

Remedies and limitation periods under the PCRs

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Introduction

- Public procurement represents a highly significant economic activity; estimated as 14% of UK's GDP and 31% of UK govt expenditure (OECD).
- Talk will cover (I) Remedies and (II) Limitation Periods under the the **Public Contracts Regulations 2015/102** ("the PCRs"):
 - **Part 2** sets out substantive requirements for tendering process;
 - **Part 3** deals with remedies and stipulates, inter alia:
 - Discretionary and mandatory remedies depending on nature of procurement challenge;
 - Short time limits for challenge – standard time limit of 30 days

(I) REMEDIES: overview of the available remedies

- Declaration of ineffectiveness of tender contract
- Penalties imposed on contracting authority
- Order setting aside any decision/action
- Order that contracting authority amend document(s)
- Award of damages to an economic operator
- NB: Interim orders

(I) REMEDIES: Has contract been entered into?



- Two categories of remedies depending on whether or not contract has been entered into
- NB contracting authority cannot simply enter into the contract on conclusion of tender process:
 - standstill period: Reg 87 – must allow 10 days (nb 15 days in certain cases) from notification to other bidders; in effect to give bidders opportunity of starting proceedings;
 - If proceedings are commenced: contracting authority must refrain from entering into contract: Reg 95

(I) REMEDIES: Where contract has not yet been entered into: Reg 97



- Where contract has not yet been entered into and there has been a breach of Part 2 duty, the Court may:
 - Order the setting aside of decision/action concerned;
 - Order contracting authority to amend any document
 - Award damages to an economic operator that has suffered loss or damage as a consequence of the breach

(I) REMEDIES: Where contract has not yet been entered into: Reg 97



- Damages:
 - has claimant suffered the loss of a significant chance of obtaining the contract? ***Lettings International v Newham London Borough Council*** [2007] EWCA Civ 1522
 - damages fall to be assessed by reference to the profits which would have been made if claimant had been awarded the contract;
 - ***Nuclear Decommissioning Authority v ATK Energy EU Ltd*** [2017] UKSC 34: PCR's provide for damages only on satisfaction of Francovich conditions - the power to award damages in respect of loss or damage suffered by an economic operator only where the breach of the PCR's was "sufficiently serious".

(I) REMEDIES: Where contract has been entered into: Reg 98



- Where contract has already been entered into and there is a breach of Part 2 duty, the Court:
 - **must** make a declaration of ineffectiveness (“**DOI**”) if relevant grounds are made out, unless Reg 100 requires court not to do so;
 - **must** impose penalties on contracting authority where required to do so by reg 102
 - **may** award damages to an economic operator which has suffered loss or damage as a consequence of the breach;

What is a declaration of ineffectiveness?

- Contract is prospectively but not retrospectively ineffective as from the time the declaration is made
- **Obligations under the contract which have yet to be performed are not to be performed**
- Court also has power to make orders dealing with consequential matters
 - e.g. addressing issues of restitution and compensation as between parties to the contract
 - court is to achieve an outcome which is ‘just in all the circumstances’; but not inconsistently with provisions agreed between parties

When must the Court make a DOI?

- Three grounds set out in Reg 99:
 - essentially limited to instances of total failure to advertise and breach of the standstill period
- Court must also take into account general interest grounds for not making a DOI: Reg 100

When must Court impose penalties?

- Court must impose penalties on contracting authority:
 - where it has made a DOI;
 - where:
 - grounds for a DOI are made out but DOI precluded by Reg 100; or
 - contract entered into in breach of standstill period (Reg 87), statutory suspension (Reg 95) or interim order (Reg 96(1)) and no DOI made;

Court must either order penalty or order that duration of contract be shortened (or both)
- Overriding consideration: penalties must be effective, proportionate and dissuasive: Reg 102(4)

(II) LIMITATION PERIODS UNDER THE PCRs



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- Striking the balance between *‘the need to allow challenges to be made to an unlawful tender process, and the need to ensure that any such challenges are made expeditiously’*
per Dyson LJ, ***Jobsin Co UK plc (t/a Internet Recruitment Solutions) v Department of Health*** [2001] EWCA Civ 1241
- Time limit in generality of cases: 30 days
- Where a decision governed by PCRs is challenged by way of judicial review, time limit under the PCRs (rather than ordinary JR time limit) applies: CPR r.54.5(6).

