Public Procurement World - United Kingdom

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# 1. The Laws

## a. What is the applicable legislation?

As a member of the EU (which the UK remains, until the process for its withdrawal is complete), the UK is subject to EU public procurement rules (the Public Sector Directive 2014/24/EU and Utilities Sector Directive 2014/25/EU, together, the "EU Procurement Directives"). The EU Procurement Directives are implemented in the UK by the Public Contracts Regulations 2015 in England and Wales (the "PCR 2015") and the Public Contracts (Scotland) Regulations 2015 in Scotland, as well as the Utilities Contracts Regulation 2016 in England and Wales (the "UCR 2016" together with the PCR 2015, the "UK Regulations") and the Utilities Contracts (Scotland) Regulations 2016 in Scotland.

The Concession Contracts Directive 2014/23/EU was implemented in England, Wales and Northern Ireland by the Concession Contracts Regulations 2016 (the "CCR 2016") and in Scotland by the Concession Contracts (Scotland) Regulations 2016. Both sets of Regulations came into force on 18 April 2016 and govern the award of concession contracts. The CCR 2016 are addressed in further detail in the answer to question 2h below.

The implementing regulations in Scotland are similar to the UK Regulations, however, references made to the UK in this chapter will relate to the UK Regulations, which only cover England, Wales and Northern Ireland.

## b. Does the legislation relate to or interact with any applicable trade agreement, such as the European Union procurement rules, WTO Government Procurement Agreement (GPA) or the procurement requirements of the North American Free Trade Agreement (“NAFTA”)?

As noted above, the UK Regulations implement the EU Procurement Directives and will be invalid to the extent of any inconsistency with the EU Procurement Directives. As an EU member state, the UK is also a party to the World Trade Organisation's Agreement on Government Procurement (the "GPA"). The UK's exit from the EU is expected to occur at some point around or after March 2019. We do not yet know what effect this will have on the UK's public procurement regime or if the UK will enter into other agreements, such as the GPA, unilaterally.

## c. What are the basic underlying principles of the legal framework?

The most fundamental principles underlying the legislation are those of transparency, non-discrimination and equal treatment, derived from EU procurement law. The EU principles of proportionality and mutual recognition are also relevant.

## d. Is aerospace and defense procurement treated differently from other types of procurement?

In accordance with the EU regime, defence procurement is governed by a different set of rules to the UK Regulations. The Defence and Security Public Contracts Regulations 2011 came into force on 21 August 2011, implementing the European Union Defence and Security Procurement Directive 2009/81/EC.

# 2. Application of the Statutory Procurement Laws

## a. Which public agencies are covered by the laws?

A broad range of UK public entities are covered by the definition of "contracting authority" under the EU Procurement Directives and in the UK Regulations. In the PCR 2015, the term "contracting authority" includes central government authorities such as the Cabinet Office, the House of Commons and government departments such as the Department for Health.

## b. Which private entities are covered by the laws?

In accordance with the EU Procurement Directives, private entities are covered by the UK Regulations in limited circumstances only.

The UCR 2016, in implementing the Utilities Sector Directive, applies to private entities operating on the basis of a special or exclusive right granted by a competent public authority undertaking certain specified actions. Such a private entity must be operating in a utility sector subject to the UCR 2016 and be awarding a contract in relation to a utilities activity falling within the UCR 2016.

## c. Are co-operations between contracting authorities exempted from public procurement law? If so, what are the conditions for the exemption?

The PCR 2015 do not apply to a contract concluded between two or more contracting authorities where all of the following conditions are satisfied:

the contract implements or establishes a co-operation between the relevant contracting authorities so as to ensure that public services they have to perform are delivered with a view to achieving objectives they have in common;

the implementation of that co-operation is governed exclusively by considerations relating to the public interest; and

the relevant contracting authorities perform on the open market less than 20% of the activities relating to the co-operation.

Additionally, the PCR 2015:

do not apply to public service contracts awarded to another contracting authority by a contracting authority based on an exclusive right which the former enjoys pursuant to: (a) published law; (b) regulation; or (c) administrative provision which is compatible with the Treaty on the Functioning of the European Union (the "TFEU"); and

may not apply where the contracting authority exercises control or joint control together with another contracting authority over the entity concerned (see further in section 7a below).

## d. Which types of contracts are covered?

There is no deviation by the UK from the EU Procurement Directives on this point. In brief, the UK Regulations apply to public works contracts, services contracts and supply contracts.

