A guide to claims and remedies for breaches of the public procurement rules

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Introduction

It is becoming increasingly common for unsuccessful tenderers in public tendering exercises to commence court proceedings against contracting authorities for breaches of the Public Contracts Regulations 2006 or its equivalent statutory instruments, for example the Utilities Contracts Regulations.

Julie Lau, a solicitor in Sharpe Pritchard’s procurement team, outlines who can bring a claim and the time within which they need to do so. She also looks at the remedies which the court may grant to a claimant, exploring a number of recent cases, and discusses strategies for mitigation.

The start of a claim

Who can bring the claim?

Only an economic operator who has suffered loss as a result of the alleged breach can bring a claim against the authority under the public procurement regime. In practice, claimants will be aggrieved or potential tenderers.

In judicial review, a third party unable to claim under the public procurement regime, but who alleges a breach of the rules, may bring proceedings if they can show that they are directly affected by the way in which the procurement was conducted (R. (on the application of Chandler) v Secretary of State for Children, Schools and Families Court of Appeal (Civil Division), 09 October 2009).

When must the claim be brought?

Regulation 47D requires claims to be brought (i.e. claim form issued at court) within 30 calendar days of when the claimant knew or ought to have known of the breach.

The extent of the claimant’s (actual or constructive) knowledge has to be such that they know the facts which apparently clearly indicate, though need not absolutely prove, an infringement – that is, the facts can be basic but ought to be more than suspicion of a breach, and give rise to a reasonable belief that there is an infringement (Sita UK Ltd v Greater Manchester Waste Disposal Authority Court of Appeal (Civil Division), 24 February 2011).

Time starts running even if the claimant’s knowledge of the breach is formed before the outcome of the tendering procedure is known (Turning Point Ltd v Norfolk CC Queen’s Bench Division (Technology & Construction Court), 26 July 2012).

The time limit in judicial review is also 30 days in respect of alleged breaches of the regulations, but is three months for other breaches (including those under the Utilities Contracts Regulations).

Consequences of a claim

The remedies available depend on whether the contract has already been entered into at the start of proceedings.

Pre-contract award

Where the contract has not yet been awarded, once the contracting authority is aware that a claim form has been issued, it must not enter into the contract – this is the automatic suspension of contract award required by Regulation 47G.
The authority may apply to court for the suspension to be lifted, and the court would then consider if it would be appropriate to impose an interim injunction preventing the contract to be let, in the absence of Regulation 47G. The courts tend to answer this question by applying the American Cyanamid principles. For instance:

- is there a serious issue to be tried?
- are damages an adequate remedy? and
- where does the balance of convenience lie?

There had been some suggestion in the courts of a possible departure from American Cyanamid (see for example, OCS One Complete Solution Ltd v The Dublin Airport Authority PLC [2014] IEHC 306). However, for now the test appears to be the correct benchmark. This was confirmed recently in:

- NP Aerospace Ltd v Ministry of Defence [2014] EWHC 2741 (TCC) (1 August 2014);
- NATS (Services) Ltd v Gatwick Airport Ltd [2014] EWHC 3133 (TCC) (2 October 2014);
- Edenred (UK) Group Ltd v HM Treasury (2014) WL 5411902 (27 October 2014); and

What is interesting is how the test is being applied. In Covanta Energy Ltd v Merseyside Waste Disposal Authority [2013] EWHC 2922 (TCC), damages were found to be inadequate to both the claimant (due to it being virtually impossible to calculate the losses in such a complex case) and the defendant (due to the environmental and public impact from a delay to procure the waste plant). The court considered that the following factors tipped the balance of convenience in favour of granting the injunction:

- it is in the public interest that public authorities comply with procurement legislation;
- damages would not be an adequate remedy for the claimant;
- if an injunction were not to be granted, the claimant would be deprived of the remedy prescribed by EU law (i.e. the automatic suspension);
- if the claimant were not to be granted the injunction but were successful at trial, their financial claim is likely to be much larger than the defendant had the resources to meet;
- it would not be in the public interest, in such a scenario, for taxpayers to pay twice – first to the service provider chosen by the authority and secondly to the successful claimant at trial; and
- the financial and environmental impact to the parties and the public arising from a delay in concluding the contract was modest in comparison to the impact on the claimant and public from allowing the contract to be let pending trial.

Although this decision was made based on a number of very particular facts, it is worth noting the factors listed above, as many, if not all, could apply in most alleged public procurement breaches.

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More recently in NATS v Gatwick, in applying the American Cyanamid test, the High Court found that it would be very difficult to estimate the damages arising from the claimant's loss of chance as the alleged errors in the procurement related to the use of undisclosed, irrational and inappropriate award criteria. In Edenred v HM Treasury, the court similarly found that damages were inadequate for the claimant, as the value of the opportunity arising for it if the authority was prevented from awarding the contract to the successful tenderers was entirely speculative due to the difficulty in evaluating: whether the government would hold another tender at all, or make different arrangements; who would submit a tender; what the bids would be; and the claimant's prospects of success. To put it a different way, damages were held to be inadequate for the claimant because it was too difficult for the court to ascertain what losses the claimant would suffer, if at all, were the contract to be awarded to the successful tenderers.

