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PROCUREMENT REFORMS – IMPLICATIONS FOR PROCUREMENT CHALLENGES AND REMEDIES

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Chapter 7 of the Green Paper (December 2020) on "Transforming Public Procurement" was concerned with "Fair and Fast Challenges to Procurement Decisions". It mooted some radical changes to the applications to Court regime in Chapter 6 of the Public Contracts Regulations 2015 ("PCR"). They included an expedited process/review system, an independent contracting authority review, a tribunal to handle low value claims and capping damages to two and a half the times of tender costs.

Following the Green Paper consultation, the Government response (December 2021) indicated that it was not going to pursue many of the possible reforms. We now have seen the Procurement Bill (introduced in May 2022) and that confirms that many of the Green Paper proposals have been dropped and reveals that the proposed new Part 9 (*"Remedies For Breach of Statutory Duty"*) looks similar to the existing regime in Chapter 6 of the PCR.

The Government response also indicated a commitment to concentrate on working with the Civil Procedure Rules Committee and re-working the Technology & Construction Court's (TCC) procurement challenges guidance – the objective being to create a quicker and more accessible challenge process through:

1. fast track expedited trial procedures;
2. usage of written only pleading cases;
3. clarity on early disclosure processes;
4. more use of TCC district registries;
5. agreeing timetables at the beginning of a claim.

The basics of bringing a claim under the Bill

In the Bill's Part 9, clause 89 expresses a contracting authority's duty to comply with specified Parts and that is enforceable in civil proceedings under Part 9 brought in the High Court. That follows the structure of PCR Reg. 91.

Such claims can now though only be brought by *"UK supplier"* or *"treaty state supplier"* (the relevant international treaties are set out in Schedule 9 of the Bill) whereas under the PCR the duties were owed EU law based and owed to an *"economic operator"* under Regs. 88 and 89.

Under clause 89 (b) a supplier can only bring a claim if it has suffered or is at the risk of suffering loss or damage as a consequence of a breach of duty. That is very similar to PCR Reg. 91, so having to cross the threshold of causation of loss before a breach becomes actionable has been retained.

Automatic suspension

At clause 90, the Bill retains what (subject to conditions) is an automatic injunction preventing a contracting authority from entering into the contract which is the subject of a challenged award decision. In the PCR this provision appears in PCR Reg. 95.

In Reg 95(1)(a) where a claim form has been issued in respect of a contracting authority's *"decision to award the contract"*[1] ;and the authority has become aware that a claim form has been issued – so the requirement to trigger the suspension operating is knowledge of issue not service of the claim form – and the contract has not been entered into, then the authority is required to refrain from entering into the contract.

In the Bill, the trigger for the suspension operating is still notice that proceedings have been commenced. The major changes are that:

(a) In sub section 90(1) (a) the basis of the issued proceedings appears to have been widened and not restricted to a decision to award the contract but now extends to *"proceedings commenced in relation to the contract"*; and
(b) Clause 90 also expressly extends to modification of a contract and not just the award of new contract.
(c) The most radical change though comes in sub-section 90(3) in that the automatic suspension will only apply if notification that proceedings have been started is given **before** the end of any applicable standstill period. Under the PCR the suspension applies whenever notice of commencement of proceedings was given (so including after the standstill period had expired) providing at the time of the notice the contracting authority had not entered into the contract.

Standstill period

As for the standstill period under the Bill, (like PCR Reg. 87(1)) clause 49 states that a contracting authority may not enter into a public contract before the end of the mandatory standstill period or at the end of a later one which may be provided for in an award notice published under clause 48. The *"mandatory standstill period"* is eight working days beginning with the day on which a contract award notice is published. This period is different to PCR Reg. 87(3). Also, unlike PCR Reg. 86(1)(d), the precise standstill statement is not required under clause 48 but that requirement may appear later in regulations to be published under clause 86.

A voluntary standstill period on modification of contracts may be held and, if so, a modification may not be made before the end of that voluntary period as published in a mandatory contract change notice published under clause 70. (Under PCR Reg 72(3), notice of modification only has to be published in two cases of modification whereas the new regime requires the publication of a notice in all cases of modification).

