 30 days. Similarly, if the contracting authority informs the economic operator of the conclusion of the contract and gives the required relevant reasons, then the time limit for commencing proceedings is reduced to 30 days.

As will be appreciated these two measures (unlike the VEAT) do not remove the possibility of a claim for ineffectiveness but they have the benefit of reducing the time limit for starting such a claim and there is no power to extend time for starting ineffectiveness claims.

EARLY DISCLOSURE OF DOCUMENTS

At a glance

- In certain cases it will be appropriate to give pre-action or early specific disclosure of documents relating to the treatment and marking of a claimant's tender.

Pre-action disclosure under Civil Procedure Rules ('CPR') 31.16 or early specific disclosure under CPR 31.12 can be crucial to the decision to start a claim or continue with it and such disclosure balances out the inequality of information between the contracting authority and the economic operator. *ALSTOM Transport v Eurostar International Ltd and Siemens PLC* [2010] EWHC 2747 (Ch) (41) supported the argument that a claimant was to be provided with the information necessary for it to know whether it had real grounds for complaint.

Roche Diagnostics Ltd v The Mid Yorkshire Hospitals NHS Trust [2013] EWHC 933 (TCC) (25) is probably the leading case on such disclosure. Here Roche wanted voluntary disclosure relating to the marking of its tender as it suspected that the Trust had misunderstood or misapplied its evaluation criteria. The Trust refused but it did produce a number of after-the-event spreadsheets which purported to explain its application of the evaluation criteria. Unfortunately the various spreadsheets contained inconsistencies and errors which Roche relied on in applying for early specific disclosure of primary evaluation documents and also pre-action disclosure in respect of an interim contract. Roche partially succeeded in both applications. The judgment emphasised the importance of primary evaluation documents being disclosed at an early stage to assess the strength of a claim. That would include any scoring guides, marked scoring sheets and evaluation notes and any evaluation reports. It is unlikely that Roche will be restricted to its own facts – the erroneous spreadsheets – and will have a general application. However, it should be noted that the

application in Roche was principally concerned with the claimant being provided with the evaluation documents relating to its own bid. If disclosure is expanded to other tenderers' documentation, then confidentiality restrictions will become relevant as well. That was the type of order made in *Geodesign Barriers Ltd v The Environment Agency* [2015] EWHC 1121 (TCC) (26) where specific categories of documents were to be disclosed into a confidentiality ring of counsel and solicitors, but no one from the claimant. An expert for the claimant was included in the ring but the court cautioned against that being an indication that expert evidence would be allowed at trial. The starting point that allowing in such evidence would be rare was reinforced.

Early specific disclosure under CPR 31.12 was considered after *Roche* (25) in *Pearson Driving Assessments Ltd v The Minister for the Cabinet* [2013] EWHC 2082 (TCC) (27). The application there was made in advance of an application to lift the automatic contract-making suspension. The claimant was looking for the disclosure to show that it had a strong seriously arguable case on the merits as that was an essential consideration for the court when it came to determine whether the balance of convenience strongly favoured maintaining or lifting the suspension. The application failed because it appeared plain on the face of the claimant's pleadings that it already had ample material to demonstrate there was a serious issue to be tried. Similarly, during the *Covanta Energy Ltd v Merseyside Waste Disposal Authority* [2013] EWHC 2922 (TCC) (28) case the court also considered an early specific disclosure application in advance of a similar automatic suspension hearing. Again the claimant relied on *Roche* (25) but again failed – principally because the judge decided that the disclosure was not necessary in order to deal fairly with the pending automatic suspension

application; the defendant in that case did not dispute that there was a serious issue to be tried; a substantial amount of information had already been provided by the defendant and the claimant had been able to plead a very full claim in its Particulars.

While *Roche* (25) is clearly a case in favour of a claimant seeking pre-action or early specific disclosure (particularly as an aid to fully pleading a claim), the approach in *Pearson* (27) and *Covanta* (28) demonstrates that the entitlement to this type of disclosure is not a matter of right or formality. Each case has to be assessed on its individual facts and on the facts in *Bristol Missing Link v Bristol City Council* [2015] EWHC 876 (TCC) (29) the court made some negative observations about the 'selective' and restrictive way the defendant council had gone about dealing with disclosure requests.

The decision in *Energy Solutions v Nuclear Decommissioning Authority* [2015] EWHC 2441 (TCC) (30) assists in explaining the relevance of documents relating to the involvement of the contracting authority's solicitors during the evaluation in that case. There the solicitors' involvement was held to be of no relevance to the issues and the application for disclosure was refused. Further, their legal review of proposed scores was covered by advice privilege.

REMEDIES OTHER THAN DAMAGES

At a glance

- In addition to an award of damages, the courts have a range of other remedies for breaches of the rules depending on whether the contract has been entered into.

The court has the following interim powers in response to alleged breaches of the procurement rules:

- To end, modify or restore the automatic stay;
- To suspend the contract award procedure;
- To suspend the implementation of any decision or action taken by the contracting authority in the course of the procurement procedure.

Under Regulation 97, (without prejudice to the court's other powers) the following remedies are available when the contract has not been entered into:

- To order the setting aside of any decision or action;
- To order the amendment of any document;
- To award damages.

If the contract has been entered into, then (unless there are grounds for seeking a declaration of ineffectiveness) the court's powers are limited to awarding damages.

Woods (6) was the first reported case where the contracting authority's award decision was set aside; the council's records were amended to reflect the judge's adjusted scores. The judge also formally made a declaration that the claimant's tender was the most economically advantageous tender provided to the council.

TENDER EVALUATION

At a glance

- There is an obligation to inform bidders clearly about evaluation criteria so they can be interpreted the same way.
- When evaluating tenders, contracting authorities cannot take into account anything that was not disclosed if this could have made a difference to how tenderers prepared their bids.
- Bidders can only challenge the scoring of their tenders if they can show there has been a manifest error by the contracting authority.

There are three main ways in which an aggrieved bidder can challenge an evaluation. The first is by arguing that the contracting authority did not provide information about how it was going to undertake the evaluation. The second is to argue that the authority made an obvious error in its marking. In either case, the basis for the arguments is that had the authority not failed in those areas, the economic operator would have had a substantial chance of winning the competition. The third argument is whether the disclosed award criteria were sufficiently clear to permit a uniform interpretation by tenderers.

An example of a challenge on the first of these grounds is the case of *Newham (73)*. The council's award of a contract was quashed because of failure to disclose some of the criteria it was using to evaluate tenders. The council considered these to be sub-criteria and that they did not need to be disclosed. The critical issue though is not how they are labelled but whether they constituted 'criteria' which needed to be disclosed in accordance with the legislation. The court judged them to be criteria and held that they should therefore have been disclosed. In addition the council had awarded additional marks for responses in the bid which exceeded its requirements without informing bidders that it was proposing to do this. The claimant's witness gave evidence that if she had

been given this information, it would have affected the way in which the bid was prepared.

