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Transforming public procurement: proposed reforms to the legal procedures for challenging public procurement decisions

In our two previous bulletins, we looked first at the current legislative framework for public procurement post Brexit and second at the recent Green Paper (Transforming Public Procurement) in which the Government sets out its proposals for what it calls an historic opportunity to overhaul the way procurement processes are run. In the next bulletin of our series, we explore the reforms proposed to the legal procedures for challenging public procurement decisions.

A new approach to legal challenges

The last 15 years has seen a growing number of legal challenges to public procurement decisions. This might be regarded as a good thing. Public procurement rules are designed to ensure fair competition between bidders, equal treatment, non-discrimination and open and transparent processes. Contracting authorities should be held to account for any failure to observe these principles and disadvantaged bidders should be given effective means of address.

Currently, most challenges to public procurement decisions are made in the Technology and Construction Court (TCC) in London which is a division of the High Court. The court process is lengthy with some cases taking well over a year to reach trial. Both parties are required to provide extensive document disclosure and there can also be detailed witness and expert evidence.

The current system tends to favour an award of damages as compensation for breaches of the procurement regulations over pre-contract remedies such as setting aside the decision to award a contract or requiring the contracting authority to re-score the tenders where manifest errors have occurred in the evaluation of bids. The reason for this tendency is that in many cases the court has taken the view that the public interest favours a contract award being made swiftly and commercial parties can usually be adequately compensated for the loss of a contract with money.

The green paper acknowledges that "*the rigour and structure [of the system] that contribute to its excellence can be a hindrance in cases where a quick resolution is sought or for businesses (especially small businesses, charities and social enterprises) who may not be able to bear the cost of a lengthy process*". It is notable that some other European countries such as Germany and Austria adopt an administrative tribunal system for procurement challenges which is considerably quicker and less expensive than the court based system in the United Kingdom.

The green paper proposes a review of the current system to reduce the time and cost involved for all parties involved in procurement challenges. The main elements of the review are considered below.

A tailored fast track system: providing an expedited trial process with active case management that tailors the process to the individual challenge. It is unclear how this would differ from the current system. The TCC already provides for urgent cases to be determined on an expedited basis, sometimes on a super expedited basis, and provides the necessary resource with a dedicated High Court judge if required. An expedited trial process can be very demanding for clients, lawyers and the courts alike and shortening timescales alone will not reduce the cost of procurement challenges.

Written pleadings: would see a presumption that certain types of claim would be reviewed on the basis of written pleadings only. It is not stated what cases would be regarded as suitable for such an approach. In our experience, even the most straightforward claims will involve some consideration of documentary and witness evidence.

Disclosure: has a large part to play in the length of procurement challenges. It is suggested by the government that the green paper's proposals for "*increased transparency in the procurement regime will address many of the issues relating to disclosure process as information relating to each procedure will be released once the contract award decision has been made*". It is true that disclosure, and fights about disclosure, can form a significant part of many procurement challenges. The reason for this is that bidders are often given inadequate information about the evaluation of their bid and the reasons for the contract award and contracting authorities are sometimes unwilling or unable to provide the information needed to establish whether procurement rules have been followed.

If the approach to greater transparency advocated by the green paper is followed then it may be hoped that the scope for lengthy disputes about disclosure at the challenge stage would be much reduced. Indeed, if bidders are given more information about the evaluation of their bids and those of the winning bidder at contract award it might help to avoid challenges made simply because of a lack of information. Unhelpfully, the green paper suggests that documents normally exempt from FOIA disclosure, including trade secrets, commercially sensitive information and confidential information, would not be subject to automatic release without going through a court process. Nevertheless, many disputes could be avoided if there was greater clarity about the types of information that could be requested by a disappointed bidder and the basis on which that information would be provided to preserve confidentiality and fair competition through the use of confidentiality rings on standard terms.

Court capacity: the green paper proposes that the TCC should effect a culture change which encourages claimants and lawyers to make more use of the TCC's district registries outside of London in order to free up capacity to be able to list all hearings more quickly. Any proposals to make more efficient use of limited court resources is to be encouraged and indeed the increased use of district registries is something that the TCC already promotes.