The new UK Regulations introduced the 'light touch' regime, which governs the award of contracts for social and other specific services listed in Schedule 3 of the PCR 2015 and Schedule 2 of the UCR 2016, for example religious services, where the value of the contract is over a certain threshold value (€750,000 ( £589,148). Contracting authorities and utilities intending to award a contract under the 'light touch' regime should:

advertise their intention to award a contract that falls within the list of specific services and above the applicable threshold;

run a competitive award process in accordance with the terms of the call for competition in the advertisement;

ensure that the procedures applied to the award of the contract comply with the principles of transparency and equal treatment of economic operators;

ensure that all time limits are proportionate and reasonable; and

publish a contract award notice.

Certain provisions of the PCR 2015 are applicable to contracts which are greater than £10,000 in value (in respect of central government contracts) or £25,000 (in respect of non-central government and NHS Trust contracts), but below the general threshold (referred to above). These provisions, known as the "Lord Young reforms" were intended to support growth and transparency and maximise opportunities for small and medium enterprises.

Aside from the Lord Young reforms, the PCR 2015 applies to contracts above the threshold value specified in Article 4 of the Public Sector Directive (in Euros) and expressed in pounds sterling in the Official Journal. Likewise, the UCR 2016 applies to contracts above the threshold value specified in Article 15 of the Utilities Sector Directive.

## e. How are changes to an existing contract dealt with? Do changes require a new procurement procedure?

Contract variations are governed by Regulation 72 of the PCR 2015. Modifications to an existing contract are permissible under the UK Regulations, in the following circumstances, where:

they have been provided for in the initial procurement documents in clear, precise and unequivocal review clauses which state the scope and nature of possible modifications and the applicable conditions and do not provide for modifications that would alter the overall nature of the contract (or framework agreement);

the modifications are for additional works, services or supplies by the original contractor, which have become necessary, were not included in the initial procurement and where a change of contractor cannot be made for economic or technical reasons or would cause significant inconvenience of substantial duplication of costs. The PCR 2015 contain the additional requirement that any increase in price must not exceed 50% of the value of the original contract;

the modification does not exceed 50% of the value of the original contract (or framework agreement), is required because of circumstances which a diligent contracting authority could not have foreseen, and (in the case of the PCR 2015) any increase in price does not exceed 50% of the value of the original contract (or framework agreement);

a new contractor replaces the original contractor as a result of, for example, a corporate restructuring or merger, that new contractor fulfils the selection criteria used in the original procurement of the contract, and this change does not entail any other substantial modifications to the contract;

the modification is not 'substantial', meaning it does not meet any of the following conditions: (a) the modification renders the contract or the framework agreement materially different in character from the one initially concluded; (b) the modification introduces conditions which, had they been part of the initial procurement procedure, would have— (i) allowed for the admission of other candidates than those initially selected, (ii) allowed for the acceptance of a tender other than that originally accepted, or (iii) attracted additional participants in the procurement procedure; (c) the modification changes the economic balance of the contract or the framework agreement in favour of the contractor in a manner which was not provided for in the initial contract or framework agreement; (d) the modification extends the scope of the contract or framework agreement considerably; (e) a new contractor replaces the one to which the contracting authority had initially awarded the contract in cases other than those provided for elsewhere in the PCR 2015 (i.e. corporate restructuring, merger etc.); and

the modification does not alter the overall nature of the contract or framework agreement and its value is below threshold and below 10% of the initial contract value for service and supply contracts and 15% of the initial contract value for works contracts.

Any modifications which do not fall into one of the above exemptions require a new procurement procedure. Contracting authorities are required to publicise permissible modifications (which fall into categories (ii) and (iii) above.

## f. What is the applicable regime for framework agreements?

The main provisions on framework agreements are set out in Regulation 33 of the PCR 2015. Under the PCR 2015, the duration of a framework agreement cannot exceed 4 years (8 years under the UCR 2016), except for exceptional cases duly justified, in particular by the subject-matter of the framework. Only those contracting authorities which are clearly identified in the call for competition or the invitation to confirm interest may use a framework agreement. Contracts entered into pursuant to a framework agreement are not permitted to entail substantial modifications to the terms set out in the relevant framework agreement.

## g. What is the applicable regime for public-private partnerships (PPPs)?

PPPs are governed by the PCR 2015 and contracting authorities are required to use the competitive dialogue procedure to procure most PPP projects (see the answer to question 3a below for more detail about this procedure).

## h. How are concessions dealt with?

The award of concession contracts is governed by the CCR 2016. Similar to the UK Regulations, the CCR 2016 applies to concession contracts with a value which is equal to or higher than the threshold specified in the Concession Contracts Directive. Contracting authorities and utilities are required to act in a transparent and proportionate manner and treat economic operators equally and without discrimination.

Contracting authorities and utilities must award concession contracts based on objective criteria which comply with the principles outlined above and which ensure that tenders are assessed in conditions of effective competition in order to identify an overall economic advantage for the contracting authority/utility.