The strict approach to what constitutes a criterion adopted by Silber J in the *Newham (73)* case has been modified by the decision of the Court of Appeal in *Varney (8)*. The council had stated that tenders would be evaluated on the basis of:

- the most economically advantageous tender to the county council (65%);
- resources (including staff) to be allocated to the delivery of the services and the manner in which the tenderer proposes to provide the services in order to deliver outstanding customer satisfaction (35%).

The bidders were required to complete a series of return schedules setting out how they would deliver the services. At the beginning of each of these schedules the council set out in some detail its requirements in terms of service delivery.

In the *Newham (73)* case Silber J had adopted a dictionary definition of the word 'criterion', defining it as meaning a 'principle, standard or test by which a thing is judged, assessed or identified'. The Court of Appeal in *Varney (8)* remarked that this would require absolutely everything which influenced the award decision to be disclosed. This was described as 'impracticable' and not required under EU law. Instead it applied the test set out in the CJEU case of *Case C-331/04 ATI EAC v ACTV Venezia (31)* that sub-criteria and their weightings do not need to be disclosed if they:

- do not alter the criteria for the award of the contract set out in the contract documents or contract notice;
- could not have affected the bid preparation if disclosed; and
- were not adopted on the basis of matters likely to give rise to discrimination against one of the tenderers.

The key lesson is that nothing must be done which could have changed the bid preparation. The challenge in the *Newham (73)* case would have been successful even if the court had not adopted the wide definition of the word 'criterion' favoured by Silber J.

Where a bidder seeks to challenge the award of the contract on the basis that the tenders were scored incorrectly, then it needs to show that there was a manifest error on the part of the authority. The approach adopted by the courts is summarised in the judgment of Morgan J in *Lion Apparel (7)*:

The court must carry out its review with the appropriate degree of scrutiny to ensure that the above principles for public procurement have been complied with, that the facts relied upon by the authority are correct and that there is no manifest error of assessment or misuse of power. 36. If the authority has not complied with its obligations as to equality, transparency or objectivity, then there is no scope for the authority to have a 'margin of appreciation' as to the extent to which it will, or will not, comply with its obligations.

In relation to matters of judgment, or assessment, the authority does have a margin of appreciation so that the court should only disturb the authority's decision where it has committed a 'manifest error'. The courts have said on more than one occasion that 'manifest error' is very similar to if not the same as the *Wednesbury* test for irrationality – see *R (Greenwich Community Law Centre) v LB of Greenwich (4)* and *BY Developments v Covent Garden Market Authority (5)*.

When referring to 'manifest' error, the word 'manifest' does not require an exaggerated description of obviousness. A case of 'manifest error' is a case where an error has clearly been made.

In the *Newham (73)* case it was also argued that there were manifest errors in the scoring. The judge went through the specific complaints and found manifest error in two instances: one where the council's witness agreed that the score was too low, and the other where the witness was unable to explain the score. In the case of most of the scores complained about by the bidder, the judge found there to be no manifest error. This aspect of the claimant's case was unsuccessful. However, in *DWF (18)*, an aspect of the scoring appeared inexplicable and anomalous to the court and that proved to be central to the claim.

In *Lancashire County Council v Environmental Waste Controls Limited* [2010] EWCA Civ 1381 (32), the Court of Appeal held that the county council would have been wrong to take account of selection criteria concerning financial standing at the award stage but that the decision makers were given strong advice about ignoring this irrelevant consideration and they were not subconsciously or otherwise influenced by that irrelevance.

Similarly, in *Wilmott Dixon Partnership Ltd v London Borough of Hammersmith and Fulham* [2014] EWHC 3191 (TCC) (33) informal debriefs to the second placed tenderer fuelled claims of the evaluation being influenced by irrelevant and undisclosed factors concerning ability to perform; a continued use of a poorly regarded subcontractor; proposed use of a weak manager; a 'sea change' in delivery of the service was required. This case is a reminder of the care that needs to be taken in controlling debriefs and informal feedback, particularly where the scores are close. Here the difference between first and second was less than 1%. This case also helpfully discusses consensus scoring and disclosure of methodologies for such scoring.

The Supreme Court's decision in *Healthcare At Home Ltd v The Common Services Agency* [2014] UKSC 49 (34)

provides a valuable guide as to the proper test to be applied when considering whether evaluation criteria were sufficiently clear in order to satisfy the duties of transparency and equal treatment. Essentially, the test of clarity is an objective one assessed by reference as to whether the hypothetical, reasonably well-informed, normally diligent tenderer would interpret the criteria the same way. This test of uniform interpretation is to be applied by the court by considering the relevant documents, not by reference to evidence of interpretation from actual or potential tenderers.

The decision in *Woods (6)* can be viewed as a landmark decision as:

- (i) it showed the court's willingness to determine what should have been the lawful scores by undertaking a detailed analysis of the legality and fairness of the evaluation. That resulted in the court holding that the council's evaluation of 8 out of the 12 of the award criteria was unlawful; the winner's scores were reduced by 40 marks and the loser's tender was increased by 6 marks;
- (ii) in consequence the losing claimant (*Woods*) had in fact submitted the most economically advantageous tender and should have won. Accordingly, the council's original decision to award the contract was set aside and this is the first reported case where such an order has been made.

While this judgment is important for a number of reasons and may well encourage marking-based challenges, it does not change the underlying principle that breaches of duty or manifest errors have to be established and it is not enough just to show that a different score might be awarded by a different marker on another occasion.

ABNORMALLY LOW TENDERS

At a glance

- Abnormally low tenders ('ALT') are now dealt with under Regulation 69.
- Contracting authorities may reject a tender on the grounds that it is ALT only after it has (a) sought specific ALT information; (b) assessed that information; and (c) consulted with the tenderer submitting the ALT concerning its explanation.

There are two potential areas of challenge here: (i) an ALT 'investigation' has been undertaken and the consequential decision to reject is challenged by the ALT tenderer; and (ii) a losing tenderer argues the contracting authority should have rejected the winning tender as ALT.

There is no definition in Directive 2004/18/EC as to what constitutes an ALT. In Case C-285/99 *Impressa Lombardini SpA* [2001] ECR I-09233 (35) the ECJ said it was a matter for member states and in the UK there is no domestic definition. Further, the Advocate General in Case C-147/06 *SECAP SpA* [2008] ECR I-03565 (36) ruled that abnormality is an indeterminate concept which must be substantiated in each case by reference to the circumstances of each tenderer. So that seems to mean that any decision to reject has to be based on the ALT tenderer's individual explanation and not by a pre-existing criteria as to what constitutes an ALT. In an ALT situation the first question is what features in a tender should trigger the possibility of seeking an ALT explanation? Second, if the explanation is sought, what threshold needs to be crossed on assessing the explanation before the right to reject can arise? With regard to the second point, there are a number of ECJ judgments focusing on whether a tender is 'genuine'; 'genuine and viable'; 'reliable and serious'. Ultimately, whichever way the point is expressed, it appears to go to whether the tenderer will adhere to his price and not seek to increase it post

award, and if the contracting authority concludes otherwise, then it has the right to reject. In order to challenge that decision successfully, the rejected tenderer would have to prove that the decision was the product of a manifest error.