(II) (a) Where proceedings do not seek a DOI



- Must be started within 30 days beginning with the date when the economic operator first knew or ought to have known that grounds for issuing the proceedings had arisen;
- Court may extend time limits where there is a '*good reason for doing so*'; but only up to a maximum of 3 months after date when the economic operator first knew or ought to have known that grounds for issuing the proceedings had arisen:
Reg 92(4) and (5)

(II) (a) Where proceedings do not seek a DOI



- What does the *‘date when the economic operator first knew or ought to have known that grounds for issuing the proceedings had arisen’* mean?
- In ***SITA UK Ltd v Greater Manchester Waste Disposal Authority*** [2011] EWCA 156, Court of Appeal approved formulation of first instance judge:

“a knowledge of the facts which apparently clearly indicate, though they need not absolutely prove, an infringement.”

(II) (a) Where proceedings do not seek a DOI



- There is no general rule that time cannot start to run until an unsuccessful tenderer is given reasons why it failed.
 - ***Turning Point v Norfolk County Council*** [2012] EWHC 2121: On 9 Feb 2011, contracting authority complained that claimant's bid was noncompliant. On 12 Mar 2011, authority informed claimant bid rejected. Claimant's challenge held to be out of time – knowledge by 9 Feb at latest.
 - ***R (Nash) v Barnet LBC*** [2013] EWCA Civ 1004: challenge to failure to consult on proposal to outsource was out of time by time of actual award of contract: ***R (Burkett) v Hammersmith and Fulham LBC*** (No.1) [2002] UKHL 23 distinguished

(II) (a) Where proceedings do not seek a DOI



- Amending an existing claim vs attempting to introduce a new claim that would be out of time:
 - ***D&G Cars v Essex Police Authority*** [2013] EWCA Civ 514: C sought permission to amend in order to plead new claims bias, tender rigging, bad faith, misconduct in public office, and conspiracy to injure. CA held that the amended pleadings were in substance new causes of action.
 - Cf. ***DWF LLP v Secretary of State for Business, Innovation and Skills*** [2014] EWCA Civ 900. DWF challenged the Insolvency Service's tendering process for legal services on the basis that the points system used appeared anomalous. Re-pleaded on disclosure.

(II) (a) Where proceedings do not seek a DOI



- DWF's pleading:
 - ***32. Insofar as it becomes apparent from any further information and/or disclosure herein that the Claimant's scores were subject to any downward adjustment at any stage by reference to matters and/or criteria not apparent from the ITT and/or other tender information, the Claimant reserves the right to contend that the Defendant was in breach of the principles of transparency and/or equal treatment***
 - Disclosure supported DWF's assertion that its scores had been arbitrarily marked down.
 - DWF granted permission to amend: DWF had made it clear that it was relying on anomaly only until and unless it could work underlying factual basis for the anomaly.

(II) (a) Where proceedings do not seek a DOI



- What is a good reason for extending?
 - “A good reason will usually be something which is beyond the control of the given Claimant; it could include significant illness or detention of relevant members of the tendering team.” **Turning Point Limited v Norfolk County Council** (2012) EWHC 2121 (TCC) Akenhead J said at paragraph [37]
 - See also **Perinatal Institute v Healthcare Quality Improvement Partnership** [2017] EWHC 1867 (TCC), where Court extended time to allow amendment to a JR claim so as to include a claim under PCRs

(II) (b) Where proceedings do seek a DOI

- Must be started within 30 days of day after (i) relevant contract award notice being published in the Official Journal or (ii) economic operator informed of conclusion of contract or summary of relevant reasons (where latter was later) and in any event within 6 months of contract being entered into
- Court may not extend time limit: Reg 92(4)



Thank you