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Limitation in Post-Covid Procurement Claims: What Authorities and Operators Need to Know

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Biography

Gwendoline Davies is a Partner, and head of the Commercial Dispute Resolution Group at Walker Morris (https://www.walkermorris.co.uk), and joined from City firm, Herbert Smith Freehills.

Ranked as a leading individual and in the top tier for commercial dispute work for a number of years, Gwendoline is a highly respected litigator and has been involved in several reported cases. The Chambers Guide to the Legal Profession describes Gwendoline as "first-class" and "a star litigator who is very commercial and responds very quickly no matter what time or time zone."

Her clients come from multiple industries and business sectors and include major corporates and leading financial institutions. She has more than 30 years of experience of representing clients in their most complex and important disputes. Her practice includes company and commercial disputes, trading disputes, regulatory matters, internal investigations and domestic and international arbitration.

She is an accredited mediator with the Centre for Dispute Resolution, a Fellow of the Chartered Institute of Arbitrators and a member of the International Bar Association.

Gwendoline is ranked as a leading individual in her field by independent guides to the profession: Chambers & Partners, Legal 500 and Best Lawyers. In 2018 she received the Hall of Fame accolade by the Legal 500 which highlights individuals who have received constant praise by their clients and have been recognized by The Legal 500 as one of the elite leading lawyers for six consecutive years or more.

Gwendoline is also endorsed by 'The Best Lawyers in the United Kingdom' directory for litigation.

Lynsey Oakdene
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Lynsey Oakdene s a Director in the Commercial Dispute Resolution team at Walker Morris (https://www.walkermorris.co.uk) and specializes in all aspects of commercial disputes. She regularly advises on a broad range of matters and is an experienced trial/hearing lawyer as well as having a wealth of experience in all forms of alternative dispute resolution. Often described by clients as "unflappable" Lynsey advises on commercial contract disputes, warranty claims, shareholder and partnership disputes, defamation claims and professional negligence claims. Over the years she has also developed substantial expertise in advising on PFI/PPP related disputes, Judicial Review and Procurement Law issues.

Lynsey works with clients from a wide background in various sectors but she has particular experience in the Energy and Infrastructure, Waste, Public and Education sectors and is a member of Walker Morris' specialist teams for those areas.

Keywords Procurement, Post-covid, Authorities, Operators, High Court
Paper type Research, Opinion

Abstract

Following a recent High Court case which focused on limitation and communication issues in the post-Covid homeworking context, the authors discuss the importance of acting clearly and quickly when it comes to any potential procurement challenge, and discuss why cases such as Bromcom Computers v United Learning Trust are of so much interest.

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Why is Bromcom Computers v United Learning Trust of interest?

Any organization which competes for business via public procurement tenders will be aware that the process can be highly complex and often involves the investment of significant time and effort from staff and senior management. Tender outcomes can have a substantial commercial impact and so the ability to obtain legal redress when things go wrong is essential.

Where the Public Contracts Regulations 2015 (PCRs) apply[1], there are legal and procedural hurdles which a claimant must overcome if it is to be able to pursue a public procurement challenge. One key hurdle is Regulation 92, which provides that a claim for breach of the PCRs must be brought within 30 days of the date when the economic operator[2] first knew or should have known that grounds for commencing proceedings arose. If a limitation deadline is missed, then the ability to pursue a claim is lost.

The recent case of Bromcom Computers v United Learning Trust[3] is of interest for three key reasons:

1. The case centred on when the Regulation 92 limitation period might start to run in circumstances where matters relevant to the requisite 'knowledge' were discussed remotely – as per the post-Covid 'new normal'.

2. The case highlights the importance of potential claimants establishing whether multiple actions of the contracting authority are multiple aspects of one potential breach, which must all be challenged within 30 days of the operator's knowledge of the 'first' action or ground giving rise to the claim; or whether they are breaches of separate duties, in which case the limitation period will run separately in relation to each breach.

3. The case confirms that potential claimants should beware the 'drip-feeding' of reasons for procurement decisions by contracting authorities, and the impact that can have on the triggering of the Regulation 92 limitation period.

What practical advice arises?

The following tips should help avoid time-consuming and costly procurement challenges, or to react quickly and effectively when any dispute does arise.


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For contracting authorities:

- Ensure that tender requirements are as clear and unambiguous as possible. Tenderers need to be able to identify exactly what they need to do to meet the criteria. Greater clarity from the outset allows for less scope for dispute down the line.

- When notifying a bidder that it has been unsuccessful, ensure that all relevant information – and in particular, the reasons for the decision – is given in a clear, well-structured, methodical manner. Try to avoid 'drip-feeding'. This advice applies whether the information is given in writing, or orally (via Teams or other remote communication format). Where information is given orally, it should be repeated in writing at the earliest possible time. Doing so should limit the scope for limitation arguments, and should ensure that limitation periods start to run as early as possible.

