Procurement law reform - Let’s start a discussion

Webinar feedback - Reform of limitation rules

16 July 2020
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This is the second bitesize feedback note following on from DLA Piper’s Panel Discussion Webinar held on 1 July 2020 which launched our discussion paper - “*Procurement Law Reform - Let’s Start a Discussion*”. The first bitesize feedback paper summarised the discussion and inclusions in relation to the potential options for overall procedural reform in relation to procurement challenges in the UK. This second paper now looks at the views expressed by the Panel on the vexed question of limitation periods for challenges and their impact on the conduct of procurements pre and post evaluation.

The Case for Change to Procurement Challenge Limitation Rules

This discussion focused on two main issues:

1. the length of the basic limitation period for procurement challenges; and
2. the period or date from which time should run for the bringing of such challenges.

Dealing with the first issue, Fionnuala McCreadie QC explained that when the current rules on limitation were being promulgated, she had warned that rather than acting as a deterrent to unmeritorious claims, the short one month limitation period could potentially have the opposite effect. In her view, subsequent experience strongly suggests that the rigid one month limitation period has not achieved its purpose. Instead, the one month period has had a series of unintended and essentially adverse impacts:

1. there is a perverse incentive on public bodies to withhold information and adopt a minimalist approach to disclosure pre-challenge in the hope that this will deter any challenge within the 30 day period;
2. however, particularly in the case of higher value procurements, this has probably resulted in challengers commencing protective proceedings both to secure the protection afforded by the automatic stay and to compel the procuring authority to provide more disclosure and information so that the true merits of a challenge can actually be assessed;
3. in many cases, the subsequent disclosure made by a procuring authority after proceedings had been commenced, in fact leads to those proceedings being discontinued but with unnecessary adverse legal cost impacts and often additional delay. This is an unnecessarily dysfunctional and adversarial state of affairs.

It would be far better in such cases if there was a longer limitation period which actually allowed parties time to engage in more effective pre-challenge correspondence and disclosure and the regulations were structured to facilitate such process taking place[1].

It is perverse that in many cases challengers are having to incur court fees of up to GBP10,000 as well as significant additional legal costs and costs risk in order to compel the disclosure of information which they properly should have been entitled to see pre-litigation in order to make an informed decision about the merits of their position.

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There was "*violent agreement*" amongst the panel members in support of this view with no one putting forward any arguments in favour of retaining the current rigid and excessively short limitation period.

The second issue for discussion arose out of Regulation 92(2) of the PCR and the requirement that proceedings "*must be started within 30 days beginning with the date when the economic operator first knew or ought to have known the grounds for starting the proceedings had arisen*."

Where there is a breach of the PCR which arises from any early discernible irregularity in the procurement process, the effect of this requirement is to transfer the risk of non-compliance from the procuring authority on to the bidders - even though the legal duty to achieve compliance rests exclusively on the authority.

Thus, if there is a material flaw in the evaluation matrix set out in an ITT, unless a bidder has identified and challenged that flaw within 30 days of the ITT being issued, it will be left without any effective remedy if and when that flaw operates to distort the outcome of the procurement.

Paul Stone highlighted that this issue, especially in procurements being run at a sub-Central Government level, was regularly encouraging perverse behaviour whereby contracting authorities were failing to answer legitimate clarification questions intended to flag such anomalies and/or failing to revise or correct such flaws in reliance on the fact that bidders would either not take formal legal advice or would otherwise be reluctant to challenge the procurement at that stage in the process.

Paul Stone also highlighted that in certain European jurisdictions a compromise approach meant that if a bidder had raised a relevant clarification question concerning a flaw or issue in the bid documentation that had not then been corrected by the procuring authority, the bidders right to subsequently challenge at the end of the process in relation to that flaw or anomaly would be preserved. If wholly eliminating the "*ought to have known*" limb from the limitation test is not an option then this approach might provide a fair compromise to the arbitrary effect of the current regime. It would mean that there was a clear onus on procuring authorities to take clarification questions seriously and to address them properly and fairly and if they failed to do so, or did so inappropriately, then they would face the risk of a potential challenge at the end of the procurement process. Clearly, pressure to "get it right" at an early stage in a procurement is going to cause far less hassle than trying to correct matters post evaluation.

Again, there was general consensus across the Panel that a reform of this nature would clearly be appropriate and would actually lead to a material improvement in the quality of procurements and the conduct of both contracting authorities and bidders in terms of assessing procurement processes properly from the outset.

The Panel also noted that, if at a sub-central government level, some form of procurement tribunal regime was introduced, then in theory the challenges during the conduct of the procurement process could potentially be subject to expedited paper only declaratory relief procedure, so that any anomalies or inconsistencies in a procurement could potentially be resolved very quickly and cost effectively and provide certainty for both parties going forward.

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[1]Note the panel did not discuss but there is also the disconnect between the 10 day standstill period for preliminary feedback before a contract may be concluded and the distinct 30 day period for the bringing of a challenge. The expiry of the standstill period is often another catalyst to the bringing of premature proceedings to stop a contract being concluded.

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