## i. Are there anti-avoidance rules (including laws on bid rigging)?

The UK rules directly reflect the EU position and therefore contain certain rules in relation to aggregation. The EU (and UK) rules require the value of purchases under individual contracts to be added together for the purpose of ascertaining the relevant threshold. This is an anti-avoidance measure, the aim of which is to deter the contracting authorities/utilities from deliberately dividing up contracts (which fulfil the same or a similar purpose) to bring them below the relevant thresholds.

Bid rigging is proscribed as a matter of competition law rather than procurement law. EU competition laws apply where trade between member states is affected. Otherwise, the Competition Act 1998 is the relevant law but it largely mirrors EU competition law. There may also be criminal liability pursuant to the Enterprise Act 2002.

# 3. Procurement Procedures

## a. What procurement procedures can be followed?

In accordance with the EU Procurement Directives, contracting authorities that intend to carry out procurements must use one of the procedures stipulated in the UK Regulations. The procedures stipulated in PCR 2015 are: open; restricted; competitive dialogue; competitive procedure with negotiation; innovation partnership; and negotiated procedure without prior publication. The following procedures are available under the UCR 2016: open; restricted; competitive dialogue; negotiated procedure with prior call for competition; and innovation partnership.

In accordance with the EU Procurement Directives, as a general rule, purchasers subject to the PCR 2015 must choose between the open and restricted procedures and are only permitted to use the negotiated or competitive dialogue procedures in limited circumstances (typically where the contract is too complicated for the other procedures). The negotiated procedure without prior publication essentially provides for the award of a contract to one player without a competitive process taking place. This cuts against the thrust of the procurement regime, therefore situations in which it may be used are interpreted strictly by the courts. The details of this procedure are set out in 7a below. The innovation partnership procedure was introduced in the Public Sector Directive and is provided for in the PCR 2015. This new procedure is intended to allow for both the research and development and eventual purchase of an innovative product or service to take place within the same single procurement process, during which the number of partners may be reduced in stages (with transparency and other safeguards built in). It is designed for particularly complex procurements and is intended to enable long-term working arrangements (a partnering type arrangement as opposed to a legal partnership) between the public and the private sector to develop an 'innovative' good, work or service, which the public sector subsequently purchases.

## b. What status do electronic means/procedures have?

It is mandatory for contracting authorities to publish contract notices electronically. Subject to certain exceptions, contracting authorities are also now required to offer unrestricted and full direct electronic access, free of charge, to the procurement documents from the date of publication of the contract notice in the Official Journal. From October 2018, contracting authorities will be required to switch to full electronic communication of tenders i.e. the electronic submission of documents such as requests to participate, invitations to participate and electronic submission of tenders by economic operators.

## c. Where are contract notices, i.e. calls for bid, published?

As noted above, contract notices are published in the Official Journal. The website is <http://eur-lex.europa.eu/oj/direct-access.html>.

## c. Can certain prospective bidders be excluded from the competition?

The UK position does not differ from the EU position – prospective bidders must be excluded from the competition in some situations and can be excluded in others. In practice, this results in a pre-qualification process for all tenders.

Regulation 57 of the PCR 2015 sets out the mandatory rejection criteria for economic operators including convictions for certain offences (e.g., conspiracy, bribery, fraud or corruption) on the part of the economic operator or its directors. Regulation 58 clarifies that contracting authorities can reject economic operators that do not demonstrate sufficient financial or economic standing and/or that do not demonstrate sufficient technical or professional ability.

Similar provisions apply under the UCR 2016, but a utility may also reject bidders on the basis of its own established criteria.

# 4. Bidder Selection

## a. Are there any rules on the selection criteria?

Under the PCR 2015, selection criteria may be related to (a) suitability to pursue a professional activity; (b) economic and financial standing; and (c) technical and professional ability. Contracting authorities shall limit the criteria to those which are appropriate to ensure that a candidate has the technical and professional abilities and the legal and financial capacities to perform the contract to be awarded. All requirements should be proportionate and relate to the subject-matter of the contract.

## b. Is prequalification an option? If so, what are the requirements? What is the procedure?

Except for the open procedure, all of the procurement procedures include a pre-qualification stage. During this stage, the contracting authority will send out a pre-qualification questionnaire (a "PQQ") containing the qualification eligibility and selection criteria, being the methodology used to assess whether bidders are qualified to bid. These criteria must be transparent and non-discriminatory. Pre-qualification is not allowed for below-threshold procurements, except pre-qualification based on mandatory exclusion grounds (see below for further information).

