

11KBW

Challenging procurement and funding decisions under the Public Contracts Regulations 2015

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19 July 2018

What are an authority's duties?

- To comply with the detailed procedures laid down by the Public Contracts Regulations 2015.
- But legal advice services are “light touch” (reg. 74) and representation in court is excluded (reg. 10).
- Equality of treatment/non-discrimination.
- Transparency.
- ‘any enforceable EU obligation’ – e.g. good administration, proportionality, competition (see the Recitals to the Directive and the EU Charter of Fundamental Rights for further examples)

Who are the duties owed to (and enforceable by)?

- Any 'economic operator'.
- This includes any firm which wishes to provide legal aid services.
- And an organisation bidding for funding which would be governed by a contract if awarded.
- A claimant must show loss or damage or risk of loss or damage (reg. 91). This imposes a causation requirement as a necessary ingredient of the cause of action, i.e. any alleged breach of duty must have made some (actual or potential) difference to the procurement outcome
- A non-economic operator, with "sufficient interest", by judicial review.

Challenging the procurement *itself*

- Contracting authorities have a wide discretion as to the design of award criteria and structure of the procurement. However, these matters are – in principle – susceptible to challenge.
- Some examples:
 - A PQQ resource or financial requirement that would exclude and/or operate to the detriment of certain types of bidders (e.g. SMEs)
 - A supervision requirement which indirectly discriminated against women (*Hereward & Foster v LSC*).
 - An award criterion or condition that is not linked to the subject matter of the contract
- BUT limitation runs from C's date of knowledge of 'basic facts'. Therefore any challenge to the PQQ/ITT needs to be brought promptly upon being made aware of the objectionable requirements. C **cannot** sit on hands and wait to see how it gets on in the competition.
- Therefore, design challenges must be brought at an early stage.

Challenging the conduct of the competition: targets

- **All** decisions within the procurement are subject to LAA's legal duties under the Regulations and potentially subject to challenge. Some examples:
 - a decision to grant/refuse an extension of time
 - a decision to accept/reject documents or information that was omitted from a tender response
 - a failure to exclude a bidder who has failed to satisfy a mandatory requirement
 - financial capacity decisions
 - the final evaluation procedure, including the marks awarded for individual answers, and the ultimate contract award decision

Challenging the outcome: transparency

- Most common ground on which challenges to award decision have succeeded.
- Authorities must disclose all award criteria and evaluate tenders solely on the basis of those criteria.
- The award criteria must be sufficiently clear and unambiguous so as to be understood in the same way by all 'RWIND' bidders.
- The correct interpretation of award criteria is a question of law for the Court. The authority has no margin of discretion.
- If C can establish breach, next question is risk of loss or damage (i.e. claim will likely be for loss of chance). Can give rise to difficult questions of causation.
- Difficult questions of fact as to the point at which assessment of the quality of a response shades into the application of an undisclosed award criterion (eg *Woods v Milton Keynes BC*).
- Example: D provides evaluators with detailed 'model' answers or 'scoring guidance' which refers to matters that were not mentioned in the ITT/IFA.
- Example: The published award criterion requires proposals to ensure good project management/delivery. D gives Bidder A higher score because proposed to use dedicated project manager. Does this constitute the application of an undisclosed award criterion?

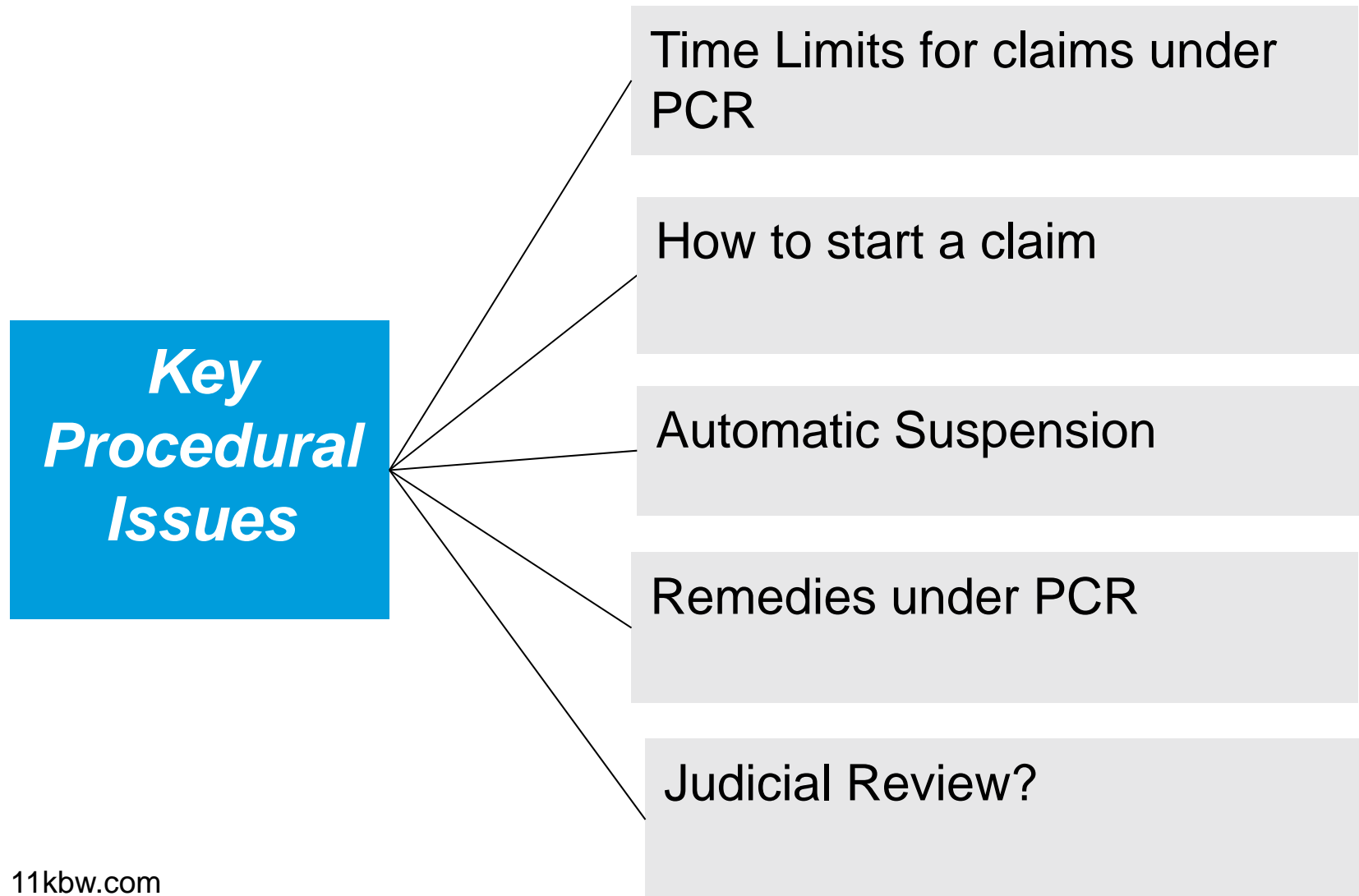
Challenging the outcome: inequality of treatment