In the case of *J Varney & Sons Waste Management Ltd v Hertfordshire County Council* [2010] EWHC 1404 (QB) (80) one of the complaints of the unsuccessful bidder was that the council had failed to carry out an investigation of 'suspect tenders'. It was argued that the council should have carried out an analysis of the tenders where prices appeared to be abnormally low. This point was argued at first instance before Flaux J. It was not argued before the Court of Appeal. The argument relied on the decision in *Morrison Facilities Services Limited v Norwich City Council* [2010] EWHC 487 (Ch) (37) in which the court had concluded that it was seriously arguable (for the purpose of granting an interim injunction) that the contracting authority had a duty to investigate tenders which it suspected of being abnormally low. In *Varney* (80) Flaux J stated that there was no basis for considering that there was a duty to investigate all tenders which appeared to be ALT unless it intended to reject.

However, the CJEU case of Case C-599/10 *SAG ELV Slovensko and Others* (38) provides some support for the contention that a contracting authority is under a duty to investigate whether a tender is ALT even if it does not go on to reject for that reason. Regulation 69(1) also appears to make authorities require tenderers to explain price or costs where tenders appear abnormally low even if they do not go on to reject for that reason. *SAG* (38) concerned a contract for the collection of tolls on motorways and other roads. One of the companies which had made a bid was asked for clarification of its low prices and was subsequently rejected on this ground. The Supreme

Court in Slovakia referred certain questions to the CJEU for a preliminary ruling.

In its judgment the CJEU stated, with reference to Article 55:

It follows clearly from those provisions, which are stated in a mandatory manner, that the European Union legislature intended to require the awarding authority to examine the details of tenders which are abnormally low, and for that purpose obliges it to furnish the necessary explanations to demonstrate that its tender is genuine, constitutes a fundamental requirement of Directive 2004/18, in order to prevent the contracting authority from acting in an arbitrary manner and to ensure healthy competition between undertakings.

In the UK, the nature of a contracting authority's duty in dealing with a potentially ALT was authoritatively considered by the High Court in *NATS (Services) Ltd v Gatwick Airport Ltd* [2014] EWHC 3133 (TCC) (39) concerning a utility (but applies equally to contracting authorities under the Regulations). That case decided that a utility or authority owes no duty to other bidders to: (a) investigate a potential ALT; or (b) reject a tender which it concludes is ALT. The reasoning and conclusion in this judgment were consistent with the judgment in *Varney* (80). Query whether (a) is still correct in the light of Regulation 69(1).

ENDING THE AUTOMATIC CONTRACT-MAKING SUSPENSION

At a glance

- The *American Cyanamid Co (No 1) v Ethicon Ltd* [1975] AC 396 (44) principles apply when a court is considering whether to exercise its discretion to order the end of the automatic suspension.
- In most cases the key issue in determining whether the suspension will be ended is whether damages will be an adequate remedy for the claimant who is challenging the award decision.
- It is difficult to articulate some unifying principle that allows one to assess which applications will succeed and which ones will not. Each application is fact-sensitive operating in an area of judicial discretion.

Without doubt, in the past twelve months or so this area of procurement challenges has seen the most case law activity and development. Every practitioner needs to be familiar with the relevant principles and the up-to-date case law where proceedings have been commenced before an awarded contract is entered into. A large number of reported cases simply settle after the suspension application so it can represent a crucial turning point – for example, *Morrison* (37); *Covanta* (28) and *DWF* (18) – all discussed below.

The structure of what happens is now contained in Regulation 95 and where a claim form is issued; and the contracting authority becomes aware that a claim has been issued (distinct from service of the claim form) in respect of an award decision; and the contract has not been entered into, the contracting authority must refrain from entering into the contract. The requirement to refrain continues until the court orders that it ends, on an application for an interim order under Regulation 96(1)(a); the claim is determined and there is no order to continue the requirement to refrain.

The important case law in this area usually centres on contracting authorities' applications under Regulation 96(1)(a) to end the contract-making suspension.

The early cases on ending the suspension, including *Indigo Services (UK) Ltd v The Colchester Institute Corporation* [2010] EWHC 3237 (QB) (40); *ALSTOM* (41); and *Exel Europe Ltd v University Hospitals Coventry & Warwickshire NHS Trust* [2010] EWHC 3332 (TCC) (42), all ordered the suspension to end. If there was an early 'trend', then it favoured ending the suspension but a number of judgments have reversed that trend and made the outcome of these applications much more variable but veering towards refusals to end the suspension.

In *The Halo Trust v Secretary of State for International Development* [2011] EWHC 87 (TCC) (43), the High Court gave guidance on lifting an automatic suspension. It decided that the *American Cyanamid* (44) principles apply:

- Is there a serious question to be tried? If so:
- Where does the balance of convenience lie?
- Would damages be an adequate remedy?

A number of cases since then have confirmed that the *American Cyanamid* (44) principles apply, notably and authoritatively in *NATS* (39) and *Group M UK Limited v Cabinet Office* [2014] EWHC 3659 (TCC) (45) and the Court of Appeal's judgment in *DWF* (18).

The court can also take into account the public interest (see *ALSTOM* (41) and *Chigwell (Shepherds Bush) Ltd v ASRA Greater London Housing Association Ltd* [2012] EWHC 2746 (QB) (46) on the public interest in awarding contracts) when undertaking the balance of convenience and that consideration featured in *Halo* (43). *Halo* (43) concerned mine clearance and development in Cambodia. The court said that if there was continuing uncertainty as to the contract award, this would lead to disruption of the mine clearance programme possibly leading to injury and loss of life. The public

interest factor also weighed heavily in favour of ending the suspension in *NP Aerospace Ltd v Ministry of Defence* [2014] EWHC 2741 (TCC) (47).

Halo (43) was one of the few reported cases where the claimant failed to pass the low *American Cyanamid* (43) threshold of a serious issue to be tried. *Group M* (45) is another example and there the weakness of the case was part of the balance of convenience test when ordering the end of the suspension.

In *Exel* (42) the court stated that even though the contract-making suspension applied automatically, there is no presumption in favour of it remaining in place and the court's approach is as if the statutory suspension was not in place and the court was considering whether it should order that the contracting authority should refrain from entering into the contract.

In *Morrison* (37) the court held that damages would not be an adequate remedy because of the difficulty in calculating them and accordingly that the status quo should be preserved. The case partly concerned non-disclosure of relevant information about the evaluation criteria. The judge considered that in this type of claim it was very difficult to say what chance of winning had been lost and hence the difficulty in calculating damages at trial. Consistent with *American Cyanamid* (44) principles, the claimant seeking to hold onto the suspension would be expected to offer a cross-undertaking in damages as if it were seeking an injunction. There is power also under Regulation 96(3) to impose such a condition as to damages.