In both NATS v Gatwick and Edenred v HM Treasury, the court considered that while there was a public interest in avoiding a delay to the provision of the services, this did not outweigh the strong public interest that the procurements should be carried out in
a proper and lawful manner (in both cases, it was possible for the authorities to mitigate the effects of any delay to the contract start). At trial, where the contract has not yet been awarded, the court may order that the decision concerned be set aside and/or order the amendment of any document. It may also award damages, and has the discretion as to any other remedy it considers appropriate (Regulation 47I).

Post-contract award

Where the contract in question has already been entered into prior to proceedings there is no interim remedy, and the remedies available at trial are limited to the following (Regulation 47J):

- ineffectiveness if any of the following grounds apply, unless the court finds overriding reasons related to the general interest requiring the contract not to be ended (Regulations 47K and 47L):
  - the contract has been awarded without prior publication of a contract notice in the Official Journal of the European Union (OJEU), unless the authority considered that the contract was not required to be advertised in OJEU, the authority has published a voluntary transparency notice stating its intention to enter into the contract and the contract was not entered into before the end of ten days from the publication of that notice;
  - the contract has been entered into in breach of a standstill period, the automatic suspension of contract award under Regulation 47G, or an interim order preventing award of contract prior to trial, which has therefore deprived the aggrieved economic operator from pursuing legal remedies prior to the entry into the contract; and there has been another breach of the requirement of the Public Contracts Regulations 2006 by the authority that has affected the chances of the aggrieved economic operator obtaining the contract; or
  - the contract was awarded under a framework agreement or dynamic purchasing system in breach of the regulations and its value exceeds the relevant threshold, unless the authority consider that the award was in accordance with the requirements of the regulations and voluntarily informed other participants in the framework agreement or dynamic purchasing system of the award and observed the standstill period.
- penalty in lieu of or in addition to ineffectiveness – civil financial penalty and/or shortening of contract duration; and
- damages instead of or in addition to ineffectiveness and/or penalty.

The time limit for seeking a declaration of ineffectiveness is:

- six months after the date of contract;
- 30 days after the contract award notice, if one was published; or
- 30 days after the economic operator is informed of the contract and reasons for award, if such notice was given.

The contract is ineffective from the time of the court declaration, ineffectiveness cannot be applied retrospectively (Regulation 47M).

The parties may, prior to contract signing, agree to contractual provisions governing their rights and obligations in the event of an ineffectiveness declaration, and the court will respect these provisions unless it considers these to be incompatible with the requirement of ineffectiveness.

Mitigation strategies in the tendering process

Contracting authorities can put in place a number of the following safeguards to mitigate against claims for breach and minimise the consequences of any remedies granted:

- observing any prescribed “standstill” period to prevent the second ground of ineffectiveness from being met;
- publishing a contract award notice or giving other notice to the relevant operators to limit the time for seeking a declaration of ineffectiveness to 30 days, and in some circumstances it may be worth waiting 30 days before awarding the contract;
- publishing a voluntary transparency notice may prevent the first ground for ineffectiveness from applying. However, this
does means publicising the authority’s failure to use a contract notice in the first place and this strategy is not risk free. In Case C-19/13, Italian Interior Ministry v Fastweb SpA (September 2014) the European Court of Justice held it was the duty of the national courts to decide if in its decision to rely on the exception provided in Regulation 47K(3) (i.e. publishing a voluntary transparency notice instead of a contract notice), the authority had acted “diligently” and could legitimately hold that that the relevant conditions for the exception were in fact satisfied, and that if it considered this not to have been met, the court could make a declaration of ineffectiveness even where a voluntary transparency notice was published.

- ineffectiveness does not apply to Part B services contracts and therefore claimants will be keen to prevent the contract from being awarded in the first place, and alternatively (or additionally) to seek damages. Authorities need to be mindful of this when formulating any mitigation strategy;
- be transparent with the evaluation and award decision, and provide sufficient information at debrief to start the clock running with respect to any claims. Note that if the authority withholds information at debrief and new facts come to light only during disclosure in court proceedings, this could restart the clock for the claimant to potentially bring a new claim based on the new information. On the other hand, it is of course important to take a balanced approach, being mindful of the authority’s duty of confidentiality towards all bidders and its own commercial considerations during an ongoing procurement; and
- consider the use of provisions in the proposed contract to regulate the consequences of any ineffectiveness declaration, so that losses are quantified and hopefully minimised. Such provisions however need to be drafted very carefully to offer protection while remaining within the remits of the regulations.

How we can help

The procurement team at Sharpe Pritchard are well known for working with national and local public bodies and contractors on a range of procurement issues. This includes advising on everything from OJEU notices to EU procedures, drafting contract documentation and compliance requirements, as well as bringing and defending challenges to procurement processes.
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