Challenges to procurement decisions

The issues and the pitfalls

BRIEFING - SPRING 2014

An examination of the grounds to challenge a procurement decision, time limits, remedies and pitfalls for public authorities and contractors.

SHARPE PRITCHARD
Solicitors and Parliamentary Agents

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Challenges to procurement decisions The issues and the pitfalls

BACKGROUND

At a glance

- The EU procurement regime requires states to have a system of remedies to provide a means of redress if contracting authorities have not followed the rules.
- Contracting authorities are under a duty to provide information to bidders to enable them to understand why they were unsuccessful.
- The remedies can only be exercised within strict time limits.

Like any system of rules, the EU procurement regime depends on an effective system of enforcement. From the time that the rules were first implemented, Member States needed to have in place a means of redress for bidders who lost out as a result of breaches committed by contracting authorities. The obligations in relation to remedies were originally set out in a separate directive from those setting out the tendering procedures. Since these requirements were imposed on a group of countries with widely varied legal systems, it was not prescriptive about the nature of the means of redress, simply obliging Member States to ensure that bidders who wished to challenge the procurement process were entitled to a review of the decision. Since then, as the rules have become more complex, and the body of case law has built up, the obligations on Member States in relation to remedies have become more prescriptive.

The process derives partly from decided cases and partly from new directives.

The case of *Alcatel*[1] imposed on contracting authorities an obligation to have a "standstill period" between notifying bidders of the outcome of the tendering process and entering into the contract. The purpose of this was to allow disappointed tenderers a window of opportunity in which to prevent the contract being entered into with the successful tenderer. However, when this rule was first introduced, the time was short (ten days) and the burden on the disappointed bidder considerable, since during this period the bidder would have to obtain a court order to prevent the contract being entered into and serve it on the contracting authority.

Life was made easier for those who wished to challenge procurement decisions by the 2009 amendments[2] to the Public Contracts Regulations 2006[3] which provided:

- when notifying bidders of the outcome, details have to be given of reasons why bids were unsuccessful;
- an automatic suspension when procurement decisions were challenged by issuing and serving proceedings. This meant that if there was a challenge by issuing and serving proceedings the entry into the contract was suspended. If the contracting authority wanted to enter into the contract, it would have to go to court and make an application to end the automatic suspension; and

[1] [1999] ECR I-7671

[2] Public Contracts (Amendment) Regulations 2009 SI 2009 No. 2992

[3] SI 2006 No. 5

- a new remedy of ineffectiveness. This means that in certain cases the court can set aside a concluded contract so that a bidder who lost out could be given a second chance if the authority has to run the tender process again. The amendments also introduced a new civil financial penalty where a declaration of ineffectiveness was made.

The strengthening of the remedies regime has gone hand in hand with an increased tendency for unsuccessful bidders to challenge procurement decisions. In the United Kingdom there have been challenges to almost every aspect of the tendering process and authorities have had to ensure that they have minimised the risk of challenge at each stage. The first stages of a challenge, in correspondence or in the early days of proceedings, can be crucial so practitioners should be familiar with key issues so they are well placed to contain a challenge or make sure it is on a sure footing from the outset.

THE COURT'S FUNCTION IN A CHALLENGE

At a glance

- The court's function in a challenge is to review the contracting authority's actions, not to re-mark the bids.

It is not the court's task to embark on a re-marking exercise. The court's role is instead to review the contracting authority's actions to see whether:

- the above rules of public procurement have been applied
- the facts relied upon by the contracting authority are correct
- in relation to matters of judgment or assessment, a manifest error has occurred. (See the discussion below under "Challenges Relating to Tender Evaluation")

These principles are set out in the judgments of Morgan J in *Lion v Firebuy Limited*[4] and Silber J in *Letting International v Newham London Borough Council.*[5]

[4] [2007] EWHC 2179 (Ch)

[5] [2008] EWHC 1583 (QB)

THE GROUNDS FOR CHALLENGE

At a glance

- Public procurement which is not subject to full compliance with the rules can still be challenged for breach of the fundamental principles of EU law.
- A significant number of challenges have arisen from issues relating to evaluation.

In the UK the right of a disaffected bidder to take the contracting authority to court is enshrined in the Public Contracts Regulations 2006.[6] The obligation on a contracting authority to comply with the regulations and any other enforceable community obligation is a statutory duty owed to economic operators. Proceedings for breach of this duty must be commenced in the High Court but are only actionable where a breach causes or risks causing a loss (Regulation 47C) as explained in *Letting International v Newham London Borough Council*[7] . Therefore, (as stated by Moore–Bick LJ in that case) a cause of action will exist if a claimant can show that it has suffered the loss of a significant chance of obtaining the contract. It is unnecessary to show actual loss. However, to receive damages, it will be necessary to prove a loss at trial (as discussed later). The reference to other enforceable community obligations means that rigid adherence to the letter of the rules will not be enough to avoid challenge.

All procurement undertaken by public authorities is still subject to the overriding principles of transparency, non-discrimination and equal treatment under the Treaty on the Functioning of the European Union.

Therefore even public procurement which is not subject to the advertising and tendering requirements of the directive may still be subject to challenge.

In 2006 the Commission widened the scope for challenges by advising that contracts for services where the value was below the EU threshold and for Part B services (i.e. those listed in Part B of the Directive which did not need to be advertised and procured in accordance with the regulations) nonetheless needed to be subject to advertising and tendering sufficient to ensure a reasonable degree of competition. Contracting authorities who believed that they could discount the possibility of a challenge in relation to below threshold and Part B contracts for services needed to think again.

In practice, most of the challenges in the UK have related to allegations of unfairness in evaluating tenders. There have been arguments about alleged non-disclosure of evaluation criteria and whether the tenders were evaluated properly. Challenges have largely come from bidders who have made a substantial investment in the tender process and are seeking to recover these costs. A bidder which has invested little in the process is much less likely to pay good money to lawyers to have the decision overturned, however unfair they think it may have been.

[6] Public Contracts Regulations 2006 regulation 47(1) – as heavily amended in 2009

[7] [2007] EWCA Civ 1522 Court of Appeal.

THE STANDSTILL PERIOD

At a glance

- There is a requirement to send a notice to participants in the tendering process setting out information on the reason for the award.
- The authority must then allow the standstill period to elapse before entering into the contract.

Once a contracting authority has decided on the award of a contract, it cannot simply sign the documents and instruct the contractor to get on with the work. The outcome first needs to be notified to the other bidders to give them the opportunity of taking the authority to court. The requirement for there to be a period between the award of a public contract and the date on which it is entered into is a piece of law formulated by the Court of Justice of the European Union which has since been incorporated in the legislation. In the case of Alcatel the CJEU decided that it was necessary for there to be a standstill period following the contract award to allow bidders who were aggrieved by the outcome of the process to take court action with a view to preventing the contract from being signed. Otherwise, under the law as it then was, once the contract was signed, the bidder's only possible remedy would be damages.

The requirement in relation to the standstill period is now contained in regulation 32A of the Public Contracts Regulations 2006. The period begins when the contracting authority sends a "contract award notice" under Regulation 32(1).