Covanta (28) perhaps represents the turning point when hanging onto the suspension became a more likely outcome. That came about not by refusing to end the contract-making suspension but by granting an injunction restraining the entry into the contract with the winning tenderer. That was because the procurement was so old that the post-2011 amended regulations did not apply.

The judge's approach though was the same and he held that: (i) damages would not be an adequate remedy for the claimant because of the difficulty in calculating them on the specific facts of this case and the nature of the claim so adopting the approach in *Morrison* (37) – the ascertainment of damages was held to be virtually impossible; (ii) the delay in entering into the contract would cause some prejudice to the defendant in that it would defer the diversion from landfill but (crucially) the trial could be held in 7 months (a speedy trial was also ordered in *Morrison* (37)); and (iii) when that time frame was compared with the 7 year procurement and the 30–35-year duration of the contract, the delay caused by the injunction was regarded as 'modest'.

Similarly, in *DWF* (18) the Court of Appeal found that if the claimant won at trial, damages would not be an adequate remedy because the court would have to be involved in a 'host of speculative questions' based on the chance of DWF winning. Further, if the suspension had been lifted there would have been a loss of staff and reputational damage which could not be compensated for in damages – a point recognised in *ALSTOM* (41). On the other hand, if DWF lost at trial, then the contracting authority could be compensated for any loss through the cross-undertaking in damages. *NATS* (39) was another case where the suspension was not lifted because of the difficulty in assessing damages; the loss of the contract to the winning bidder would substantially impair the Contractor's ability to win new business and there had already been a substantial delay in the award. Also, the damage to the contracting authority if NATS lost at trial under the cross-undertaking in damages was easily calculable. As such, the balance of convenience favoured maintaining the suspension.

Even if there is strong public interest in favour of lifting the suspension, that can still be 'outdone' where damages were not an adequate remedy and a speedy

trial was ordered, as was the case in *Edenred (UK Group) Ltd v HM Treasury and others* [2014] EWHC 3555 (48).

Two cases (decided within a month of each other and both of which concerned social care procurements) illustrate the court's ability to be flexible when exercising its discretion to maintain or end the suspension. In *Solent NHS Trust v Hampshire County Council* [2015] EWHC 457 (TCC) (49) the suspension was ended and the fact that the contractor's damage through a loss of profit was readily calculable (so damages were an adequate remedy) was important in this decision. Interestingly, the contractor's loss of reputation claim (allegedly caused if the suspension was ended and not capable of being compensated in damages) was dealt with in this way: 'even if the suspension was lifted, it remains open to Solent to pursue its case on liability and establish if it can that it should have won the new contract, which would restore any reputation which it thinks it might lose'.

In the second case, *Bristol* (29), the court refused to grant the application to end the suspension and found that damages would not be an adequate remedy for the contractor and to end the suspension would effectively extinguish the claim. The contracting authority relied on *Solent* (49) but that was distinguished, not least because unlike in Solent there was no profit margin and the advantages of the new contract were not quite so clear.

The fact specific and unpredictable nature of applying to end contract making suspensions is further illustrated by a September 2015 decision which ended the suspension (*OpenView Security Solutions v LB of Merton* [2015] EWHC 2694 (TCC) (78)) and a January 2016 judgment where the application to end the suspension was refused (*Counted4 Community Interest Company v Sunderland City Council* [2015] EWHC 3898 (TCC) (79)).

At first blush *Merton* (78) (a CCTV contract) seems to have undermined the

case for retaining automatic suspensions by emphasising: (i) the interests of the winning tenderer; (ii) the public interest in allowing authorities to proceed with their plans promptly. Further, the judge appeared to attach less weight to the importance of the review remedy (Regulation 97) than was given in earlier cases like *Covanta* (28). He was quite hostile to the idea that damages would not be an adequate remedy simply because they had to be assessed on a loss of a chance basis. Perhaps this judgment's most significant features are: the rejection of a generalised argument that damages would not be an adequate remedy where a loss of reputation is alleged. If that was being run then it is necessary to show that significant irrecoverable financial loss will be suffered by a loss of reputation on potential future providers of profitable new contracts (a tall order!); the weight attached to the fact that OpenView had an established place in the market and had not yet committed resources to the Merton contract – 'It is therefore not being deprived of existing market presence but of the chance of increasing it in the future. That disadvantage is relative, transient and minor when compared with the consequences to either party on the facts of American Cyamamid itself.'

Counted4 (79) concerned a substance misuse services contract and they were the incumbent. The judge held that damages would not be an adequate remedy if Counted4 won at trial since if the suspension was ended prior to that, Counted4 would lose its team under TUPE to the winning tenderer and the loss of the suspension might mean that it would be unable to pursue its claim for damages to trial. Of particular significance was the judge's willingness to: (i) discount the council's heavy reliance on the public interest in getting the new provider in place; and (ii) find that it was not appropriate to order the usual cross undertaking in damages as Counted4 were a not for profit organisation and there was no clear evidence of financial harm that would be caused to the council if the suspension remained in place.

EXPERT EVIDENCE

At a glance

- It will rarely be appropriate for the court to hear expert evidence on the issue of liability in procurement challenges.

In the case of *BY Development (5)* the court considered the circumstances in which it would be appropriate for expert evidence to be adduced in procurement challenges in respect of liability. (Expert witnesses are commonly used in disputes over quantum.) The answer is that, in relation to liability, such circumstances are going to be very rare. The claimants had submitted an unsuccessful bid for the redevelopment of New Covent Garden Market. The areas in which they had been marked down included their approach to planning and financial risk. They sought permission to adduce expert evidence on both planning and finance issues. For the most part, the questions they proposed to ask the experts amounted to whether the defendants had been correct to evaluate the planning and financial criteria in the way they did. The court concluded that in a case involving allegations of manifest error or unfairness, expert evidence would not generally be admissible in procurement cases. This was for three reasons:

- The court is carrying out a limited review of the public body's decision. It is not making its own decision about the merits;
- The public body is likely to include experts or to have taken expert advice; and
- Such evidence may usurp the court's function.

The court referred to some procurement cases in which expert evidence had been permitted but indicated that these were all for particular special reasons. Expert evidence could sometimes be admissible in cases involving manifest error, by way of technical explanatory evidence. There might also be unusual cases where such evidence is relevant and necessary to allow the court to reach a conclusion on manifest error, especially when the issue

is specific and discrete, such as a debate about one of the criteria or complex issues of causation. The present case was not one where expert evidence was needed.

IMPLIED CONTRACT CLAIMS

At a glance

- A procurement exercise can give rise to limited implied contractual obligations.
- In cases where the procurement rules apply in full there is no basis for the imposition of additional implied contractual safeguards.