## d. Do “blacklists” for bidders exist? If so, what are the conditions for unlisting?

Regulation 57 of the PCR 2015 sets out the various mandatory and discretionary exclusion grounds for contracting authorities to exclude prospective bidders. Blacklisting an entity prevents such entities competing for public contracts for a period specified in the PCR 2015, if that entity falls within one or more of the exclusion grounds. Similar provisions apply under the UCR 2016.

Any economic operator which falls within the exclusion ground(s) may supply evidence proving that measures implemented by the economic operator are sufficient to demonstrate its reliability in spite of the existence of a relevant ground for exclusion. If the contracting authority considers such evidence to be sufficient, the economic operator shall not be excluded from the procurement procedure.

## e. Does the involvement of a company in the set-up of a procurement procedure exclude the company from said procedure due to conflict of interest?

No. The PCR 2015 do not prevent companies from being involved in the preparation of the procurement procedure or engaging in preliminary market consultations with the contracting authority. However, the contracting authority must take appropriate measures to ensure that competition is not distorted by the participation of that company. A company can be excluded from the procedure because of their prior participation, but only where there are no other means to ensure the contracting authority's compliance with its duty to treat economic operators equally. Before being excluded, a company will be given the opportunity to prove that their involvement in preparing the procurement procedure is not capable of distorting competition.

## f. Can bidders combine to submit a bid (bidder consortia)? What limitations apply?

Groups of economic operators may take part in procurement procedures. Contracting authorities may specify how groups of economic operators are to meet the selection criteria in the procurement documents, provided that this is proportionate and justified by objective reasons. Conditions for the performance of a contract by groups of economic operators which are different from those for individual participants must be proportionate and justified by objective reasons as well. To the extent necessary for the satisfactory performance of the contract, once groups of economic operators have been awarded the contract, contracting authorities may require the group to assume a specific legal form.

Bidder consortia may be excluded from the competitive procedure if the formation of the bidder consortium itself is considered to have the aim of distorting competition. This is a particular risk if the participating companies are competitors on the same market. However, even in such circumstances, it may be possible to justify entering into a consortium if:

the individual members of the consortium are not able to submit a bid on their own because they lack the required capabilities;

the members of the consortium are otherwise engaged in a way that prevents them from making use of their capabilities; or

only the association of the companies enables them to submit a promising bid (i.e. they would not have been able to submit a bid with a chance of receiving the award on their own).

It is up to the participants of a bidding consortium to convince the contracting authority that their association does not present grounds for exclusion.

In contrast, non-competitors that form a bidder consortium are less likely to be deemed to have entered into an agreement to distort competition.

## g. Can members of a bidder consortium be changed during a procurement procedure?

This issue is not specifically prohibited in the PCR 2015. As noted above, contracting authorities are permitted to impose additional conditions for the performance of a contract by such groups of economic operators which are different from those imposed on individual bidders, but the conditions must be proportionate and justified by objective reasons. Further, contracting authorities must ensure that they comply with their general obligations to treat economic operators equally and without discrimination and to act in a transparent and proportionate manner. Additionally, the rules in respect of modifications to contracts must be adhered to (see the answer to question 2e above).

## h. Do limitations apply for participation of related bidders in the same procurement procedure with competitive bids?

The PCR 2015 do not address the issue of restrictions upon the participation of related bidders in the same procedure. However, this has been the subject of EU case law. For example, in *Assitur* (C-538/07), the CJEU held that exclusion of related bidders was permitted. Nevertheless, the court noted that contracting authorities should not adopt blanket prohibitions; related bidders must be given the opportunity to demonstrate that their conduct has not been influenced by their relationship.

# 5. Specifications

## a. Are there any rules on the specifications?

Reflecting the EU Procurement Directives, the UK Regulations provide that where a contracting authority wishes to lay down technical specifications which must be met by the contract, then it must specify the technical specifications in the contract documents. Equal access must be afforded to economic operators and contracting authorities must ensure that no obstacles are created to opening up public procurement to competition. The EU Procurement Directives and the UK Regulations therefore generally prohibit specification of particular items that can be sourced from only one supplier and technical specifications must afford equal access to the procurement and should not create unjustified obstacles to opening up the public procurement to competition.

## b. Are bidders allowed to change the specifications or submit their own standard terms of business?

Bidders are not allowed to change the specifications or submit their own standard terms of business (as this would also amount to a change of specification). However, contracting authorities may permit bidders to submit variant bids and if so, should make this clear in the contract notice or invitation to confirm interest.