- Like cases must be treated alike and different cases treated differently.
- Subject to objective justification (but NB High Court has ruled that this is a strict test, with no margin of discretion for the authority: *Woods v Milton Keynes BC*).
- If a tender is marked down for a particular failing, authority must adopt the same approach to other tenders having the same failing.

Challenging the outcome: scoring challenges

- *Woods v Milton Keynes* (July 2015) = first successful marking challenge. Now also *EnergySolutions v Nuclear Decommissioning Authority* (July 2016).
- Did authority make a “manifest error” in the marking of tenders?
- Manifest error is “broadly equivalent” to *Wednesbury* reasonableness/rationality (authority has wide margin of discretion when marking tenders).
- However, a finding of manifest error does not require obviousness. “Manifest” refers to the ‘nature and centrality’ of the error to the decision under challenge; a significant error which has clearly been made.
- Determination of the lawful/correct score following a finding of breach is a question for the Court.

Key procedural issues



Time limits for starting claims

- “within” 30 days beginning with date when C knew or ought to have known that grounds for bringing the claim first arose – reg. 92(2)
- When do you know? Knowledge, not suspicion: *Nationwide Gritting v Scottish Ministers*
- Discretion to extend up to three months after date above: reg. 92(5). BUT very difficult to get extension
- Identify real decision under challenge – if challenge criterion in ITT, 30 days from publication of ITT.

Automatic suspension

- Usually want to stop contract signature
- Need to issue claim *before* contract has been entered into (otherwise limited to claim in damages – reg. 98)
- Standstill period gives the opportunity to do this.
- Reg. 95 imposes injunction preventing contract signature.
- Standstill may be extended by agreement. Can only hold off if have undertaking/promise not to enter into contract

How to start a claim

- Issue a claim form (reg. 92(6)).
- Claim form: brief details of claim identifying cause of action. Can be just few lines long. No need for particulars of claim at this stage
- Claim form must be served within 7 days of issue: reg. 94(1).
- Particulars of claim to follow within 7 days.
- Issue fee? Damages claim or not.

3. Automatic suspension: lifting the stay

Reg 96

- D can apply to lift the stay
- Court will consider whether would be appropriate to make an interim order requiring D to refrain from entering into contract – apply *American Cyanamid* test
 - Serious issue to be tried
 - Damages not adequate remedy
 - Balance of convenience
- *Bristol Missing Link v Bristol CC; Counted4 CIC v Sunderland CC*

Early disclosure is key

Roche Diagnostics v Mid Yorks Hospitals NHS Trust

“In general terms, therefore, and always subject to issues of proportionality and confidentiality, the challenger ought to be provided promptly with the essential information and documentation relating to the evaluation process actually carried out, so that an informed view can be taken of its fairness and legality.”

4. Final remedies

- Reg 97 – where contract not been entered into, Court may:
 - Set aside decision or action
 - Order D to amend any document
 - Award damages
 - Exercise any other powers
- Reg 98 - if contract entered into, damages or declaration of ineffectiveness

5. Judicial Review: if PCR does not apply

- Can challenge decision on contract award through judicial review
- May need to issue claim for JR as well as under PCR
- Timing issues apply: still want to issue before contract entered into
- Need to do more at outset to get claim off the ground
- Apply for interim relief in Administrative Court



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