In a number of the challenges for breaches of the procurement rules there have also been attempts to rely on the existence of a private law contractual obligation. This is partly because the limitation period for claims under the regulations is the inconveniently short period of 30 days, whereas claims in contract allow the luxury of a six-year limitation period. The idea that the tendering process gives rise to a contractual claim derives from the case of *Blackpool & Fylde Aero Club v Blackpool Borough Council* [1990] 1 WLR 1195 (50) in which the court held that there could be an implied contract which gave rise to a duty to consider a tender submitted in accordance with the requirements of an invitation to tender. In *Harmon CFEM Facades (UK) Ltd v The Corporate Officer of the House of Commons* [1999] All ER (D) 1178 (51) the court found breaches both of the procurement rules and of an implied contractual duty to comply with the legislative requirements.

In the first instance cases of *Lion v Firebuy* (7) and *Varney* (80) the courts held that the fact that there was a detailed tender procedure governed by the regulations left no room for an implied contract claim.

This approach was followed by the Court of Appeal in *JBW Ltd v Ministry of Justice* [2012] EWCA Civ 8 (52) where the claimant was prevented from arguing a breach of the procurement rules as a result of the court's finding that the contract (for the provision of bailiff services) was a services concession contract and that therefore the rules did not apply. The claimants therefore argued that there was a

breach of an implied contract. This raised the question of the scope of this contract. The court was prepared to accept that there was a duty to consider the tender as required by the *Blackpool & Fylde* (50) case and also that such consideration should be in good faith. However it rejected the claim that the implied contract should include obligations of transparency and equal treatment on the basis that:

- it was not necessary to imply such terms to give efficacy to the contract;
- there could not have been a common intention to imply such terms, given that the Ministry had always argued that the procurement rules did not apply; and
- the reservation of a power to alter the terms of the tender process was inconsistent with an obligation to act with transparency.

After this case and a bank of others including *Varney* (80), *Turning Point* (11) and *Exel* (42) it seems unarguable to maintain that a procurement creates an implied contract in cases where the regulations apply in full. Nevertheless the point still appears, for example in *Wilmot Dixon* (33) where the judge decisively held that 'There is no room for the implication of any contract, this being a case governed by the regulations'.

CLARIFICATIONS AND MISTAKES

At a glance

- Contracting authorities to seek clarifications provided this does not change the bids.
- There is no duty to give bidders the opportunity to correct mistakes.

The principles as to when a contracting authority should clarify an ambiguity or establish whether an error in a tender has occurred before it is rejected for those reasons can be found in *Tideland Ltd v Commission of the European Communities* [2002] ECR II-03781 (53). While there is no duty to seek clarification in every case of ambiguity, in cases where surrounding circumstances indicate an ambiguity that probably has a simple explanation and is capable of being easily resolved, then it would be contrary to the requirements of good administration for a contracting authority to reject a tender without exercising its power to seek clarification. A failure to do so could be a manifest error. The judge in *R (Hoole & Co) v Legal Services Commission* [2011] EWHC 886 (Admin) (54) considered the duty to seek clarification:

In my judgment, the critical factor which gives rise, or may give rise, to a duty to seek clarification is where the tender as it stands cannot be properly considered because it is ambiguous or incomplete or contains an obvious clerical error rendering suspect that part of the bid. If the inability to proceed with a bid, which may be an advantageous addition to the competitive process, can be resolved easily and quickly it should be done, assuming there is no change to the bid or risk of that happening. If there is an obvious error or ambiguity or gap, clarifying it does not change the bid because, objectively the bid never positively said otherwise.

The duty to clarify depends on the circumstances in each case including whether:

- there is an express or implied power in the invitation to tender to do so;
- it is fair to all tenderers to ask for clarification from one tenderer rather than all; and
- clarification would allow a material amendment to that tender.

The other side of the coin is whether disclosed selection criteria are sufficiently clear to tenderers. The relevant principle is to be found in *SIAC* (22) and is a test based on whether the criterion allows all reasonably well-informed and normally diligent tenderers to interpret it in the same way. There has been a recent discussion and application of this test in *William Clinton (t/a Oriel Training Services) v Department of Employment and Learning and another* [2012] NICA 48 (55).

The leading case on the rejection of tenders because of mistakes and/or their late submission is *JB Leadbitter v Devon County Council* [2009] EWHC 930 (Ch) (56). The tenderer had forgotten to upload an important document with its tender. It remedied that error in an impermissible manner and after the deadline had expired. The contracting authority refused to extend the deadline for this purpose and its refusal was upheld by the court. That judgment acknowledged that contracting authorities have discretion to reject for errors or late submission, or accept them despite these shortcomings. This has to be exercised proportionately. In permitting them, authorities must guard against breaching the principle of equal treatment. Accordingly, in *Azam Azam & Co v Legal Services Commission* [2010] EWCA 1194 (57) the claimant missed the submission deadline by 7 days, claiming that the contracting authority had failed to inform it of the deadline and it was disproportionate not to extend it. Its claim failed and Rimer LJ held:

A deadline is a necessary part of a tendering process. The deadline

was plainly stated in readily accessible documents. There was no fault by the respondents: they needed to be conscious of their duty to treat tenderers and potential tenderers equally and to avoid suggestions of favouritism towards a particular party ... The need for an extension could not be attributable to any fault on the part of the respondents or to any factor outside the control of the appellants.

Similarly in *Hoole* (54) and *Harrow Solicitors v Legal Services Commission* [2011] EWHC 1087 (Admin) (58) the claimants had made mistakes in completing answers in their tenders. Had they not done so they would have received higher scores, although in *Hoole* the relevant and correct information appeared elsewhere in the tender and in *Harrow* it was argued that the correct information could have been easily ascertained. In *Hoole* (54) it was argued that there was a duty to take account of information of which it was aware from the other part of the tender. That argument was rejected and such a duty was:

severely circumscribed where there is a competitive tender and an overriding duty to treat all tenders equally ... Any general duty to give an applicant an opportunity to correct errors in the absence of fault by the defendant yields to the duty to apply the rules of the competition consistently and fairly between all applicants, and not afford an individual applicant an opportunity to amend the bid and improve its prospects of success in the competition after the submission date had passed.

In *Harrow* (58) the idea that the contracting authority should investigate whether the applicant meant something different to its answer was rejected. The claim also failed because to allow the answer to be corrected would have amounted to an impermissible change after submission of tenders.

R (All About Rights Law Practice) v Lord Chancellor [2013] EWHC 3461 (Admin) **(59)** concerned a case where a mandatory tender form was submitted blank and the tender was rejected for that failure. The decision was challenged by way of judicial review on the grounds that the rejection was not proportionate as the error was easy to remedy whereas the adverse consequences were very significant. Second, the rejection amounted to unequal treatment as in other comparable situations errors were allowed to be corrected. Both grounds were rejected. The first ground because it would not be a correction but a new improved bid given the original was blank. The second ground because the other tender situations were not comparable.