This must set out:

- the criteria for the award of the contract;
- the reasons for the decision including the characteristics and relative advantages and the scores of the addressee's tender and the winning tender;
- the name of the successful bidder; and
- the date when the standstill period will end.

The standstill period is ten days if the communication of the contract award was made electronically, otherwise fifteen days. If there has been no application to the court during the standstill period, the contracting authority can go ahead and award the contract. If there has been such an application, and it has been served on the contracting authority, then the contracting authority cannot proceed with the award of the contract unless it applies to court and the automatic stay is lifted.

Entering into a contract in breach of Regulation 32A engages the second ground of ineffectiveness under Regulation 47K (5) but only if all of the second ground's ingredients are fulfilled. In short, even if a Regulation 32A contract award notice could be regarded as defective, but still announces a standstill period that allows for proceedings to be commenced before the contract is concluded, then any claim surrounding such a defect - by ineffectiveness or otherwise - ought to fall away (see para 55 of *Alstom Transport v Eurostar and Siemens)*[8].

[8] [2011] EWHC 1828 (Ch)

DECLARATIONS OF INEFFECTIVENESS

At a glance

- In cases of serious failures to observe the rules the courts have power to declare a contract ineffective.
- If there has been an OJEU advertisement relating to the procurement, it is unlikely that a declaration of ineffectiveness will be granted for breach of the advertising requirements.

Before 2009 a contracting authority knew at least that, once it had awarded a contract then, whatever the shortcomings in the procurement process, the only remedy available to an economic operator was an award of damages. That changed when the 2009 Remedies Directive introduced a new remedy which requires that a declaration of ineffectiveness must be made where the grounds are made out.

A declaration will render a concluded contract ineffective from the date of the declaration (not retrospectively) with the result that obligations under the contract which have yet to be performed are not to be performed.

For a declaration to be made there must be a breach of Regulation 47A or 47B (namely a breach of duty owed to economic operators) and at least one of the three grounds for ineffectiveness set out in Regulation 47K.

The first ground concerns a failure to publish a contract notice (Regulation 47K(2)-(4)).

The second ground requires the following four conditions all to be satisfied (Regulation 47K(5):

- the contract must have been entered into in breach of the standstill period requirement (under Regulation 32A) or the automatic stay (whether imposed by Regulation 47G, or re-imposed under Regulation 47H);
- there must have been some breach of Regulations 47A or 47B;
- the breach under the first condition must have deprived the tenderer of the possibility of starting proceedings in respect of that breach; and
- the breach of Regulations 47A or 47B must have affected the chances of the tenderer obtaining the contract.

The third ground relates to frameworks and dynamic purchasing systems.

The most likely ground for making such an order will normally be the first ground.

There is a very limited discretion not to make a declaration of ineffectiveness if there are overriding reasons relating to the general public interest why such a declaration should not be made. (Regulation 47L). In that rare event, the court must instead order at least one remedy under Regulation 47N(3) i.e. shortening the duration of the contract and/or imposing a civil financial penalty.

There are not going to be many cases in which a contracting authority simply ignores its obligations to advertise a public contract.

The Office of Government Commerce (as it then was) advised in its guidance[9] that a declaration of ineffectiveness could be granted where there had been an advertisement but the subsequent contract is outside the scope of that notice or where there had been a variation of an existing contract in circumstances where the scope and scale of the change was such that a new OJEU advertisement was required but no advertisement was made.

The OGC also warned that there could be breaches in cases where a procurement was categorised as Part B when it was Part A and as a result of the incorrect use of the negotiated procedure.

This guidance, however, appears to be overcautious and was not followed in the only decided case on the issue. In the *Eurostar* case[10], the court decided that the test to be applied in considering whether there was an absence of a proper notice was "mechanistic" and to be decided on the particular facts in each case. However, that did not mean publishing a notice any time before the conclusion of the contract would cure the failure to advertise. If the advertisement was capable of being related to the procedure, that was sufficient. In *Eurostar* a "qualification notice" at the commencement was held to be sufficient to provide requisite notice so as to exclude the first ground even though the required contract notice had not been published. So, if a notice was published a little late – say in an open procedure where insufficient time was allowed for submitting tenders – the first ground would probably not be available. In contrast, if there was a serious breach of the requirements relating to content and or timescales which deprived the notice of practical value, then it is possible that the first ground would be available.

With regard to the second ground, the court noted that ineffectiveness was intended to apply where proceedings could not be brought to prevent a contract from being entered into. Here, however, the claim was started before the contract was awarded so it could not be argued that the claimants had been deprived of an opportunity of bringing proceedings.

The claim was therefore struck out.

[9] Implementation of the Remedies Directive: OGC Guidance on the 2009 amending regulations 18th December 2009

[10] Alstom Transport v Eurostar International Limited [2011] EWHC 1828 (Ch)

Safeguards against applications for declarations of ineffectiveness

At a glance

- Contracting authorities can protect themselves by publishing notices.

There are two means by which contracting authorities can protect themselves against possible applications for declarations of ineffectiveness. These are voluntary ex-ante transparency notices and contract award notices.

If an authority awards a contract and considers that the EU procurement rules do not apply, it may publish a notice describing the nature of the contract, the details of the economic operator to which the contract was awarded and a justification of the decision of the contracting authority to award the contract without the prior publication of a contract notice. This is known as a voluntary ex-ante transparency notice (sometimes called a "VEAT"). Once this has been done, and the authority has, following the publication of the notice, waited ten days before entering into the contract without a challenge having been commenced, then the court will not be able to make a declaration of ineffectiveness.

If a contract is awarded without prior publication of a contract notice, the authority may publish a contract award notice following the award of the contract. If the contract award notice includes justification of the decision of the contracting authority to award the contract without prior publication of a contract notice, then the time limit for taking proceedings is the reduced period of 30 days.

Time limits for declarations of ineffectiveness

At a glance

- Once a potential claimant knows it has grounds for proceedings it has 30 days in which to commence them.
- No proceedings can be commenced more than six months after the date of the breach.

There are special time limits relating to starting proceedings for declarations of ineffectiveness (see Regulation 47E).

In the case of a contract awarded without publication of a prior contract notice, the time limit is 10 days from a VEAT notice (see below) and 30 days of the date of a contract award notice where that notice contains the authority's explanation as to why it considered that no prior contract award notice was required.

If the contracting authority has informed the bidder of the conclusion of the contract and provided a summary of the reasons why it was unsuccessful, the 30 day time limit begins on the day after the bidder was informed of the conclusion of the contract or, if later, the relevant reasons for the award. The summary of the reasons does not for this purpose need to be particularly extensive and does not have to be in writing[11].

In all other cases the limit is 6 months from the date the contract is signed.

[11] Alstom Transport v Eurostar International Limited [2011] EWHC 1828 (Ch)

Additional consequences

At a glance

- If a court makes a declaration of ineffectiveness it must impose a civil financial penalty and can make other orders.

If a court makes a declaration of ineffectiveness then in addition it must impose a civil financial penalty i.e. a fine. This must be "effective, proportionate and dissuasive". It needs to reflect the seriousness of the breach and the authority's behaviour. Other than this there is no guidance given as to the level of fines but clearly for public bodies, including states, a fine is going to have to be very large if it is to be dissuasive.

