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Time Limits for Bringing a Procurement Challenge

The time limits for challenging a public sector procurement process continue to attract constriction, and this is making it increasingly difficult for a disgruntled tenderer to succeed in preventing a contract being awarded. This article aims to summarise the current position on time limits and highlight a number of recent cases that impact on this aspect of procurement law.

What are the time limits?

There are a number of routes to bringing a challenge. The chosen route will depend on the remedy being sought or preferred venue for the challenge being heard. A 'conventional challenge' is brought by starting court proceedings. The time limit for doing so was reduced from 3 months to only 30 days by the Public Procurement (Miscellaneous Amendments) Regulations 2011. Therefore, from 1 October 2011 a disgruntled party must bring a challenge within 30 days of when that party first knew or ought to have known that grounds for starting proceedings had arisen pursuant to regulation 47D of the Public Contracts Regulations 2006 (as amended), hereafter referred to as *"the 2006 Regulations"* - in other words the clock starts ticking from the date the challenger knew or ought to have known of a breach. It is worth mentioning that the Miscellaneous Amendments also removed the requirement to bring a challenge promptly, thereby bringing the 2006 Regulations in line with the Uniplex judgment *(Case C-406/08 Uniplex (UK) Ltd v NHS Business Services Authority)*. Time is stopped by starting proceedings, as per Regulation 47F of the 2006 Regulations.

However a further time limit can effectively be implied by the remedy sought. If a challenger seeks to prevent the contract award in the hope that their challenge will yield the contract to them, or a second opportunity to win it, then the challenge will normally need to be commenced before the standstill period expires; commonly ten days. After expiry of the standstill period options are limited predominantly to damages or seeking (the thus far elusive) declaration of ineffectiveness. To seek damages the time limit of thirty days from knowledge applies (more of which below).

For seeking a declaration of ineffectiveness special time limits apply, as set out at Regulation 47E of the 2006 Regulations. There is a long stop limit of six months for application, though a prudent contracting authority will engage the measures that reduce the limit to thirty days. Most achieve this through publishing a contract award notice in the OJEU.

Disgruntled bidders may also bring a challenge in certain circumstances via Judicial Review proceedings. Until recently this route provided the benefit of a longer time limit for commencing action; namely "… *not later than 3 months after the grounds to make the claim first arose*". However, following reforms to the judicial review system claims based on grounds arising on or after 1 July 2013 must be commenced within thirty days.

Consequently, whether a challenger is seeking to start a conventional challenge, apply for a declaration of ineffectiveness or engage the judicial review route, the time limit could be thirty days for each, assuming steps have been taken to reduce the ineffectiveness time limit. Whilst this appears to keep things fairly neat and tidy, one should remain mindful of the different tests (making things sound more familiarly complex) that start the clock ticking. For judicial review this is based on the more objective and ascertainable time when the event giving rise to grounds for a challenge occurred. Whereas for challenges brought under the 2006 Regulations time commences from when the potential challenger knew or ought to have known of the event. Whilst at first the distinction may seem trivial, its potential impact is far from it and the suggestion from some that time limits are now harmonised is short sighted. Time will start running for the purposes of judicial review when an event occurs; however it may be weeks before the aggrieved bidder becomes aware of the event in which case time limits for a challenge under the 2006 Regulations might start much later.

All that said, many challengers subject themselves to a self-imposed time limit of the standstill period, to prevent the contract being awarded in the first instance. This breeds many problems of its own.

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Time Limits for Bringing a Procurement Challenge, continued...

The first issue is the length of the standstill period, which if the award notification is made electronically will commonly only be ten days (Regulation 32A of the 2006 Regulations). During this time there will be one, perhaps two, weekends potentially reducing the number of working days available to six days. During that time available the potential challenger is likely to need to meet internally and discuss whether they wish to pursue that course of action, meet with their lawyers and take advice, in addition to allowing the lawyers sufficient time to consider the documents, draft the claim and issue it. I can say from first hand experience of acting for challenging parties that this is no mean feat.

The next problem follows on from the above; accurately formulating the claim. Commonly, and for good reason, litigation in ordinary circumstances only follows when numerous lengthy exchanges between parties and their legal representatives have been carried out. There may even be a requirement for a Pre-Action Protocol to be followed where parties set out the claim and corresponding responses. All of this culminates in potential grounds for a claim being fairly thoroughly aired, tested and debated before the 'would be claimant' is forced to make the decision whether to commence litigation. In a procurement challenge there is simply no time for doing so. Potential consequences include:

- Commencing a court claim without knowledge that the defending public body can easily defeat it; and
- Starting a 'speculative' claim based on suspected wrongs, but in absence of clear proof.

Arguably, it is the second example that causes the greatest problems. One of the many difficulties that arise from this is the inability to gain sight of documents that might be fundamental to the success of the claim. Litigation does facilitate early pre-action disclosure in certain circumstances and courts have allowed this to be used in the present context, but only where the request was very specific *(see Roche Diagnostics Ltd v The Mid Yorkshire Hospitals NHS Trust [2013] EWHC 933 (TCC)).* The courts have made it clear that they will not sanction a fishing expedition whereby a challenger seeks disclosure of documents on a wholesale basis in the hope of finding something from which to formulate a sound claim *(see Pearson Driving Assessments Ltd v The Minister for the Cabinet [2013] EWHC 2082 (TCC)).*

The typical approach to dealing with these difficulties is for the challenger to draft a short claim form seeking to then elaborate on detail in the particulars of claim. Once again recent case law looks set to rock the boat. In the Corelogic case *(see Corelogic Ltd v Bristol City Council [2013] EWHC 2088 (TCC))* a challenge was made on the basis that inadequate post tender information was provided. The claimant subsequently alleged manifest errors in the assessment of the tender and the use of undisclosed award criteria; both of which appear to provide a stronger basis of challenge and so they sought leave to amend the claim form.

The High Court refused to allow them to do so on the basis that it would constitute a 'new claim' outside of the thirty day limitation period, which should only occur if the grounds arise from the same facts or substantially the same facts as those already in issue in the proceedings.

In some instances the above considerations will leave a challenger stuck between a rock and a hard place. On one hand proceedings must be commenced quickly to avoid the time limit from expiring, whilst on the other a hasty challenge made before sufficient information is available may lead to its own problems.

The 2006 Regulations do provide scope for extending the time limits, but only where there is "*…good reason for doing so*" as set out in Regulation 47D(4); though it appears that the courts will again approach this discretionary power very strictly, even if an extension of only fourteen days is sought *(Turning Point Ltd v Norfolk County Council [2012] EWHC 2121 (TCC))*. Reliance on that provision might only be considered a hopeful last resort.