The ECJ case of *Case C-336/12 Ministeriet for Forskning v Manova A/S* (10 October 2013) **(60)** provides a useful summary of the principles which allow the clarification of final tenders post-submission so that the correction or amplification of details of a tender are allowed, as are the correction of obvious material errors. The request cannot be made until all tenders have been looked at; the request must relate to all parts of the tender which require clarification; the request cannot lead to what will be a new tender; the request does not unduly favour the tenderer to whom the request is directed. Applying those principles, the contracting authority was allowed to request a pre-existing balance sheet which objectively predated the deadline. However, that latitude would not be available in cases where the rules of the procurement required exclusion for failing to provide documents.

AWARDS OF DAMAGES

At a glance

- Claimants who successfully challenge procurement decisions are entitled to damages based on the profits they would have made, which can be very substantial.
- A contracting authority that enters into a challenged contract is faced with the prospect of paying under the contract and also paying damages.

If there has been a breach of the regulations and that has caused a loss, what is the basis for the calculation of those damages? (A 'loss' in this context usually means that were it not for that breach the claimant could have been awarded the contract or there was a substantial chance that it could have been.)

As stated in the *Exel* (42) judgment: 'It is now fairly well established that a claimant who successfully challenges a procurement exercise will be entitled to damages, usually calculable on a lost opportunity or chance basis'. As we have seen from *Lettings* (2) the chance has to be significant, otherwise it will not be actionable. This is generally considered to be around a 15% to 20% chance.

The calculation of damages will be by reference to the profit that would have been made. So if a successful claimant is held to have had a 50% chance of winning, then the starting point is that it would receive 50% of the profit that it would have made were it not for the breach. In *Lancashire County Council* (32) the judge at first instance found that there was a loss of a substantial chance of winning the competition and assessed that as a 50% chance. Also in *Mears v Leeds City Council (No2)* [2011] EWHC 1031 (TCC) (61) it was held that a lack of transparency in weightings meant that the claimant had lost the chance of being included as one of the tenderers and damages were awarded (to be assessed) as the appropriate remedy and declined to set aside the procurement procedure.

As has been noted earlier, calculating damages in loss of chance cases can be difficult – see also paragraphs 44 and 48(e) of the judgment in *Covanta* (28).

An interesting and novel development in this area can be found in *Energy Solutions EU Ltd v Nuclear Decommissioning Authority* [2015] EWHC 73 (TCC) (62). There the claimant chose to start its claim after: (a) the standstill period had ended; and (b) the contract was entered into with the successful tenderer; but still before the 30-day time limit had expired. These choices and actions were effectively permitted by the regulations. At a preliminary issue trial, the authority argued that the claimant's actions broke the chain of causation of damage since, if it had acted differently and brought the contract-making suspension into play, then it would have suffered no loss. The question of 'acted differently' was one of fact for the full trial but the court doubted whether making a choice allowed by the regulations would bar a claim for damages, and decided that, having made out an actionable claim for breach of duty, the award of damages to compensate for losses suffered is not discretionary and that the award is not dependent on the gravity of the breach. The Court of Appeal upheld this decision *Energy Solutions EU Ltd v Nuclear Decommissioning Authority* [2015] EWHC Civ 1262 (63).

The further decision in *Woods Building Services v Milton Keynes* [2015] EWHC 2172 (TCC) (64) is also important from the point of view of damages and remedies (see Regulation 97). Having determined that the council should have given the highest mark to Woods, the original award decision was set aside. The claimant in consequence sought an order that it should be awarded the contract or alternatively damages to be assessed. The council argued it should be entitled to abandon and re-run the competition without a damages liability. While the judge accepted he had jurisdiction to order a mandatory injunction requiring the council to enter

into a contract with Woods, he instead ordered damages. He regarded that remedy as exceptional because, otherwise, that would produce a forced and unwilling contractual relationship. That of course means the council would have to pay Woods' tender costs, and profit on the contract twice – Woods' lost profit and the winning bidder's on the re-run procurement, but the former would be subject to whether Woods won the re-run procurement. That duplicated expenditure of public money factor alone might have been sufficient to incline the court to require the council to award to Woods, having already held that it was the true winner. The judge also considered that it was inappropriate to award Woods the contract from a flawed process, even though it might be argued that the judgment had corrected those flaws.

JUDICIAL REVIEW

At a glance

- It is possible for individuals with a sufficient interest to challenge procurement decisions by way of judicial review.
- In limited circumstances an economic operator can challenge by way of judicial review.

Since the only parties to have suffered loss as a result of breaches of the procurement rules will be the contractors who took part in the process, it might be thought that only those contractors would have the right to challenge the award decision. However, the Court of Appeal has decided that, in certain circumstances, third parties may apply for procurement decisions to be set aside. In the case of *R (Chandler) v Secretary of State for Children, Schools and Families and London Borough of Camden* [2009] EWCA Civ 1011 (65), Mrs Chandler, who was opposed to the foundation of an academy school by her local authority, sought to challenge its decision by arguing that its failure to have an open competition was a breach of the procurement rules. Both the High Court and the Court of Appeal said that the rules did not apply. However, the courts did not reject out of hand the notion that people who were not involved in the process might still be able to challenge its legality. The Court of Appeal held that breaches of the procurement rules could in certain circumstances give rise to a public law remedy:

We incline to the view that an individual who has a sufficient interest in compliance with the public procurement regime in the sense that he is affected in some identifiable way, but is not himself an economic operator who could pursue remedies under Reg 47, can bring judicial review proceedings to prevent non-compliance with the regulations or the obligations derived from the treaty especially before any infringement takes place. He may

have such an interest if he can show that performance of the competitivetendering procedure in the directive or of the obligation under the treaty might have led to a different outcome that would have had a direct impact on him. We can also envisage cases where the gravity of a departure from public law obligations may justify the grant of a public law remedy in any event. (Paragraph 77)

What then is meant by 'sufficient interest' in this context? Mrs Chandler, the court made plain, did not come into this category. Her interest was simply in campaigning against the academy school, not in upholding the integrity of the procurement process.

The issue was considered again in *R (Unison) v NHS Wiltshire Primary Care Trust and others* [2012] EWHC 624 (Admin) (66). The trade union Unison challenged the decision by the primary care trust to enter into a contract with a company called NHS Shared Business Services Ltd which involved the outsourcing of family health services. Unison claimed that there had been non-compliance with the EU procurement rules. *Eady J considered the tests in Chandler (65)* and came to the view that Unison could not show that there would have been a different outcome if the rules had been followed. Nor could it show that its members were affected in some identifiable way. Nor was he persuaded that the gravity of the departure justified a public law remedy being invoked. This case is also useful when considering time limits for commencing proceedings.

In *Traffic Signs and Equipment Ltd and David Connolly's Application* [2012] NICA 18 (67) the Northern Ireland Court of Appeal indicated that the tests in *Chandler (65)* needed to be interpreted restrictively.