If it orders ineffectiveness then the court may make additional orders under Regulation 47M to deal with the consequences and implications in order to achieve an outcome which the court considers is just in all of the circumstances.

TIME LIMITS FOR CHALLENGES

At a glance

- Proceedings must be commenced within 30 days of the date on which the claimant knew or ought to have known it had grounds for making a claim.
- The court has power to extend this period for good reason subject to an overall time limit of three months.

There have been extensive changes to the time limits for bringing procurement challenges. The requirement now is that proceedings must be commenced within 30 days of the date on which the economic operator knew or ought to have known that the grounds for starting the proceedings had arisen. The court has power to extend this time limit for "good reason".

The meaning of the expression "knew or ought to have known" was considered by the Court of Appeal in *SITA UK Ltd v GMWDA*[12]. The court stated that "the standard ought to be a knowledge of the facts which apparently clearly indicate though they need not absolutely prove, an infringement." The court also held that time does not start afresh upon knowledge of further breaches of the same duty.

The difficulty that contractors face in deciding whether to take action in relation to a breach of the rules is illustrated by *Turning Point v Norfolk County Council*[13]. The council were seeking bids for a contract for the provision of drug and alcohol treatment services. The claimant, TPL, considered that it had not been given enough information about transferring staff to price their bid properly. It submitted various clarification requests but did not receive all the information it considered was needed. On 9th February 2011 it submitted a bid and qualified it by stating that it had not priced for TUPE costs.

On 12th March 2011 the council notified TPL that it had rejected its tender as it was qualified and therefore non-compliant. On 28th March 2011 TPL commenced proceedings, arguing that the lack of clarity and failure to provide information meant that the tender process was unfair and unlawful. The council asked the court to strike out the claim on the basis that it was not commenced within the permitted time limit. The court agreed. TPL must have had knowledge of the relevant breach, the failure to disclose relevant information, by 9th February at the latest.

This case is an example of time running and expiring before the outcome of the tender was known. *Mears Ltd v. Leeds City Council*[14] is also an example of grounds arising before a tenderer is eliminated and gives a useful summary at paragraph 70 of previous decisions concerning the principles of when time starts running. *Turning Point* also serves as a reminder that there is no general rule that time cannot start to run until an unsuccessful tenderer is given reasons why it failed.

The claim was therefore out of time. TPL asked the court to extend time on the basis that it had commenced proceedings promptly and that it was unrealistic to have expected it to issue proceedings before the outcome of the tender process was known. The court declined to extend time. The 30 day time limit meant 30 days not 30 days plus a reasonably short period. A "good reason" would need to be something beyond the control of the claimant, such as illness of the bid team members. (See also *Mermec v Network Rail Infrastructure*[15] for a discussion on extending time).

[12] [2011] EWCA Civ 156

[13] [2012] EWHC 2121

[14] [2011] EWCA 2694 (TCC)

[15] [2011] EWHC 1847

The effect of this case is that, when faced with an apparent breach during the course of a procurement exercise the bidder will either have to commence proceedings, thus bringing to a halt a competition that it might win, or accept it and continue to participate in the process.

Although a permission for judicial review case to challenge a decision to outsource a significant amount of local government services, *R (Nash) v LB of Barnet*[16], is relevant to the question of when the grounds for starting proceedings first arose. Here, the council decided in 2010 to procure the outsourcing. It published OJEU notices in March and June 2011. It decided to award in December and January 2013. Proceedings were started in January 2013 on the basis that the grounds for bringing the claim arose when the final decision was made to award. At both first instance and in the Court of Appeal it was held that all of the claims (except the Equality Act one) were time barred because the challenge in substance was to the earlier decisions to procure. Of importance to future cases is the decision at both levels that *R (Burkett) v Hammersmith & Fulham LBC*[17] is not authority for the argument that in every case where a public law decision is made at the end of a decision making process, but there are one or a number of previous decisions, time will only run from the date of the latest decision. If the later decisions are distinct and concern different stages in the process, then it is necessary to decide which decision is being challenged. If it really is an earlier decision, then making a subsequent decision in the same process does not start time running afresh. In the context of this procurement *Burkett* was distinguished and that is likely to be so in most procurement cases which involve multiple decisions in one single procurement process.

D&G Cars v Essex Police Authority[18] is of interest as it represents a pitfall when it comes to amending a claim. Here the claimant sought permission to amend in order to plead new claims of bias, tender rigging and bad faith which only emerged when disclosure had been given. The claimant sought to introduce those new claims by amendment (arguing they were not time barred as they were based on the same facts and not a new cause of action) after expiration of the 30 day time limit from the date of the facts in the originally pleaded causes of action. Permission was refused on the grounds that they were new causes of action which were time barred. It is not clear why the claimants did not seek to amend on the basis that the time limit did not start running until the claimant received the relevant disclosure – being the date when it knew or ought to have known that the grounds for bringing the claim had arisen for the purposes of Regulation 47D.

A Scottish decision in *Nationwide Gritting Services Ltd v. The Scottish Ministers*[19] might seem like an inroad into the strict application that the time limit, (as per *Mermec* for example) runs from when the claimant had possession of the basic facts which would lead to a reasonable belief that there is a claim. However, an important distinguishing feature was that the claimant in *Nationwide* was not a disappointed tenderer but only an economic operator in the same field of activity (supplier of de-icing salt) who had heard rumours of a direct award without the publication of a contract notice or contract award notice. It made some enquires and some information was given and the Ministers claimed that the information given was sufficient to make time run. That argument was rejected and it was held that the claimant had mere unsupported suspicions that the defendant may have acted unlawfully and had no hard information.

16 [2013] EWCA Civ 1004
17 [2002] 1 WLR 1593
18 [2013] EWCA Civ 514
19 [2013] CSOH 119

DEVELOPMENTS IN DISCLOSURE OF DOCUMENTS

At a glance

- In certain cases it will be appropriate to give pre-action or early specific disclosure of documents relating to the treatment and marking of a claimant's tender.

Pre-action disclosure under CPR 31.16 or early specific disclosure under CPR 31.12 can be crucial to the decision to start a claim or continue with it and such disclosure balances out the inequality of information between the contracting authority and the economic operator. *Alstom Transport v Eurostar International Ltd*[20] supported the argument that a claimant was to be provided with the information necessary for it to know whether it had real grounds for complaint.

Roche Diagnostics Ltd v Mid Yorkshire Hospitals NHS Trust[21] is probably the leading case on such disclosure. Here *Roche* wanted voluntary disclosure relating to the marking of its tender as it suspected that the trust had misunderstood or misapplied its evaluation criteria. The trust refused but it did produce a number of after the event spreadsheets which purported to explain its application of the evaluation criteria. Unfortunately the various spreadsheets contained inconsistencies and errors which Roche relied on in applying for early specific disclosure of primary evaluation documents and also pre-action disclosure in respect of an interim contract. Roche partially succeeded in both applications. The judgment emphasised the importance of primary evaluation documents being disclosed at an early stage to assess the strength of a claim. That would include any scoring guides, marked scoring sheets and evaluation notes and any evaluation reports. It is unlikely that *Roche* will be restricted to its own facts – the erroneous spreadsheets- and will have a general application. However, it should be noted that the application in *Roche* was principally concerned with the claimant being provided with the evaluation documents relating to its own bid. If disclosure is expanded to other tenderers' documentation then confidentiality restrictions will become relevant as well.