Timescales: the green paper suggests that some time could be gained in the early part of proceedings by defining and aligning common timescales for submission of pleadings for both parties. It is not understood what is intended by this proposal as court rules already provide clear and relatively short timescales for pleadings to be filed with the court.

New tribunal: in addition to the proposed reform of court processes, the green paper raises the prospect of more fundamental reform with the establishment of a dedicated tribunal to consider lower value claims or challenges to processes during an ongoing competition. As noted above, other European countries already make use of administrative tribunals for this purpose at significantly reduced cost and greater speed than the court process adopted here. The green paper suggests that the government intends to await the outcome of its reforms to the court process before taking steps to set up a new tribunal. We can, however, see considerable potential benefits to resolving procurement challenges in a dedicated tribunal especially where the value of the contract does not justify a full High Court claim. One option would be to allow parties access to the tribunal at first instance for a fast decision adopting a limited process without a hearing with a right of appeal to the High Court if they were unhappy with the tribunal's decision.

Remedies: the green paper proposes that the current preference for damages over pre-contract remedies should be reversed. The green paper acknowledges that an award of damages can be an effective means of encouraging contracting authorities to comply with procurement rules but notes that it may also act as a deterrent to adopting more innovative and efficient processes. The payment of large damages awards is also not a good use of public money and it is suggested that damages awards can encourage speculative claims although no evidence for this view is provided by the green paper.

Two measures are proposed to give effect to this proposal. First, there will be a new legal test for lifting the automatic suspension which applies where a legal challenge is made within 10 days of notification of the contract award. The current test is based on the standard legal test for granting an injunction: the court looks at the balance of convenience between the parties, asking which party will suffer the greatest irremediable prejudice from granting or not granting the injunction, and whether damages would be an adequate remedy for the claimant. As noted above, the courts often take the view that a commercial party can be compensated in damages for the loss of a contract and so in many cases the automatic suspension is lifted on the application of the contracting authority. The terms of the proposed new test are not explained.

Secondly, the green paper proposes that damages should be capped at 1.5 times the bid costs incurred by the challenger. Such a restrictive cap on liability can only be justified where other adequate pre-contract remedies are available to a disappointed bidder and, as the green paper acknowledges, a sufficiently speedy review process so that contract awards are not delayed for lengthy periods of time whilst challenges are determined. It is certainly the case that the proposed cap would render damages a wholly inadequate remedy for most bidders that have been unlawfully deprived of a contract by a breach of the procurement rules. The green paper does acknowledge that in certain cases, such as unlawful direct awards or in the case of crisis procurements where it is proposed that there should be no automatic suspension, the primary remedy of a disappointed bidder would be in damages. The proposal to cap damages is one of the more controversial aspects of the green paper and it will be interesting to see how much support is received for this proposal following the consultation period.

Bid feedback: the green paper proposes an end to the requirement for contracting authorities to issue debrief letters to all bidders following contract award. The reason is that the requirement to provide information, including the characteristics and relative advantages of the winning bid, is said to be complicated and time consuming for the contracting authority. The green paper suggests that the enhanced transparency proposed throughout the procurement process and at contract award will ensure that losing bidders have sufficient information about the evaluation of their bid and the winning bid to satisfy themselves about the lawfulness of the procurement process without the need for a debrief letter.

Increased levels of transparency are certainly desirable and if full information about the evaluation process is provided in a timely fashion by contracting authorities then the need for a debrief letter should fall away. Of course, if the information is not readily available to losing bidders at the contract award stage then challenges will be more and not less likely. Also, as noted above, commercially sensitive and confidential information will not be made available to bidders automatically and, unless a clear procedure for providing such information to bidders is adopted, disappointed bidders are likely to challenge where it is not provided.

Standstill and limitation periods: the green paper makes no proposal to change the current 10 day standstill period, consistent with the stated preference for pre-contract remedies over damages claims, and the current limitation period for bringing a procurement challenge will remain at 30 days. This is consistent with the stated intention of keeping the challenge process as fast as possible.

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