Nash (15) was mentioned earlier in the context of time limits. There the claimant in judicial review proceedings was a resident of the defendant council who claimed that outsourcing of

services would lead to deterioration in the council services which she received. No point appears to have been raised as to the claimant's lack of interest to bring that claim.

Further, the successful claimant in *Gottlieb v Winchester City Council* [2015] EWHC 231 (Admin) (68) challenged by judicial review proceedings the defendant council's decision to vary a Section 106 development agreement. The defendant only raised the sufficient standing of the claimant as a non-economic operator at trial (rather than at the permission stage) as a reason to refuse relief. The court held that the claimant had sufficient standing as he sought observance of the procurement regime in order to deliver an open competition which allowed the selection of a development which best suited the City of Winchester's needs. The outcome might have been different if the standing point was raised at the permission point.

In limited cases, an economic operator may also have a remedy in judicial review for what are breaches of duties owed under the Regulations. That created an anomaly in timing for commencing proceedings – 3 months for judicial review but 30 days under the regulations. That 'loophole' was closed on 1 July 2013 by an amendment to CPR 54 whereby any decision affected by a duty owed to an economic operator under the Regulations and which was the subject of a claim in judicial review has to be filed within the same 30-day period for enforcing a breach under the regulations.

The Legal Services Commission cases concerning mistakes in tenders are an exception to the general starting point that there is no parallel right to seek judicial review of procurement decisions because there is sufficient public interest in Legal Aid franchise procurements. This general position will be different though if (a) the contracting authority is exercising a statutory function (so as to introduce a public law element in what would

otherwise be a private law area and for which there is a discreet statutory remedies code); and (b) the authority has gone seriously wrong such as to abuse its power – see *R (Molinaro) v Royal Borough of Kensington and Chelsea* [2011] EWHC Admin 896 **(69)**.

That appears to be the approach taken in: *R (A) v Chief Constable of B Constabulary* [2012] EWHC 2141 (Admin) **(70)**. In that case a subcontractor for seizing vehicles had been excluded as a result of a process of security vetting but was not given a reason for the failure to pass the security vetting. It was held that the Chief Constable was exercising statutory functions in seizure, recovery and retention of vehicles (albeit through a contract for discharging those functions); the vetting was carried out in the public interest so it was a public function; the Chief Constable owed a duty to the subcontractor to act fairly and had acted unfairly by applying a blanket policy of not providing reasons for vetting decisions.

Economic operators might also be able to challenge procurement decisions by way of judicial review to complain of breaches of the public procurement regime if a claim under the regulations does not provide a suitable alternative remedy: *R (Hossacks) v Legal Services Commission* [2011] EWCA Civ 788 **(71)**. The scope for an economic operator to challenge by way of judicial review is developing and (for example) the claimant in *Edenred* **(48)** also started a parallel claim for declarations through judicial review proceedings.

PUBLIC SECTOR EQUALITY DUTY

At a glance

- The public sector equality duty applies to tendering processes.
- There is potential for the duty to apply on changes of service provider.

In principle the public sector equality duty ('PSED') set out in s149 of the Equality Act 2010 applies to tendering processes: *Greenwich (4)*. The public sector equality duty imposes an obligation on all public authorities to have 'due regard' to the prescribed equality objectives under Section 149, namely to:

- eliminate all forms of discrimination and harassment prohibited by the Equality Act;
- advance equality of opportunity; and
- foster good relations between people with different protected characteristics.

Elias LJ's judgment in *Greenwich (4)* is authority for the following propositions:

- (1) a change from one provider to another by itself will not engage the PSED. Something more is needed;
- (2) when alleging a breach of the PSED, it is necessary to identify a protected Equality Act characteristic which realistically can be argued to have been engaged;
- (3) the PSED is to be satisfied at the point when the material policy decision is taken. (Minor changes of detail do not require further equalities consideration);
- (4) the issue for the court is of 'substance' in each case. (Here, the Specification included the relevant equalities considerations so when applying the award criteria, the council had in substance complied with PSED. Further, a full strategic equality impact assessment had been carried out at an early stage when

government funding was being reduced and the claimant could not identify any equality objective that might be prejudiced by the council's decision).

The proposition in 1) in particular would appear seriously to restrict the impact of the PSED. The limits of *Greenwich (4)* have recently been examined in *R (RB) v Devon County Council* [2012] EWHC 3597 (Admin) (72) and do not seem to sit too easily with the judgment in *Greenwich (4)*. *Devon (72)* concerned the decision to appoint a private sector provider as preferred bidder for integrated children's social and healthcare services. The procurement commenced in September 2011. An equality impact assessment was produced in March 2012 and recorded no impact as there was no change in service post-award. The claimant did not challenge the decision to procure (agreeing that was in the public interest) but challenged the decision to appoint a preferred bidder in June 2012 when there was no specific consideration of equalities issues. In the light of *Greenwich (4)*, because the claimant could not identify any prejudice arising out of the decision to appoint a preferred bidder, one would have thought the claim would have failed. However, the judge held there was a breach of the PSED but did not quash the decision. He also held that the PSED was first engaged when the decision to procure was made in September 2011 and the neutral nature of a change of supplier identified in *Greenwich (4)* was distinguished by reference to the unique nature of the integrated service and the fact that it catered for vulnerable groups. This distinction does not appear overly persuasive particularly since the claimant in *Greenwich (4)* also catered for vulnerable groups. No quashing order was made because the PCT was about to be abolished and there was an urgent need for a new provider; the

PSED was dealt with in an assessment that went with the subsequent award decision in September 2012; the claimant could not identify any specific detriment.

It remains to be seen if *Devon (72)* will be followed or overruled but in the meantime it would be sensible to assume that decisions to change the service provider could engage the PSED; equality objectives should be incorporated into every stage of the award process through the specification and award criteria or via a separate impact assessment at significant stages which influence the nature of the service provided or the potential selection of the ultimate successful tenderer.

MODIFICATIONS TO CONTRACTS DURING THEIR TERM

At a glance

- The relevant legal framework in this important and commonplace area is now to be found in Regulation 72 and the previous case law is codified in Regulation 72 (1)(e) and 72(8).
- The obvious issue here is whether a change to an existing contract is lawful or it goes too far and requires a fresh procurement. Each case is going to be fact-sensitive and each requires its own careful examination.

In the UK there have been two important variation cases; *Gottlieb (68)* and *Edenred* (consisting of *Edenred (48)*, *Edenred (Group UK) Limited v Her Majesty's Treasury and others* [2015] EWCA Civ 326 (74) and *Edenred (Group UK) Limited v Her Majesty's Treasury and others* [2015] UKSC 45 (75)).

Also, in *Medicure Ltd v The Minister of the Cabinet Office* [2015] EWHC 1854 (76) the judge decided that on the facts of that framework case there was no variation of a framework as its operation was contemplated by the procurement documents. Of interest is the judge's observation that a situation might occur where a variation took place in fact but it was in the authority's interest not to acknowledge that variation formally. This case is also enlightening when considering who is the proper defendant in a framework agreement challenge. If a framework was being improperly used, then the right defendant was the customer, not the party who set it up.