Early specific disclosure under CPR 31.12 was considered after *Roche* in *Pearson Driving Assessments Ltd v the Minster for the Cabinet*[22]. The application there was made in advance of an application to lift the automatic contract making suspension and was framed to assist resisting that application. The claimant there relied on *Roche*. The claimant was looking for the disclosure to show that it had a strong seriously arguable case on the merits as that was an essential consideration for the court when it came to determine whether the balance of convenience strongly favoured maintaining or lifting the suspension. The application failed because it appeared plain on the face of the claimant's pleadings that it already had ample material to demonstrate there was a serious issue to be tried.

[20] [2011] EWHC 1828 (Ch)

[21] [2013] EWHC 933

[22] [2013] EWHC 2082

Similarly, during the *Covanta Energy Ltd –v- Merseyside Waste Disposal Authority*[23] case the court also considered an early specific disclosure application in advance of a similar automatic suspension hearing. Again the claimant relied on *Roche* but again failed – principally because the judge decided that the disclosure was not necessary in order to deal fairly with the pending automatic suspension application; the defendant in that case did not dispute that there was a serious issue to be tried; a substantial amount of information had already been provided by the defendant and the claimant had been able to plead a very full claim in its particulars.

Whilst *Roche* is clearly a case in favour of a claimant seeking pre-action or early specific disclosure, the approach in *Pearson* and *Covanta* demonstrates that the entitlement to this type of disclosure is not a matter of right or formality.

REMEDIES OTHER THAN DAMAGES

At a glance

- In addition to an award of damages, the courts have a range of other remedies for breaches of the rules depending on whether the contract has been entered into.

The 2009 directive also required Member States to make available a variety of remedies besides damages which the courts could grant in response to breaches of the procurement rules. The court has the following interim powers:

- to end, modify or restore the automatic stay;
- to suspend the contract award procedure; and
- to suspend the implementation of any decision or action taken by the contracting authority in the course of the procurement procedure.

The following remedies are available when the contract has not been entered into:

- to order the setting aside of any decision or action;
- to order the amendment of any document; and
- to award damages.

If the contract has been entered into then (unless there are grounds for seeking a declaration of ineffectiveness), the court's powers are limited to awarding damages.

[23] [2013] EWHC 2964

TENDER EVALUATION

At a glance

- There is an obligation to inform bidders about evaluation criteria.
- When evaluating tenders authorities cannot take into account anything that was not disclosed if this could have made a difference to how tenderers prepared their bids.
- Bidders can only challenge the scoring of their tenders if they can show there has been a manifest error by the authority.

There are two main ways in which an aggrieved bidder can challenge an evaluation. The first is by arguing that the authority did not provide enough information about how it was going to undertake the evaluation. The second is to argue that the authority simply got it wrong in terms of the marking.

The best example of a challenge on the first of these grounds is the case of *Letting International v Newham London Borough Council*[24]. The council's award of a contract was quashed because of failure to disclose some of the criteria it was using to evaluate tenders. The council considered these to be sub-criteria and that they did not need to be disclosed. The critical issue though is not how they are labelled but whether they constituted "criteria" which needed to be disclosed in accordance with the legislation. The court judged them to be criteria and held that they should therefore have been disclosed. In addition, the council had awarded additional marks for responses in the bid which exceeded its requirements without informing bidders that it was proposing to do this. The claimant's witness gave evidence that if she had been given this information, it would have affected the way in which the bid was prepared.

The strict approach to what constitutes a criterion adopted by Silber J in the *Newham* case has been modified by the decision of the Court of Appeal in *Varney v Hertfordshire County Council*[25]. The council had stated that tenders would be evaluated on the basis of:

- the most economically advantageous tender to the county council (65%); and
- resources (including staff) to be allocated to the delivery of the services and the manner in which the tenderer proposes to provide the services in order to deliver outstanding customer satisfaction (35%).

The bidders were required to complete a series of return schedules setting out how they would deliver the services. At the beginning of each of these schedules the council set out in some detail its requirements in terms of service delivery.

In the *Newham* case Silber J had adopted a dictionary definition of the word "criterion" defining it as meaning a "principle, standard or test by which a thing is judged, assessed or identified." The Court of Appeal in *Varney* remarked that this would require absolutely everything which influenced the award decision to be disclosed. This was described as "impracticable" and not required under EU law. Instead it applied the test set out in the CJEU case of *ATI EAC v ACTV Venezia*[26] that sub-criteria and their weightings do not need to be

[24] [2008] EWHC 1583 (QB)

[25] [2011] EWCA Civ 708

[26] Case C-331/04

disclosed if they:

- do not alter the criteria for the award of the contract set out in the contract documents or contract notice;
- could not have affected the bid preparation if disclosed; and
- were not adopted on the basis of matters likely to give rise to discrimination against one of the tenderers.

The key lesson is that nothing must be done which would have changed the bid preparation. The challenge in the *Newham* case would have been successful even if the court had not adopted the wide definition of the word "criterion" favoured by Silber J.

Where a bidder seeks to challenge the award of the contract on the basis that the tenders were scored incorrectly then it needs to show that there was a manifest error on the part of the authority. The approach adopted by the courts is summarised in the judgment of Morgan J in *Lion Apparel Systems Limited v Firebuy Limited*[27]:

35. The court must carry out its review with the appropriate degree of scrutiny to ensure that the above principles for public procurement have been complied with, that the facts relied upon by the Authority are correct and that there is no manifest error of assessment or misuse of power.

36. If the Authority has not complied with its obligations as to equality, transparency or objectivity, then there is no scope for the Authority to have a "margin of appreciation" as to the extent to which it will, or will not, comply with its obligations.

37. In relation to matters of judgment, or assessment, the Authority does have a margin of appreciation so that the court should only disturb the Authority's decision where it has committed a "manifest error".

38. When referring to "manifest" error, the word "manifest" does not require an exaggerated description of obviousness. A case of "manifest error" is a case where an error has clearly been made."

In the *Newham* case it was also argued that there were manifest errors in the scoring. The judge went through the specific complaints and found manifest error in two instances: one where the council's witness agreed that the score was too low, and the other where the witness was unable to explain the score. In the case of most of the scores complained about by the bidder, the judge found there to be no manifest error. This aspect of the claimant's case was unsuccessful.

[27] [2007] EWHC 2179 (Ch)

ABNORMALLY LOW TENDERS

At a glance

- Contracting authorities cannot reject a tender on the grounds that it is abnormally low without seeking clarification.
- The duty to investigate abnormally low tenders is a duty owed to all the participants in the tender process.

This is a difficult area as authorities may face challenges both for rejection of tenders as abnormally low and for failure to reject a tender as abnormally low. Under the public procurement directive there is a requirement to seek clarification before rejecting a tender on the basis that it is abnormally low, in the following terms (Article 55):

> "If, for a given contract, tenders appear to be abnormally low in relation to the goods, works or services, the contracting authority shall, before it may reject those tenders, request in writing details of the constituent elements of the tender which it considers relevant."