## c. Is the protection of Small and Medium Enterprises addressed in procurement legislation? If so, how?

Some measures were codified in the PCR 2015 in order to enable greater access to public contracts by small and medium enterprises ("SMEs"). Those measures:

ensure that a contract opportunity above or below the EU threshold is also advertised on the Contracts Finder website, when a contracting authority advertises such contract opportunity;

require contracting authorities to have regard to Cabinet Office guidance on the qualitative selection of economic operators for above threshold procurements to prevent SMEs from being asked burdensome or unnecessary questions;

remove a pre-qualification stage for below threshold procurements; and

improve prompt payment, by requiring contracting authorities to include provision for 30-day payment terms that flow through the supply chain.

The measures either remove unnecessary barriers to participation, or reduce time and cost in procurement procedures.

# 6. Contract Award

## a. Are there any rules on the award of contracts?

Contracting authorities must award public contracts based on the most economically advantageous tender assessed from the point of view of the contracting authority. That tender shall be identified on the basis of the price or cost, using a cost-effectiveness approach and may include the best price-quality ratio, which shall be assessed on the basis of criteria linked to the subject-matter of the contract in question.

Award criteria shall ensure the possibility of effective competition and be accompanied by specifications that allow the information supplied by the tenderers to be verified to assess how well the tenders meet the award criteria. The contracting authority must also specify the relative weighting given to each of the criteria in the procurement documents, unless this is identified on the basis of price alone.

## b. Are there any limitations regarding the offered bid price?

In accordance with the EU position, the UK Regulations require contracting authorities to ask the tenderers to explain the price or costs proposed in the tender where tenders appear to be abnormally low in relation to the works, supplies or services.

## c. Are there any rules on alternative bids?

In accordance with the EU position, the UK Regulations permit contracting authorities to allow alternative or variant bids (which must be stated in the contract notice or invitation to confirm interest).

# 7. Exemptions to Competitive Bidding

## a. Are there any exemptions to competitive bidding, i.e. under what conditions is a direct award/single sourcing permissible?

The EU Procurement Directives provide various exclusions and exemptions that are reflected in the UK Regulations.

The PCR 2015 contains exclusions for public contracts or design contests for telecommunications, land, broadcasting, arbitration or conciliation services, certain legal services, certain financial services, loans, employment, civil defence/protection and danger prevention services, public rail or metro transport services or political campaign services and where national security requires an exclusion.

As noted in the answer to question 3a above, the PCR 2015 also permits contracting authorities to employ the negotiated procedure without prior publication in certain circumstances. In brief, this is allowed in the following circumstances, as set out in Regulation 32:

where no (suitable) tenders (or requests to participate) have been submitted in response to an open or restricted procedure, provided that the initial conditions of the contracts are not substantially altered;

where the contract can only be performed by a particular economic operator because:

the procurement is for the creation or acquisition of a unique artistic work or performance;

competition is absent for technical reasons; or

the protection of exclusive rights (e.g. IP rights)

provided that, in respect of the second two sub-categories, no reasonable alternative exists, and the absence of competition is not the result of an artificial narrowing of the procurement's parameters;

for reasons of extreme urgency brought about by events unforeseeable to the contracting authority, meaning the time limits of the open or restricted procedure cannot be complied with;

in respect of supply contracts:

where the products involved are manufactured purely for research purposes;

for additional deliveries by the original supplier under a contract where a change of supplier would oblige the contracting authority to acquire supplies having technical characteristics which would result in incompatibility or disproportionate technical difficulties in operation and maintenance;

for supplies quoted and purchased on a commodity market;

for the purchase of supplies on particularly advantageous terms, from a supplier or liquidator in an insolvency situation; and

in respect of works or services, for new works and services consisting of the repetition of similar works or services delivered under a previous contract concluded in the previous three years, provided that the works and services are in conformity with a basic project for which the original contract was awarded following a competitive procedure.

Where these circumstances apply, the contracting authority can essentially negotiate with a single supplier without any competition even though the contract would otherwise fall within the regulations.

The Utilities Sector Directive provides a procedure for the European Commission to withdraw the application of the Directive from sectors directly exposed to competition. The European Commission has made exemption rulings on the following utilities in England, Scotland and Wales: (i) electricity and gas supply; (ii) electricity generation; and (iii) exploitation of gas and oil.

The EU Procurement Directives and UK Regulations also do not apply to "in-house" arrangements, on the basis of the so-called *Teckal* exemption, established by the former European Court of Justice and which has now been codified in the EU and UK rules. The PCR 2015 provide that contracts can be directly awarded by contracting authorities so long as:

the public body controls the service provider in question as if it was that public body's own department;

the service provider carries out more than 80% of its activities with the contracting authority or other legal entities which are controlled by the contracting authority; and

there is no direct private capital participation in the service provider, with the exception of non-controlling and non-blocking forms of participation which do not exert a decisive influence on the service provider.

## b. What are the consequences for violation of the competitive bidding requirement?

There are three main potential consequences of an unlawful direct award (assuming that that direct award is challenged in court).

