

Third party procurement challenges to development projects



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The statutory remedy for ‘economic operators’



- See Chapter 6 of the 2015 Regulations (implementing rules originally introduced by the Remedies Directive 97/66/EC).
 - Regs 89-104 deal with the time limits, procedure and remedies.
 - Proceedings in the High Court (TCC)
- Remedy available to “any economic operator which, in consequence of [breach of procurement law] *suffers or risks suffering loss or damage*”: Reg. 88.
- “*Economic operator*” defined by Reg. 2(1) as:
“any person or public entity or group of such persons and entities, including any temporary association of undertakings, which offers the execution of works or a work, the supply of products or the provision of services on the market.”
- Members of the public are not economic operators
- A claimant unsure if it is an economic operator may be well advised to bring parallel claims: 2015 Regs + JR. (See Section 5.7 of Admin Court Guide 2017 – transfer of JR to TCC envisaged).

Judicial review: pre 2017 cases (1)

- Available to a claimant unable to rely on the remedies provided to economic operators under the Regs?
- S.31(3) Senior Courts Act 1981 – applicant for JR must have “*sufficient interest in the matter to which the application relates*”
- ***R (Chandler) v. Camden LBC*** [2010] 1 CMLR 19 (obiter):
“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 ... He may have such an interest if he can show that performance of the competitive tendering 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.”

Judicial review: pre 2017 cases (2)

- The Claimant in **Chandler** failed because:
“Mrs Chandler is not challenging the Secretary of State’s decision because of any interest that she has in the observance of the public procurement regime but because she is opposed to the institution of academy schools. She is thus attempting, or seeking to use the public procurement regime for a purpose for which it was not created.”
- **R (Law Society) v. Legal Services Commission** [2007] EWHC 1848 (Admin) per Beatson J.: Law Society had sufficient interest to bring a procurement JR re. legal aid reform as it was *“a participant in the LSC’s consideration of the reform of legal aid”* and *“the professional body that represents all solicitors and has statutory functions relating to the profession.”*

Judicial review: pre 2017 cases (3) $\frac{L}{C}$

- ***R (Unison) v. NHS Wiltshire PCT*** [2012] EWHC 624: procurement challenge by a trade union to outsourcing of certain NHS services to the private sector. Eady J.: a trade union bringing a procurement JR needed, in order to have standing, to show that its members are affected in some identifiable way by the breach.
- ***R (Gottlieb) v. Winchester City Council*** [2015] EWHC 231 per Lang J – claimant objector to a proposed urban redevelopment held to have standing to bring a procurement JR of the modification of a development agreement relating to that development:
“In contrast (to Mrs Chandler), the Claimant in this case does not pursue any ulterior motive. He seeks what the procurement process is intended to provide, namely, an open competition to allow Winchester to select the development which best fulfils its needs.”

Wylde: the issues



- The case-law and the underlying principles was recently reviewed by Dove J. in ***R (Wylde) v. Waverley BC*** [2017] EWHC 466 (Admin).
- A challenge to the modification of a development agreement relating to the redevelopment of Farnham Town Centre by Crest Nicholson.
- The claimants were opponents of the developers, who claimed standing as local taxpayers and councillors who wished for a further competitive tendering exercise to take place in the hope that would result in an alternative developer with alternative proposals.
- The Council and the developer argued that:
 - Contrary to the obiter in ***Chandler***, the contract was not amenable to JR at all (Dove J. did not decide this issue); alternatively
 - In any event, applying ***Chandler*** the Claimants lacked standing and insofar as ***Gottlieb*** suggested otherwise it was plainly wrong and should not be followed (Dove J. agreed).

Wylde: Dove J's judgment (1)



- What was a “*sufficient interest*” so as to generate standing for JR depended on the statutory context – the interest had to be in the fulfilment of the purpose of the legislation in issue.
- That approach “*leads to a much more restrictive qualification for standing in procurement cases than would apply in judicial review generally*” [39]
- The purpose of the of the Regs. & PCD was:
“firstly, to provide for an open and transparent system for the competition for public contracts in the interests of securing a fair and efficient market for those contracts and secondly, to provide a bespoke system of remedies for those parties who are directly involved in competing for such contracts and participating in the market for them. This regime is quite clearly tightly focused on those directly engaged with and actively seeking the benefit of obtaining public contracts that fall within the scope of the 2006 Regulations.”

Wylde: Dove J's judgment (2)



- *“The public interest is no doubt served by these aims and objectives of the 2006 Regulations (for instance, by fostering value for money and the objective evaluation of bids for public works), but that is very different from saying that it follows that any member of the public could have an interest in the enforcement of those Regulations which should be recognised by the grant of standing in judicial review. It is in my view entirely consistent with the purpose of the Regulations to confine standing in any judicial review claim brought outside the extensive range of remedies available to economic operators, and by a person who is not an economic operator, to only those who "can show that performance of the competitive tendering procedure... might have led to a different outcome that would have had a direct impact on him".*
- **Law Society** correctly decided; **Gottlieb** wrongly decided.

Wylde: Dove J's judgment (3)



- Conclusion in the present case on the facts:

“...these claimants are unable to demonstrate any direct impact upon them which would arise from the conduct of a competitive tendering exercise. Not only are they not economic operators, but they are not remotely approximate to any economic operator, nor could they begin to demonstrate any interest in the procurement process which might be akin to or a proxy for status as an economic operator. Whilst, therefore, I have no doubt that the concerns and objectives of the claimants are entirely genuine and expressed by them in the public interest, that observation, and their interest as either council tax or rate payers or as members of local authorities, are not sufficient to establish that they were within the Chandler test and thus they do not have standing to bring this claim.”

So who can now bring a JR?



- Those with a **derivative interest** – though not an economic operator, still have ‘skin in the game’:
 - Intended sub-contractors
 - Joint venture partners
 - (Significant?) shareholders in unsuccessful bidder
- Those with a **representative interest** (acting on behalf of those with an interest in the procurement regime):
 - ***Rostron v. Guildford BC*** [2017] EWHC 3141 per John Howell QC, citing ***Law Society*** and ***Wylde***: “a person representing the interests of those who do have EU rights has standing to assert them, even if that person has no EU right in issue”
 - Trade unions and other representative bodies

(This assumes the ‘no JR at all’ argument raised but not decided in ***Wylde*** is not upheld in future)

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