The advantage in holding a voluntary standstill period is that the set aside remedy in clause 94(1)(e) does not apply if the contract change notice provided for a standstill period and the modification was not made before the end of that standstill period (clause 94(3)). This is like the scheme in PCR Reg 99(1) where the first ground of ineffectiveness can be disapplied by the prior publication of a voluntary transparency notice and holding the required standstill period.

The ability to agree to extend the standstill period was not provided for in the PCR but such extensions were commonplace and indeed the TCC's Guide encourages the parties to be sensible about agreeing to extend. There is no apparent reason in the Bill why this practice should not continue, and it actually assumes a greater importance given that the contract-making suspension only takes effect if notice of issue is given before the standstill period expires.

Interim remedies – ending the contract making restriction

Under the PCR and the Bill, procurement challenges create a unique position in that once proceedings are commenced, and the Defendant is informed of that and it has not entered into the contract, then an automatic injunction is obtained preventing entry into the contract or framework agreement with the winning tenderer. Under the PCR that feature though was balanced by being subject to the court ending or modifying that restriction (PCR Reg 96) and that power also appears in clause 91 of the Bill.

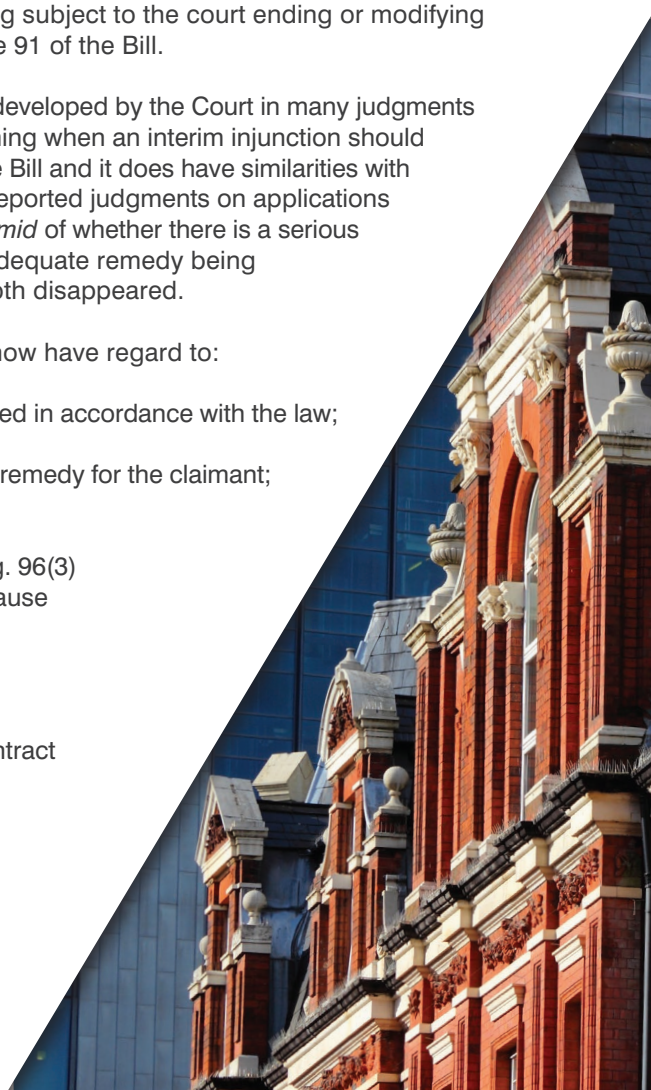
Under the PCR a test for ending the contract making restriction was developed by the Court in many judgments by adopting the common law *American Cyanamid*[2] principles governing when an interim injunction should be granted. The test to be applied now appears in clause 91(2) of the Bill and it does have similarities with the way the *American Cyanamid* test has been applied in the many reported judgments on applications to end the suspension. However: (i) the initial test in *American Cyanamid* of whether there is a serious issue to be tried; and (ii) the question of whether damages are an adequate remedy being determinative of whether the suspension should be ended, have both disappeared.