In the case of *Varney v Hertfordshire County Council* one of the complaints of the unsuccessful bidder was that the council had failed to carry out an investigation of "suspect tenders". It was argued that the council should have carried out an analysis of the tenders where prices appeared to be abnormally low. This point was argued at first instance before Flaux J. It was not argued before the Court of Appeal. The argument relied on the decision in M*orrison Facilities Services Limited v Norwich City Council*[28] in which the court had concluded that it was seriously arguable (for the purpose of granting an interim injunction) that the authority had a duty to investigate tenders which it suspected of being abnormally low. In *Varney* Flaux J stated that there was no basis for considering that there was a duty to investigate all tenders which were abnormally low irrespective of whether they were going to be rejected.

However, in the CJEU case of *SAG ELV Slovensko v Urad pre verjne obstaravanie*[29] the court concluded that there is an obligation on contracting authorities to seek clarification of all abnormally low tenders. The case concerned a contract for the collection of tolls on motorways and other roads. One of the companies which had made a bid was asked for clarification of its low prices and was subsequently rejected on this ground. The Supreme Court in Slovakia referred certain questions to the CJEU for a preliminary ruling. These included the following question:

> "Is a contracting authority's procedure, according to which it is not obliged to request a tenderer to clarify an abnormally low price, in conformity with Article 55 of [Directive 2004/18]?"

Article 55 is set out at the beginning of this section. In its judgment the court stated, with reference to Article 55:

> "It follows clearly from those provisions, which are stated in a mandatory manner, that the European Union legislature intended to require the awarding authority to examine the details of tenders which are abnormally low, and for that purpose obliges it to

[28] [2010] EWHC 487 (Ch)

[29] Case C-599/10

> furnish the necessary explanations to demonstrate that its tender is genuine, constitutes a fundamental requirement of Directive 2004/18, in order to prevent the contracting authority from acting in an arbitrary manner and to ensure healthy competition between undertakings."

The court concluded:

> "Article 55 precludes a contracting authority from taking the view that it is not required to ask a tenderer to clarify an abnormally low price."

This appears to be something of an "over-interpretation" of Article 55 which requires the contracting authority to request the clarification "before it may reject those tenders". This indicates that the intention of the directive was to ensure that authorities did not reject bids as being unrealistically low without giving the bidders a chance to explain their pricing. It says nothing about seeking clarification before a tender is accepted. It might be assumed from this that if the authority wished to accept an abnormally low tender then it was a matter for that authority whether to accept it and take the risk of failure or whether to seek clarification and reject it as abnormally low if the explanation was not satisfactory. However, it appears probable that, following this case, courts will accept that the duty to seek clarification of abnormally low tenders is a duty owed to all the bidders and not just those whose bids the authority is proposing to reject.

LIFTING THE AUTOMATIC SUSPENSION

At a glance

- The *American Cyanamid* principles apply when a court is considering whether to lift the automatic suspension.
- In most procurement challenges, damages will be considered to be an adequate remedy and the suspension will be ended.

Since the introduction in 2009 of the automatic suspensions, the court's general predisposition is to end the automatic suspension and regard damages as an adequate remedy. There are exceptions though.

In the *Newham* case, the unsuccessful bidder sought an interim injunction to prevent the council entering into a contract. The injunction was granted for two reasons: first, the difficulty in assessing damages meant that damages would not be an adequate remedy; second the claimants were also asking for an order setting aside a decision to award the contract, which was of some commercial value. This case and two others where the suspension was not ended overall are not the norm. The fact that damages are difficult to assess should not really a reason why they are an inadequate remedy. If a commercial organisation has lost a tender, then its loss is its projected profit, or a proportion of that reflecting its chance of winning the tender if the process had been conducted fairly.

It has not lost reputation or anything else that cannot easily be compensated by damages. The same can be said of the remedy of setting the tender decision aside. The Court of Appeal said in *Letting* this had commercial value. The key word here is "commercial". It means that it can be given a monetary value paid.

In *Halo Trust v Secretary of State for International Development*[30], the High Court gave guidance on lifting an automatic suspension. It decided that the *American Cyanamid*[31] principles apply:

- Is there a serious question to be tried? If so,
- Where does the balance of convenience lie?
- Would damages be an adequate remedy?

The court can also take into account the public interest in awarding contracts and the impact on others. The case concerned mine clearance and development in Cambodia. The court said that if there was continuing uncertainty as to the contract award, this would lead to disruption of the mine clearance programme possibly leading to injury and loss of life.

In *Exel Europe Ltd v University Hospitals Coventry and Warwickshire NHS Trust*[32] the Court stated that there is no presumption in favour of maintaining the suspension and the court's approach is as if the statutory suspension under 47G(1) was not in place. The strength or weakness of the claim is also relevant. See also *Indigo v Colchester Institute*[33].

In *Morrison Facilities Services Limited v Norwich City Council*[34] the court held

[30] [2011] EWHC 87
[31] American Cyanamid v Ethicon [1975] AC 396
[32] [2010] EWHC 3332
[33] [2010] EWHC 3237 (QB)
[34] [2010] EWHC 487

that damages would not be an adequate remedy and that the balance of convenience indicated that the status quo should be preserved. The basis for this was simply that the calculation of damages would be problematic. The case partly concerned non-disclosure of relevant information about the evaluation criteria. The judge considered that in this type of claim it was very difficult to say what chance of success has been lost. The judgment in this case is not typical of the current approach.

The weight of emphasis in favour of ending the automatic suspension was illustrated in *Chigwell (Shepherds Bush) v ASRA Greater London Housing Association Ltd*[35] as was the relevance of the public interest in ensuring contracts are awarded promptly when determining the balance of convenience.

Covanta Energy Ltd v. Merseyside Disposal Authority[36] represents a rare example of the Court refusing to allow a contracting authority to enter into the contract that was the subject of the challenge. That came about not by refusing to end the contract making suspension under Regulation 47G, but by the grant of an injunction. That was because the procurement was so old (7 years) the post-2011 amended Regulations did not apply. The Judge's approach though was the same and he held that: (i) damages would not be an adequate remedy for the claimant because of the difficulty in calculating them on the specific facts of this case and the nature of the claim so adopting the approach in Morrisons – the ascertainment of damages was held to be virtually impossible; (ii) the delay in entering into the contract would cause some prejudice to the defendant in that it would defer the diversion from landfill but (crucially) the trial could be held in 7 months (a speedy trial was also ordered in Morrisons); (iii) when that time frame was compared with the 7 year procurement and the 30-35 year duration of the contract, the delay caused by the injunction was regarded as "modest".

This judgment is significant as it accepted that the balance of convenience lay in favour of preventing entry into the Contract and counters the general trend of the Court saying it will simply do its best to quantify damages and that is sufficient - although *Metropolitan Resources v SOS for the Home Department*[37] also found that damages were not an adequate remedy due the difficulty in calculating them on a loss of a chance basis but it still lifted the automatic suspension. That case also referred to the unsatisfactory feature of having to extend a current contract if the suspension is not ended; the relevance of the adequacy of the cross–undertaking in damages (under Regulation 47H(3)) if the suspension is not lifted.

