

Overview of the remedies regime governing public procurement challenges

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Who can bring a procurement challenge?

- Only economic operators are able to bring a claim for breach of the PCRs:

91.— Enforcement of duties through the Court

(1) A breach of the duty owed in accordance with regulation 89 or 90 is actionable by any economic operator which, in consequence, suffers, or risks suffering, loss or damage.

(2) Proceedings for that purpose must be started in the High Court, and regulations 92 to 104 apply to such proceedings.

- NB – separate remedies available for health services contracts for breach of NHS (Procurement, Patient Choice, and Competition) (No.2) Regulations
- Hardly any scope at all left for third party JRs after Wylde v Waverley BC [2017] EWHC 466 (Admin):

“It is...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“.

What remedies are available to an aggrieved bidders under the PCRs and how do they differ to JR?

- Interim remedy of the automatic suspension (if filed before contract entered into)
- Pre-contractual and post-contractual remedies
- **Contract not entered into (Reg 97):**
 - Order setting aside contract award decision
 - Order to amend any document
 - Damages
- **Contract entered into (Reg 98):**
 - Declaration of Ineffectiveness
 - Penalties
 - Damages

The Declaration of Ineffectiveness

- Very powerful remedy introduced by the Remedies Directive. Contract is considered prospectively ineffective.
- Grounds for a Dol:
 - Failure to advertise via a contract notice (unless Voluntary Transparency Notice issued)
 - Breach of standstill or automatic suspension
 - Framework agreement: failure to carry out call-off competition in accordance with terms of framework
- Court must make a Dol, but not if general interest grounds under Reg 100 apply: “overriding reasons relating to a general interest”.
- Some protection afforded by **Voluntary Transparency Notices/VEAT notices** under Reg 99(3), but limited utility if mistake made: see *Fastweb* Case C-19/13. The test is whether CA acted diligently and could legitimately hold that no requirement to advertise.
- First Dol in England & Wales granted in 2018 by Court of Appeal in *Faraday v West Berkshire* [2018] EWCA Civ 2532. See also *AEW Europe LLP v Basingstoke BC* [2020] PTSR 21
- NB: some doubt as to whether Dols available for Light Touch Regime contracts (eg health services contracts)

Damages...

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Damages: what are the relevant tests?

- Threshold *Francovich* test of “sufficiently serious breach” now applies: *NDA v EnergySolutions EU Limited* [2017] UKSC 34 at [39]
- Direct causal link between breach and damage sustained: *NDA*
- Measure: equivalent to tort of breach of statutory duty, so economic operator to be put into position as if breach had not occurred: *Harmon CFEM (Facades) UK) Ltd v Corporate Officer of the House of Commons* (1999) 67 Con LR 1.
- A contracting authority’s lawful withdrawal of a procurement competition will not deprive an economic operator of its cause of action in damages for breach of statutory duty, if that has accrued (i.e. there was a breach of duty causing loss or damage) before the withdrawal: *Amey Highways Ltd v West Sussex CC* [2019] EWHC 1291 (TCC)

Limitation periods

- General time limit where DoI not sought (Reg 92 PCR): within **30 days** of the time the economic operator “knew or ought to have known” that grounds for starting the claim have arisen. This time period may be extended where there is a “good reason” for doing so, but always within three months
- Where DOI sought (Reg 93 PCR) –
 - where award notice published in OJEU or contracting authority informs economic operator of conclusion of contract and summary of reasons, **within 30 days.**
 - Otherwise, within ***6 months of date on which contract entered into.***
- If Judicial review is sought for claims “governed” by the PCRs, within 30 days of time economic operator knew or ought to have known of decision: CPR 54.5(6).
- Note longer limitation period for a claim under s.76(5) Health and Social Care Act for breach of NHS Regs – s.9 Limitation Act applies: **6 years!**
- NB: limitation period triggered by filing of claim form in the TCC, but particulars have to be served within 7 days of issue, and therefore physically sent no later than 5 days after issue to achieve deemed service (see Reg 94, and CPR7.4/CPR 6.14).