First, if the contract in question has not been entered into, when a claim form is issued and the contracting authority is on notice of this, the contracting authority "is required to refrain from entering into the contract". This is known as an "automatic suspension" to contract-making, and these continue until the court orders otherwise. The court may go on to lift the automatic suspension, allowing the contract to be entered into. Alternatively, after a substantive hearing, the court may order that the decision awarding the contract is set aside, or that the contracting authority amend any document relating to the procurement process.

Second, if the contract has already been entered into, the court must order a "declaration of ineffectiveness", unless there are "general interest" grounds for it not to do so. The consequences of a declaration of ineffectiveness are that the contract is to be considered prospectively (but not retrospectively) ineffective as from the time the declaration is made, meaning any obligations yet to be performed are not to be performed. The contracting authority can mitigate against the risk of a declaration of ineffectiveness being made against it if it considers that the direct award is lawful by publishing in the Official Journal of the EU a "voluntary ex ante transparency" (VEAT) notice prior to entering into the contract, and then refraining from entering the contract for at least 10 days after the date of publication of the notice. Where a court makes a declaration of ineffectiveness in these circumstances, it must also order that the contracting authority pay a civil financial penalty to the Cabinet Office. Where a court does not order a declaration of ineffectiveness, but considers that the direct award gave it grounds to do so, it must order that the duration of the contract be shortened and/or that the contracting authority pay a civil financial penalty to the Cabinet Office.

Third, whether or not the contract has been entered into, and regardless of whether the court orders a declaration of ineffectiveness, the court may order that the contracting authority pay damages to any economic operator which has suffered loss or damage as a result of the direct award. However, in the recent decision of *Nuclear Decommissioning Authority v Energy Solutions EU Ltd*[[1]](https://resourcehub.bakermckenzie.com/en#_ftn1) the Supreme Court confirmed that such damages may only be awarded by the courts if they satisfy the "*Francovich* criteria" (i.e. that (1) the rule of law infringed must be intended to confer rights of individuals, (2) the breach must be sufficiently serious, and (3) there must be a direct causal link between the breach of the obligation and the damage sustained by the injured party).

[[1]](https://resourcehub.bakermckenzie.com/en#_ftnref1) [2017] UKSC 34

# 8. Remedies and Enforcement

## a. Are there any remedies and enforcement mechanisms in the procurement legislation?

The UK Regulations include all of the remedies and mechanisms which were originally introduced by the EU Remedies Directive (2007/66/EC). This include mechanisms such as *Alcatel* or standstill periods. The available remedies for bidders are described in the answer to question 7b above.

Under the previous rules, 'Part B' services were exempt from the standstill requirement. However, the position in respect of contracts which fall within the 'light touch' regime is less clear.

Government guidance published in March 2015 acknowledged that a contracting authority may not strictly be required to observe the standstill period for above threshold 'light touch' regime contracts, but recommended that contracting authorities send a standstill notice and observe the standstill period (in the same way as in procurements governed by the main rules), to avoid the risk that the contract (or framework agreement) might be declared ineffective if case law later clarifies that standstill periods are required for 'light touch' contracts.

## b. Are remedies available outside the scope of procurement legislation, e.g. civil law damage claims?

Under limited circumstances, a procurement decision may be challenged in the UK by judicial review. However, it is important to note that a review only relates to how a decision was made, not to its merits and it can only be commenced where there is no suitable alternative remedy. The use of judicial review in the procurement context is exceptionally rare - the case of *Cookson & Clegg v Ministry of Defence* effectively rules out the use of judicial review unless it involves issues such as bribery, corruption, State aid or unlawful policy; or the contract falls outside the Regulations and there is a sufficient public law element to the contract.

It could be possible to bring a claim in tort of misfeasance in public office which applies when there is targeted malice or reckless knowledge on the part of the decision-maker that they will probably cause injury. The Claimant must have suffered damage specific to him, which can include pure economic loss.

An alternative to litigation could be to lodge a complaint with the UK Cabinet Office (which contains the UK government executive agency which deals with procurement management) or the European Commission.

The PCR 2015 specifically provides for damages to be awarded. As such, a court would not order damages in relation to a separate private law action.

## c. Is there a specific forum before which procurement disputes are heard?

The High Court of England and Wales hears procurement disputes (typically in the Technology and Construction Court "TCC"). Appeals from the County Court and High Court are heard in the Court of Appeal, appeals from that court are heard by the Supreme Court.

## d. Are there any timing requirements for the review?

Potential claimants have 30 days to commence legal proceedings (for matters arising after 1 October 2011). In relation to matters arising before 1 October 2011, the limitation period is three months. The 30 day time limit may be extended at the court's discretion up to a period of three months.