When considering whether to end the suspension the Court must now have regard to:

- the public interest in, among other things:
  - upholding the principle that contracts should be awarded/modified in accordance with the law;
  - avoiding delay in performance of the contract;
- interest of suppliers, including whether damages are an adequate remedy for the claimant;
- any other matters the Court considers appropriate.

The Court's power to impose undertakings or conditions in PCR Reg. 96(3) in cases where it decides not to end the suspension is retained in clause 91(4) but that power appears to be wider as it applies to any order made under clause 91(1) – not just to the 91(b) power to *"…extend the restriction or imposing a similar restriction"*.

The chances are that the Court will approach the retention of the contract making suspension as if it were granting an injunction and so it will turn to the starting point of requiring the Claimant to provide a cross- undertaking in damages in return for hanging onto the suspension.



The other counterpoint in the PCR to what is an automatic injunction was the requirement to serve proceedings within 7 days after the date of issue. That allowed a contracting authority to move quickly in applying to end the suspension. There is no equivalent provision in the Bill so the position could arise that the suspension is engaged by informing those proceedings had been issued (clause 90 (1)) but there is no obligation to serve other than the requirement under the Civil Procedure Rules ("CPR") to serve within four months after issuing (Rule 7.5(1)). To end that potential four months of potential "paralysis" a contracting authority could serve a notice under CPR 7.7 requiring the Claimant to serve the claim form or discontinue. That is all going to take time and delay can be crucial when there is an urgency to enter into a contract or the Claimant has an interest in delaying.

1) Pre-Contractual and 2) Post-Contractual Remedies with set aside power

Like the PCR (Regs. 97 and 98) the Court's power to award remedies in the Bill (clauses 92 and 93) depends upon whether the contract that is the subject of the issued proceedings has or has not been entered into.

The ineffectiveness regime in PCR Reg. 99 (which gave the court power to declare concluded contracts ineffective) is no more under the Bill, but a power to set aside such a concluded contract appears in clause 94 if the Court is satisfied that a claimant was denied a proper opportunity to obtain a pre-contractual remedy because a specified set-aside condition is met. The conditions appear at clause 94(1) (a) to (f) and are as follows:

(a) A required contract award notice (akin to the contract award decision notice under the PCR, Reg 86) was not published;
(b) The contract was entered into or modified before the end of a standstill period or whilst suspension in force;
(c) The contract was entered into or modified whilst the automatic suspension was in force or in breach of an order extending or imposing a similar restriction;
(d) In the case of contracts which are exceptions to holding the mandatory standstill period (described in clause 49(3)) the breach only became apparent on publication of the contract award notice;
(e) In the case of modifications, the breach becomes apparent on publication of a contract change notice;
(f) The breach became apparent only after contract entered into or modified.

Time Limits on Commencing Claims

Time limits appear in clause 95 of the Bill and are very similar to the equivalent provisions in PCR Reg. 92 and 93. So, the 30-day time limit for starting a claim running from the date of actual knowledge or constructive knowledge of the basis for bringing the claim; the power to extend that time limit if there is a good reason to do so; the power to extend is limited to three months from the date of knowledge, have all been retained.

There is a special time limit in clause 95(4) for set-aside claims or where a contract detail notice under clause 51 (similar to the contract award notice in PCR Reg 86) was not published. That time limit can run up to six months from the date the contract was entered into (clause 95(4) (a) and (b)). That appears to mirror the six-month "longstop" time limit for bringing an ineffectiveness claim in PCR Reg. 93(2) (b).

Time limits and what constitutes knowledge to start the 30 days running have featured greatly in UK procurement challenge decisions. Given the similarity in the wording, the chances are that the PCR case law will continue to be relevant and cited even though that body of case law may have roots in EU Directives and EU case law.

The Green Paper aimed to make procurement challenges more accessible, quicker and perhaps less expensive. Given the similar provisions and similarity of wording between Chapter 6 of the PCR and Part 9 of the Bill, it would appear that the essential landscape of procurement challenges is unlikely to be transformed.

Please contact our Procurement team if you require assistance with any of the topics covered in this article.

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[1] Arguably a decision to reject a tender is not a decision to award the contract and so proceedings in respect of that decision would not be subject to the automatic suspension.
[2] 1975 A C 396

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