[35] [2012] EWHC 2746 (QB)
[36] [2013] EWHC 2922 (TCC)
[37] [2011] EWHC 1186 (Ch)

EXPERT EVIDENCE

At a glance

- It will rarely be appropriate for the court to hear expert evidence on the issue of liability in procurement challenges.

In the case of *BY Development Ltd v Covent Garden Market Authority*[38] the court considered the circumstances in which it would be appropriate for expert evidence to be adduced in procurement challenges in respect of liability. (Expert witnesses are commonly used in disputes over quantum.) The answer is that, in relation to liability, such circumstances are going to be very rare.

The claimants had submitted an unsuccessful bid for the redevelopment of New Covent Garden Market. The areas in which they had been marked down included their approach to planning and financial risk. They sought permission to adduce expert evidence on both planning and finance issues.

Prior to the hearing of the application they identified the questions on which they were seeking to adduce expert evidence. For the most part the questions they proposed to ask the experts amounted to whether the defendants had been correct to evaluate the planning and financial criteria in the way they did. The court concluded that in a case involving allegations of manifest error or unfairness, expert evidence would not generally be admissible in procurement cases.

This was for three reasons:

- the court is carrying out a limited review of the public body's decision. It is not making its own decision about the merits;
- the public body is likely to include experts or to have taken expert advice; and
- such evidence may usurp the court's function.

The court referred to some procurement cases in which expert evidence had been permitted but indicated that these were all for particular special reasons. Expert evidence could sometimes be admissible in cases involving manifest error. It could be required by way of technical explanatory evidence. There might also be unusual cases where such evidence is relevant and necessary to allow the court to reach a conclusion on manifest error, especially when the issue is specific and discrete, such as a debate about one of the criteria or complex issues of causation. The present case was not one where expert evidence was needed.

[38] [2012] EWHC 2546 (TCC)

IMPLIED CONTRACT CLAIMS

At a glance

- A procurement exercise can give rise to implied contractual obligations.
- In cases where the procurement rules apply in full there is no basis for the imposition of additional implied contractual safeguards.

In a number of the challenges for breaches of the procurement rules there have also been attempts to rely on the existence of a private law contractual obligation. This is partly because the limitation period for claims under the Public Contracts Regulations is the inconveniently short period of 30 days whereas claims in contract allow the luxury of a six year limitation period. The idea that the tendering process gives rise to a contractual claim derives from the case of *Blackpool & Fylde Aero Club v Blackpool Borough Council*[39] in which the court held that there could be an implied contract which gave rise to a duty to consider a tender submitted in accordance with the requirements of an invitation to tender. In *Harmon CFEM Facades v Corporate Officer of the House of Commons*[40] the court found breaches both of the procurement rules and of an implied contractual duty to comply with the legislative requirements.

In the first instance cases of *Lion Apparel Systems Limited v Firebuy and Varney v Hertfordshire County Council* the courts held that the fact that there was a detailed tender procedure governed by the regulations left no room for the implication of an implied contract claim.

This approach was followed by the Court of Appeal in *JBW Limited v Ministry of Justice*[41] where the claimant was prevented from arguing a breach of the procurement rules as a result of the court's finding that the contract (for the provision of bailiff services) was a services concession contract and that therefore the rules did not apply. The claimants therefore argued that there was a breach of an implied contract. This raised the question of the scope of this contract. The court was prepared to accept that there was a duty to consider the tender as required by the *Blackpool Aero Club* case and also that such consideration should be in good faith. However it rejected the claim that the implied contract should include obligations of transparency and equal treatment on the basis that:

- it was not necessary to imply such terms to give efficacy to the contract;
- there could not have been a common intention to imply such terms, given that the Ministry had always argued that the procurement rules did not apply; and
- the reservation of a power to alter the terms of the tender process was inconsistent with an obligation to act with transparency.

After this case and a bank of others including *Varney, Turning Point* and *Exel* it seems unarguable to maintain that a procurement creates an implied contract in cases where the regulations apply in full.

[39] [1990] 1 WLR 1195

[40] 67 Con LR 1

[41] [2012] EWCA Civ 8

CLARIFICATIONS AND MISTAKES

At a glance

- Contracting authorities to seek clarifications provided this does not change the bids.
- There is no duty to give bidders the opportunity to correct mistakes.

The principles as to when an authority should clarify an ambiguity or establish whether an error in a tender has occurred before it is rejected for those reasons can be found in *Tideland Signal Limited v Commission of EU*[42]. While there is no duty to seek clarification in every case of ambiguity, in cases where surrounding circumstances indicate an ambiguity probably has a simple explanation and is capable of being easily resolved then it would be contrary to the requirements of good administration for an authority to reject a tender without exercising its power to seek clarification. A failure to do so could be a manifest error. The judge in *Hoole*[43] (see below) considered the duty to seek clarification:

> "In my judgment, the critical factor which gives rise, or may give rise, to a duty to seek clarification is where the tender as it stands cannot be properly considered because it is ambiguous or incomplete or contains an obvious clerical error rendering suspect that part of the bid. If the inability to proceed with a bid, which may be an advantageous addition to the competitive process, can be resolved easily and quickly it should be done, assuming there is no change to the bid or risk of that happening. If there is an obvious error or ambiguity or gap, clarifying it does not change the bid because, objectively the bid never positively said otherwise".

The duty to clarify depends on the circumstances in each case including whether:

- there is an express or implied power in the invitation to tender to do so;
- it is fair to all tenderers to ask for clarification from one tenderer rather than all; and
- clarification would allow a material amendment to that tender.

The other side of the coin is whether disclosed selection criteria are sufficiently clear to tenderers. The relevant principle is to be found in *SIAC Construction v Mayo County Council*[44] and is a test based on whether the criterion allows all reasonably well informed and normally diligent tenderers to interpret it in the same way. There has been a recent discussion and application of this test in *William Clinton v. Department of Employment*[45].

The leading case on the rejection of tenders because of mistakes and/or their late submission is *Leadbitter v Devon County Council*[46]. The tenderer had forgotten to upload an important document with its tender. It remedied that error in an impermissible manner and after the deadline had expired. The authority refused to extend the deadline for this purpose and its refusal was upheld by the court. That judgment acknowledged that authorities have a discretion to reject for errors /late submission or accept them despite these shortcomings. This has to be exercised proportionately. In permitting them, authorities must guard against

[42] [2002] ECR II 3781
[43] [2011] EWHC 886
[44] [2002] All ER (EC) 272
[45] [2012] NICA 48
[46] [2009] EWHC 930

breaching the principle of equal treatment. Accordingly, in *Azam &Co v LSC*[47] the claimant missed the submission deadline by 7 days, claiming that the authority had failed to inform it of the deadline and it was disproportionate not to extend it. Its claim failed and Rimer LJ held:

> "A deadline is a necessary part of a tendering process. The deadline was plainly stated in readily accessible documents. There was no fault by the respondents: they needed to be conscious of their duty to treat tenderers and potential tenderers equally and to avoid suggestions of favouritism towards a particular party … The need for an extension could not be attributable to any fault on the part of the respondents or to any factor outside the control of the appellants."