The UK Regulations apply the *Uniplex* requirement that time begins to run from the moment the Claimant knows or ought to have known of the alleged breach.

## e. What are the main preconditions for review?

In order to enforce a contracting authorities' duties under the PCR 2015 in court, the claimant must be an "economic operator". Economic operator is defined 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*". This is a broad definition and includes bidders in a procurement process, as well as other parties potentially, including sub-contractors and entities that would have bid in the procurement process had they been made aware of the opportunity (i.e. in the context of a direct award).

## f. What are admissible grounds for starting a review proceeding?

An economic operator may enforce in the courts any duty incumbent on a contracting authority contained in Part 2 of the PCR 2015 (i.e. the provisions that implement the Public Sector Directive 2014/24/EU, being the substantive section of the PCR 2015 that governs procurement procedures), if that economic operator suffers or risks suffering loss or damage as a result of a breach of such a duty.

## g. Does a review proceeding affect an ongoing procurement procedure or an awarded contract respectively?

As noted in the answer to question 7b, where an economic operator issues a claim form in relation to a contracting authority's decision to award a contract, the contracting authority is on notice of this fact, and the contract has not been entered into, the contracting authority is required to refrain from entering into that contract. Other than an automatic suspension, a court may (but is not obliged) to make an order suspending the procurement procedure or any other decision or action taken by the contracting authority in the course of that procedure for the period during which court proceedings are ongoing.

## h. What are the consequences of a successful review proceeding for the affected procurement procedure or awarded contract respectively?

This will depend on what the court decides. Where a contract has not been entered into, the court has the power to make a final order setting aside any decision or action of the contracting authority, or to order that the contracting authority should amend any document relevant to the procurement procedure. Where the contract has been entered into, the court must make a declaration of ineffectiveness (if the grounds for ineffectiveness are satisfied) and impose the concomitant civil financial penalties on the contracting authority. If the court does not make a declaration of ineffectiveness, it may also order that the duration of the contract is shortened.

## i. How long does a judicial proceeding for review take?

This depends on many factors, chiefly the complexity of the case and the prevailing workload of the court. In our experience, proceedings under the PCR 2015 are supposed to be relatively fast, meaning they should take months rather than years (ideally less than 6 months). However, we also have experience of cases taking years, particularly if the first instance decision in the High Court is appealed to the Court of Appeal and then the Supreme Court.

## j. Must unsuccessful bidders be notified before the award? If so, when?

Contracting authorities are required to send each candidate and tenderer a notice communicating its decision to award a contract.

## k. Are review proceedings common?

Public procurement challenges have become more frequent in recent years in the UK. As a result, the Courts have been dealing with growing numbers of public procurement claims. However the short limitation period and the perceived risk of damaging an ongoing relationship through litigation, means some economic operators are still reluctant to challenge contracting authorities in court. It is also common for proceedings to settle shortly after being issued, if a contracting authority accepts that the procurement procedure contained a flaw. Where a contract is particularly significant (i.e. it represents all or the majority of a company's business), challenges are more likely.

## l. Are damage claims in relation with procurement procedures common?

Yes, although they tend to be a "secondary remedy": if a company is aggrieved by a procurement procedure or its outcome, it will tend to focus on remedies (such as a declaration of ineffectiveness) that will allow it an opportunity to be awarded the contract or have its tender reconsidered, by having the procurement procedure restarted. Damages will therefore often be claimed in the alternative.

In any event, where a claim is brought as a pre-contract remedy and where the automatic suspension has been maintained, the court will decide whether damages or setting aside the award decision is the most appropriate remedy. In *Mears Limited v Leeds City Council* [2011] EWHC 1031 (TCC) the Court identified the relevant considerations in deciding on an appropriate remedy for breach of the procurement rules. These included the time that would be taken to retender the services, the absence of any interim contract pending any retender, and that damages would be an adequate remedy for the claimant in that case.

## m. What are the leading court decisions involving procurement disputes?

As noted above, disputes are normally determined as a result of early rulings and/or settlement and only a few cases proceed to trial in the UK. However some of the more notable UK decisions include:

*Brent London Borough Council v Risk Management Partners Limited and London Authorities Mutual Limited and Harrow London Borough Council* [2011] UKSC 7 applying the *Teckal* decision in the UK (subsequently codified in the PCR 2015) in circumstances where a number of local authorities set up their own mutual insurance company. The case confirmed that *Teckal* applied in the UK and that it could apply where a number of different contracting authorities jointly control the "in-house" entity.

*Sita UK Limited v Greater Manchester Waste Disposal Authority* [2011] EWCA Civ 156 applied the *Uniplex* decision in the UK and confirmed that time runs from the date of actual or constructive knowledge of the breach.