For economic operators:

- Upon receipt of an invitation to tender, seek clarification in relation to any requirements which are unclear or ambiguous. Failure to provide clear requirements might constitute grounds for a challenge right from that point, even though the procurement process has not yet been concluded. Be aware, however, that the time to make a claim in respect of any such failure is likely to start running at this very early stage.

- If your tender is unsuccessful, seek legal advice urgently. There can be significant traps for potential claimants in trying to work out what duties or actions on behalf of contracting authorities can amount to actionable breaches, and when limitation starts to run in relation to them. In fact, depending upon the information that is provided by the contracting authority, there is even the risk that any relevant limitation period starts to run immediately the operator learns of its failed bid.

- When considering whether to issue proceedings within the tight Regulation 92 timescale, remember that the requisite knowledge of an infringement by the contracting authority need not be absolute. As soon as an economic operator has knowledge of any facts which indicate a possible claim, time starts to run fast and it will be prudent to prepare and issue a claim.

What happened in the particular case?

The claimant was unsuccessful in its bid to supply a cloud-based information system for schools. The fact that the claimant was unsuccessful and the reasons for the defendant contracting authority's decision were 'drip-fed' to the claimant over the period 30 March to 23 April 2020. Some of those communications were informal e-mails, some were purported notices pursuant to PCRs Regulation 86 and some were audio-visual via Microsoft Teams meetings (presumably as a result of the national lockdown that was then in place).

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On 18 May 2020 the claimant commenced proceedings alleging various breaches. The defendant argued that the claim was out of time and that the Regulation 92 limitation period had started to run from 3 April, the date on which a Teams meeting had been held. The claimant argued, instead, that the limitation period had not started to run until 22 April, when a Regulation 86-compliant notice was served.

The High Court held

When it comes to multiple allegations of breach, no matter how the particulars of claim might be drafted, the court will decide whether actions of the contracting authority are multiple aspects of one potential breach, which must all be challenged within 30 days of the operator's knowledge of the 'first' action or ground giving rise to the claim; or whether they are breaches of separate duties, in which case the limitation period will run separately in relation to each breach.

In this case, although the claimant had particularized what it believed to be a number of different duties owed to it by the defendant and around eight different breaches, the court decided that all actions under challenge related to just one duty of the defendant – that in relation to its conduct of the bid evaluation process. As a result of this finding, the court had only to establish one date for the commencement of the Regulation 92 limitation period – the date on which the claimant first had the requisite knowledge of a potential breach of that duty, and therefore of its potential claim.


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The court explained that the standard of knowledge required to trigger the limitation period is knowledge of the facts which indicates, albeit does not necessarily prove, an infringement. A potential claimant does not need to know detailed facts or that there is a real likelihood of success – the limitation period will start running as soon as there is knowledge of material which does more than merely give rise to suspicion of a breach.

Bearing in mind the different times and methods by which information and reasons concerning the defendant's bid decision were imparted to the claimant, the court clarified that a claimant's knowledge for these purposes will be decided by reference to substance and not form. Accordingly, the way in which knowledge is acquired by a claimant is not conclusive – but neither is it irrelevant.

That is an important finding – particularly post-Covid[4] – as it confirms that providing information to tenderers orally (via Teams or other such format) can suffice. Writing is not necessarily required for these purposes.

However where information and/or reasons are not provided by a contracting authority, whether orally or otherwise, in such a clear, structured and readily understood manner as to allow an unsuccessful bidder to reasonably assess them, then knowledge to trigger the limitation period will not arise.

In this case the Teams meetings were not structured and did not involve methodical feedback. The sessions were also heated and, whilst the parties could see and hear each other remotely, the court accepted that their ability to interact was diminished to some degree.

On balance, the court agreed with the claimant and decided that the Regulation 92 30-day limitation time period had begun to run on 22 April 2020 – the date on which the written Regulation 86-compliant notice was served.

The UK government is currently consulting on transforming the public procurement regime. However, from our analysis of the consultation paper we do not expect this to change the limitation date for bringing claims or the relevance of the case law relating to this.

Reference

1 subject to limited exceptions, the PCR apply to public supply, works and services contracts unless their value falls below the relevant threshold (see Crown Commercial Service PPN 04/17 for current thresholds).
2 that is, any entity which offers the execution of works, the supply of products or the provision of services on the market.
3 [2021] EWHC 18 (TCC)
4 At the date of writing we are, of course, in another full national lockdown and all required to work from home where that is possible.