Similarly in *R (Hoole & Co) v LSC*[48] *and Harrow Solicitors v LSC*[49] the claimants had made mistakes in completing answers in their tenders. Had they not done so they would have received higher scores, although in *Hoole* the relevant and correct information appeared elsewhere in the tender and in *Harrow* it was argued that the correct information could have been easily ascertained. In *Hoole* it was argued that there was a duty to take account of information of which it was aware from the other part of the tender. That argument was rejected and such a duty was:-

> "…severely circumscribed where there is a competitive tender and an over-riding duty to treat all tenders equally … Any general duty to give an applicant an opportunity to correct errors in the absence of fault by the defendant yields to the duty to apply the rules of the competition consistently and fairly between all applicants, and not afford an individual applicant an opportunity to amend the bid and improve its prospects of success in the competition after the submission date had passed".

In *Harrow* the idea that the authority should investigate whether the applicant meant something different to its answer was rejected. The claim also failed because to allow the answer to be corrected would have amounted to an impermissible change after submission of tenders.

R (All About Rights Law Practice) v Lord Chancellor[50] concerned a case where a mandatory tender form was submitted blank and the tender was rejected for that failure. The decision was challenged by way of judicial review on the grounds that the rejection was not proportionate as the error was easy to remedy whereas the adverse consequences were very significant. Secondly, the rejection amounted to unequal treatment as in other comparable situations errors were allowed to be corrected. Both grounds were rejected. The first ground because it would not be a correction but new improved bid given the original was blank. The second ground because the other tender situations were not comparable.

[47] [2010] EWCA Civ 1194

[48] [2011] EWHC 886

[49] [2011] EWHC 1087

[50] [2013] EWHC 3461

AWARDS OF DAMAGES

At a glance

- Claimants who successfully challenge procurement decisions are entitled to damages based on the profits they would have made.

If there has been a breach of the regulations and that has caused a loss what is the basis for the calculation of those damages? A "loss" in this context usually means that were it not for that breach the claimant could have been awarded the contract or there was a substantial chance that it could have been.

As stated in the *Exel* judgment:

> "It is now fairly well established that a claimant who successfully challenges a procurement exercise will be entitled to damages, usually calculable on a lost opportunity or chance basis".

As we have seen from *Lettings* the chance has to be significant otherwise it will not be actionable. This is generally thought to be around a 15 per cent to 20 per cent chance. The calculation of damages will be by reference to the profit that would have been made. So if a successful claimant is held to have had a 50 per cent chance of winning, then the starting point is that it would receive 50 per cent of the profit that it would have made were it not for the breach.

As has been noted earlier calculating damages in loss of chance cases can be difficult - see also paragraphs 44 and 48 (e) of the judgment in *Covanta*[51].

[51] [2013] EWHC 2922 (TCC)

[52] [2009] EWCA Civ 1011

JUDICIAL REVIEW

At a glance

- It is possible for those with a sufficient interest to challenge procurement decisions by way of judicial review.
- In limited circumstances an economic operator can challenge by way of judicial review.

Since the only parties to have suffered loss as a result of breaches of the procurement rules will be the contractors who took part in the process, it might be thought that only those contractors would have the right to challenge the award decision.

However, the Court of Appeal has decided that, in certain circumstances, third parties may apply for procurement decisions to be set aside.

In the case of *R (Chandler) v London Borough of Camden* [52] . Mrs Chandler, who was opposed to the foundation of an academy school by her local authority, sought to challenge its decision by arguing that its failure to have an open competition was a breach of the procurement rules. Both the High Court and the Court of Appeal said that the rules did not apply. However the courts did not reject out of hand the notion that people who were not involved in the process might still be able to challenge its legality. The Court of Appeal held that breaches of the procurement rules could in certain circumstances give rise to a public law remedy:

> "We incline to the view that an individual who has a sufficient interest in compliance with the public procurement regime in the sense that he is affected in some identifiable way, but is not himself

> an economic operator who could pursue remedies under Reg 47, can bring judicial review proceedings to prevent non-compliance with the regulations or the obligations derived from the Treaty especially before any infringement takes place. He may have such an interest if he can show that performance of the competitive tendering procedure in the Directive or of the obligation under the Treaty might have led to a different outcome that would have had a direct impact on him. We can also envisage cases where the gravity of a departure from public law obligations may justify the grant of a public law remedy in any event" (paragraph 77).

What then is meant by "sufficient interest" in this context? Mrs Chandler, the court made plain, did not come into this category. Her interest was simply in campaigning against the academy school, not in upholding the integrity of the procurement process.

The issue was considered again in *R (Unison) v NHS Wiltshire Primary Care Trust and others*[53]. The trade union Unison challenged the decision by the primary care trust to enter into a contract with a company called NHS Shared Business Services Ltd which involved the outsourcing of family health services. UNISON claimed that there had been non-compliance with the EU procurement rules. Eady J considered the tests in *Chandler* (set out above) and came to the view that *Unison* could not show that there would have been a different outcome if the rules had been followed. Nor could it show that its members were affected in some identifiable way. Nor was he persuaded that the gravity of the departure justified a public law remedy being invoked. This case is also useful when considering time limits for commencing proceedings.

In *Connolly's Application for Judicial Review*[54] the Northern Ireland Court of Appeal indicated that the tests in *Chandler* needed to be interpreted restrictively.

Nash was mentioned earlier in the context of time limits. There, the claimant in judicial review proceedings was a resident of the defendant council who claimed that outsourcing of services would lead to deterioration in the council services which she received. No point appears to have been raised as to the claimant's lack of interest to bring that claim.

In limited cases, an economic operator may also have a remedy in judicial review for what are breaches of duties owed under the regulations. That created an anomaly in timing for commencing proceedings – 3 months for judicial review but 30 days under the regulations. That "loophole" was closed on 1st July 2013 by an amendment to CPR 54 whereby any decision affected by a duty owed to an economic operator under Regulation 47A and which was the subject a claim in judicial review has to be filed within the same 30 day period for enforcing a breach under the Regulations 47C and 47D.

The Legal Services Commission cases concerning mistakes in tenders are an exception to general starting point that there is no parallel right to seek judicial review of procurement decisions because

[53] [2012] EWHC 624 (Admin)

[54] [2012] NICA 18

there is sufficient public interest in Legal Aid franchise procurements. This general position will be different though if (a) the authority is exercising a statutory function (so as to introduce a public law element in what would otherwise be a private law area and for which there is a discreet statutory remedies code); and (b) the authority has gone seriously wrong such as to abuse its power – see *R (Molinaro) v. Royal Borough of Kensington and Chelsea* [2001] EWHC Admin 896. That appears to be the approach taken in: *R (A) v Chief Constable of B Constabulary* [55]. In that case a sub-contractor for seizing vehicles had been excluded as a result of a process of security vetting, but was not given a reason for the failure to pass the security vetting. It was held that the Chief Constable was exercising statutory functions in seizure, recovery and retention of vehicles (albeit through a contract for discharging those functions); the vetting was carried out in the public interest so it was a public function; the Chief Constable owed a duty to the sub–contractor to act fairly and had acted unfairly by applying a blanket policy of not providing reasons for vetting decisions.