*McLaughlin and Harvey Limited v Department of Finance & Personnel* [2011] NICA 60 concerns the extent to which a contracting authority is obliged to disclose sub-criteria in the invitation to tender (and the weight to be applied to each of them).

*JB Leadbitter & Co. Ltd v Devon County Council* [2009] EWHC 930 (Ch) confirmed that contracting authorities must act proportionately but concluded that a tenderer could be rejected for purely technical non-compliance (failure to submit electronically in accordance with the tender instructions).

*Harmon CFEM Facades (UK) Ltd v. The Corporate Officer of the House of Commons* [2000] EWHC Technology 84 is a rare example of a damages award and in extraordinary circumstances where the contracting authority effectively implemented a "Buy British" policy.

*NATS (Services) Ltd v Gatwick Airport Ltd* [2014] EWHC 3133, is, again, a rare example of an automatic suspension of a contract award being maintained. In that case, the court rejected a contracting authority's application to lift an automatic suspension order to allow them to enter into the contract with the winning bidder.

*Healthcare at Home Ltd v The Common Services Agency* [2014] UKSC 49 confirmed that the standard of a "reasonably well-informed and diligent tenderer" is objective, and what the actual tenderer did or thought in relation to the provision of reasons for a contract award, is not relevant to this standard.

*Edenred (Group UK) Limited v Her Majesty's Treasury and others* [2015] UKSC 45 is the leading case on the meaning of "material variation" of a public contract.

*Nuclear Decommissioning Authority v Energy Solutions EU Ltd* [2017] UKSC 34 confirmed that the "Francovich" conditions applied to the award of damages in a procurement action.

# 9. Other Relevant Rules of Law

## a. Are there any related bodies of law of relevance to procurement by public agencies?

The UK Regulations are the most relevant as they consolidate UK public procurement legislation and implement the European Directives. In addition, the underlying principles of the "TFEU" also have applicability. UK case law has also shown that judges will be mindful of giving effect to EU principles and obligations.

As already noted above, competition law can be relevant in procurement disputes.

The Freedom of Information Act 2000 is also of relevance in that it requires public bodies to grant access to information in relation to tenders unless exemptions apply. There is specific government guidance on freedom of information obligations in relation to particular categories of procurement information.

# 10. Industry sectors of special importance or with a specific procurement regime

## a. Are there any specific laws or practices that apply in the technology sector?

The European Procurement Regulations and UK implementation of the same generally do not draw any distinction between the procurement of technology and other goods and services. The same rules and principles therefore apply to the public procurement of technology, which could involve both contracts for the supply of goods (hardware and commercial off-the-shelf-software) and/or contracts for services (bespoke software or managed services). One distinctive feature of the industry, however, is the common use of framework agreements.

There are additional policies and procedure to be observed when procuring technology, given the large scale of public-sector technology projects and the complexity and risk that often accompanies them. ICT procurement projects in central civil government are subject to a review by an independent team in the Cabinet Office.

The UK government requires contracting authorities to pro-actively publish all ICT contracts concluded by central government departments above a low financial threshold. The publication is subject to redactions justified by exemptions in the Freedom of Information Act. There is specific government guidance on ICT contracting and a specific model contract to use as a starting point.

## b. Are there any specific laws or practices that apply in the defense sector?

Yes. The Defence and Security Public Contracts Regulations 2011 apply to the defence sector. These implement the Defence and Security Procurement Directive 2009/81/EC. The Regulations give defence procurers greater freedom to use the negotiated procedure with prior publication of a contract notice (known as the "competitive negotiated procedure") as well as the negotiated procedure without prior publication of a contract notice (i.e. a direct award).

## c. Are there any specific laws or practices that apply in the health care sector?

Yes. The National Health Service (Procurement, Patient Choice and Competition) (No. 2) Regulations 2013. These apply to the procurement of "health-related services" and "social care services". Broadly, this means all healthcare and social services. An important exception to this is the supply of pharmaceuticals and medical devices, which fall under the PCR 2015.

## d. Are there any specific laws or practices that apply to any other particular industry sector?

There are no other specific laws or practices for other industry sectors that have not been mentioned above.

# 11. Looking Ahead

## a. Are there any proposals to change the law in the future?

In August 2016, the TCC (the division of the High Court which commonly hears public procurement disputes) issued a draft Protocol on Procedures for Public Procurement Cases, to provide guidance on the court process. The guidance apparently addresses issues including pre-action conduct, confidentiality and expedited hearings. However, at the time of writing, it had yet to be approved by the Deputy Head of Civil Justice. Once approved, the final version of the Protocol will be annexed to the TCC Guide and should provide useful guidance to claimants and practitioners.

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