In *Edenred*, the *High Court (48)*, *Court of Appeal (74)* and the *Supreme Court (75)* all rejected the claimant's contention that the addition of the new services to existing services extended the scope of the original contract considerably, were a substantial modification and required a new procurement. This was because an expansion to cover those additional

services was envisaged by the OJEU advertisement and related procurement documents; the expansion was covered by the original contract's change control mechanism (although as the Supreme Court decided that the change was not substantial, it did not need to decide whether the Court of Appeal was right in holding that there was a clear, precise and unequivocal review clause under Regulation 72(1)(a) which covered the new services, but it was inclined towards that view); the original procurement required the contractor to have the resources necessary to provide the increased new services. It is also worth noting that the Supreme Court considered whether the new service was valid by reference to the 2015 Regulations, even though they came into force on 26 February 2015 and that predated the amendment and the original procurement.

In *Gottlieb (68)* the issue was whether a number of changes to a development agreement concerning Winchester city centre were sufficiently substantial that they could not be effected without a fresh procurement. When it comes to working out whether a change is 'substantial', the underlying consideration is whether the changes are so material, they demonstrate an intention to renegotiate the essential terms of the contract. The existence of that intention is to be ascertained by comparing the original contract with the one as modified.

An amendment which, if part of the original tender procedure, would have allowed for the admission of tenderers other than those who were admitted may be material. The court held that this test has to be broadly construed and whether on the balance of probabilities a 'realistic hypothetical bidder' would have been admitted to the amended procedure – so it was not necessary to adduce evidence of an actual potential bidder who would have applied to be admitted to the amended process.

Notably in *Gottlieb (68)* the variations did not render the subject matter of the agreement different but the varied contract was materially different in character because unprofitable physical features of the original agreement were removed and greater opportunities for the developer to make a profit were introduced.

While the agreement contained a variation clause it was so broad and unspecific it failed to be transparent as it did not allow tenderers to assess the scope of potential variations.

THE PITFALLS

What then are the lessons contracting authorities need to draw from this tangled narrative of legislation and case law?

- Most important of all, transparency. Most challenges could have been avoided by providing the bidders with the right information at the right time. In particular, it is essential to disclose all the criteria to be used to evaluate the tenders and having done so, apply those criteria. If a bidder can show that: the contracting authority withheld anything which could have affected the preparation of its bid; or marks were awarded on the grounds of something not linked to the disclosed criteria, that may provide grounds for challenge. The *Woods* (6) case provides valuable insights into why the reasons for giving marks needs to be recorded, justified and correlate to a disclosed criteria. It also acts as a reminder to provide an actual explanation for giving a particular score rather than simply restating the scoring criteria.
- Beware of 'loose' debrief feedback which might be seen as not being linked to the disclosed evaluation criteria, as in *Wilmott Dixon* (33).
- If a contracting authority is concerned about the outcome of an evaluation and it wants to evaluate again, then the evaluators should be different and should not be aware of the previous marking.
- If a claim is made and served, be prepared to apply promptly for the automatic suspension to be lifted and seek other interim orders as appropriate, like a cross-undertaking in damages if the suspension continues or security for costs. The courts now realise that these are commercial disputes and that the disappointed bidder can usually be compensated by the payment of damages. Unless there are exceptional circumstances, the suspension will probably be lifted.
- Beware of the requirement to investigate abnormally low tenders set out in Regulation 69 (1).
- Seek clarifications of errors or ambiguities which look as if they can easily be cleared up, but be careful to ensure this is done in a way that does not give the bidder an opportunity of raising new issues or negotiating, which could lead to a breach of duty to the other bidders.
- Do not be afraid of using voluntary transparency notices. There are circumstances where it is not possible to publish a contract notice in advance of the procurement, and the use of a voluntary transparency notice (in conjunction with the 10-day standstill period) will establish whether there are potential challengers and allow them to be confronted at an early stage, as well as prevent the first ground for ineffectiveness (Regulation 99(2)) from applying.
- Be decisive and clear in identifying the mandatory requirements for a tender and in prescribing the consequences for non-compliance with those requirements.
- Be full, compliant and clear in Regulation 86 letters ('standstill letters') to tenderers informing them of contract award decision.
- Be geared up to give pre-action or early specific disclosure as that may assist in disposing of the claim early and also because it might have to be given in any event in accordance with *Roche* (25). However, be astute to set up an effective confidentiality ring in the event that disclosure covers other tenderers' confidential information.
- Many challenges can be 'nipped in the bud' so be prepared to take them seriously and give comprehensive

- responses in the early stages and be prepared to invest resources and time in the early stages. If you are not going to give disclosure of primary evaluation documents, make sure that any summary of scoring accurately reflects the contemporaneous evaluation documents. Mistakes excite litigation as in *Roche* (25).
- Make your OJEU notice and other procurement documents as far-sighted as possible so they envisage future potential variations both in terms of value and scope. When deciding to vary a contract during its term, ensure that the contract terms envisage and permit the variation, and where in doubt, seek legal advice as to whether further protective measures such as a voluntary transparency notice ought to be taken.

Watch this space. Look out for new cases. The landscape keeps changing, especially as the Regulations become the subject of court judgments. A draft TCC pre-action protocol is also in circulation and when in force the process for challenges in that division will become easier to follow.

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OUR CREDENTIALS

The Sharpe Pritchard procurement challenge team regularly acts for central and local government; housing associations and, to a lesser extent, economic operators.

Our team members can step into a procurement which is already being handled by the firm to manage and deal with potential areas of challenge including issues raised by a displeased economic operator during the course of the procurement. We are also often instructed to act in a challenge raised in a project where we are not already acting on a day to day basis. Whatever the circumstances, our experience has shown to us that our early intervention can contain and prevent potential areas of challenge escalating by giving the right strategic and procedural advice. For example, advising on how to handle a mistake in a tender submission or advising on the permitted bounds of a clarification in order to ensure that the best possible decisions are made at the earliest available time.

Challenges can start with a “low key” initial complaint or by proceedings which

have sometimes been commenced simply to stop a potential claim from becoming time barred. In either case, the early stages can determine how far such claims will go and we can play an active part in that crucial initial time – a stage which can be of particular importance where the challenger is the losing incumbent. Such assistance can include bringing our knowledge and experience to bear in advising on the merits/issues and recommending corrective/mitigating action where appropriate and possible.

Our early participation can involve dealing with issues in correspondence, ending the contract making suspension and after the initial period, continuing to act in any on-going proceedings.

Even when a contract has been entered into our team can help and have great experience in assisting clients on measures which can mitigate the risk of challenge, such as in cases where an authority wishes to modify a contract during its term and where one of the grounds of ineffectiveness could apply.

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