Economic operators might also be able to challenge procurement decisions by way of judicial review to complain of breaches of the public procurement regime if a claim under the regulations does not provide a suitable alternative remedy: *R (Hossack) v Legal Services Commission*[56].

PUBLIC SECTOR EQUALITY DUTY

At a glance

- The public sector equality duty applies to tendering processes.
- There is potential for the duty to apply on changes of service provider.

In principle the public sector equality duty (PSED) set out in s149 of the Equality Act 2010 applies to tendering processes: *R (Greenwich Community Law Centre) v London Borough of Greenwich*[57]. The public sector equality duty imposes an obligation on all public authorities to have "due regard" to the prescribed equality objectives under s149, namely to:

- eliminate all forms of discrimination and harassment prohibited by the Act;
- advance equality of opportunity; and
- foster good relations between people with different protected characteristics.

Elias LJ's judgment in *Greenwich* is authority for the following propositions:

- a change from one provider to another by itself will not engage the PSED. Something more is needed;
- when alleging a breach of the PSED, it is necessary to identify a protected Equality Act characteristic which realistically can be argued to have been engaged;
- the PSED is to be satisfied at the point when the material policy decision is taken. Minor changes of detail do not require further equalities consideration; and

[55] [2012] EWHC 2141

[56] [2012] EWCA Civ 1203

[57] [2012] EWCA Civ 496

- the issue for the court is of "substance" in each case. (Here, the specification included the relevant equalities considerations so when applying the award criteria, the council had in substance complied with PSED. Further, a full strategic equality impact assessment had been carried out an early stage when government funding was being reduced and the claimant could not identify any equality objective that might be prejudiced by the council's decision.

The first proposition in particular would appear seriously to restrict the impact of the PSED. The limits of *Greenwich* have recently been examined in *R (RB) v Devon County Council*[58] and this case does not seem to sit too easily with the judgment in *Greenwich*.

Devon concerned the decision to appoint a private sector provider as preferred bidder for integrated children's social and health care services. The procurement commenced in September 2011. An equality impact assessment was produced in March 2012 and recorded no impact as there was no change in service post award. The claimant did not challenge the decision to procure (agreeing that was in the public interest) but challenged the decision to appoint a preferred bidder in June 2012 when there was no specific consideration of equalities issues.

In the light of *Greenwich*, because the claimant could not identify any prejudice arising out of the decision to appoint a preferred bidder, one would have thought the claim would have failed. However, the judge held there was a breach of the PSED but did not quash the decision. He also held that the PSED was first engaged when the decision to procure was made in September 2011 and the neutral nature of a change of supplier identified in *Greenwich* was distinguished by reference to the unique nature of the integrated service and the fact that it catered for vulnerable groups. This distinction does not appear overly persuasive particularly since the claimant in *Greenwich* also catered for vulnerable groups. No quashing order was made because the PCT was about to be abolished and there was an urgent need for a new provider; the PSED was dealt with in an assessment that went with subsequent award decision in September 2012; the claimant could not identify any specific detriment.

It remains to be seen if *Devon* will be followed or overruled but in the meantime it would be sensible to assume that decisions to change the service provider could engage the PSED; equality objectives should be incorporated into every stage of the award process through the specification and award criteria or via a separate impact assessment at significant stages which influence the nature of the service provided or the potential selection of the ultimate successful tenderer.

[58] [2012] EWHC 3597

CLAIMS IN DECEIT

If a tenderer believes that it has been the subject of a fraudulent misrepresentation by the contracting authority, then it has the basis for a claim in deceit. Such claims against public authorities are very rare. However, if the claimant does succeed in proving deceit then it will be entitled to any loss that it incurs as a result, irrespective of whether this was foreseeable.

Such a claim was recently made against Leeds City Council in the case of *Montpellier Estates Limited v Leeds City Council*[59]. The council undertook a competitive tender to find a development partner for a new music venue in Leeds. During the tender the city council also asked their advisers to prepare a public sector comparator so it could assess the value for money of the proposals submitted against the cost undertakimg the development itself. The council concluded that neither proposals offered value for money. It discontinued the tendering exercise.

The claimant was one of the tenderers and alleged that there were breaches of the procurement rules, and it had been induced to enter into and remain in the competition as a result of fraudulent representations made by a councillor, council officers and consultants. The argument being that the city council only wanted to gain market knowledge from the tender and build the venue itself.

The judge rejected all the allegations of deceit. Also, most of the claims were based on conversations, many of which were informal and took place at social events. One lesson from this case it is that there should not be any informal discussions while the tendering exercise is taking place and that formal meetings need to be carefully minuted.

[59] [2013] EWHC 166(QB)

THE PITFALLS

What then are the lessons authorities need to draw from this tangled narrative of legislation and case law?

- Most important of all, transparency - most successful challenges could have been avoided by providing the bidders with the right information at the right time. In particular, it is essential to disclose all the criteria to be used to evaluate the tenders and having done so, apply those criteria. If a bidder can show that the authority kept back anything which could have affected the preparation of its bid, its challenge is more likely to succeed and provoke a claim. Do not withhold evaluation sub-criteria and rely on the limited exception as occurred in *Varney* or mix selection with award criteria.
- Always bear in mind the 30 day time limit and when it starts to run. Once the 30 day period has gone by, whatever stage the tender process has reached, the opportunity to commence a valid claim will normally be lost.
- If a claim is made and served, be prepared to apply promptly for the automatic suspension to be lifted and seek other interim orders at the same time like a cross-undertaking in damages if the suspension continues or security for costs if appropriate. The courts now realise that these are commercial disputes and that the disappointed bidder can usually be compensated by the payment of damages. Unless there are exceptional circumstances, the suspension will probably be lifted.
- If there is a tender that appears to be abnormally low, seek the required clarification, even if it is not intended to rule it out on these grounds. The safer view is that there is now a duty owed to all bidders to do this.
- Seek clarifications of errors or ambiguities which look as if they can easily be cleared up, but be careful to ensure this is done in a way that does not give the bidder an opportunity of raising new issues or negotiating. If this is allowed to happen, there is likely to be a breach of duty to the other bidders.
- Do not be afraid of using VEATs. There are circumstances when it is not possible to follow the procurement procedures. The use of a VEAT will establish whether there are potential challengers and allow them to be confronted at an early stage.
- Be decisive and clear in identifying what are mandatory requirements for a tender and in prescribing the consequences for non–compliance with those requirements.
- Be full, compliant and clear in Regulation 32 notices when providing information about contract award procedures.
- If a “new claim” for a breach of duty arises from disclosure – seek to amend the claim on the basis that the date of knowledge of that “new claim” runs from the date on which access to those documents was obtained.

Watch this space. Look out for new cases and legislation. The landscape is bound to keep changing.

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Sharpe Pritchard LLP Elizabeth House Fulwood Place London WCIV 6HG
T 020 7405 4600 **F 020 7405 4646**
E enquiries@sharpepritchard.co.uk **W www.sharpepritchard.co.uk**