



E-Bulletin

The latest in procurement case law

Two procurement cases have recently been decided which will be of note to public bodies.

Lifting an automatic suspension of a tender process

The case of *Newcastle Upon Tyne Hospital NHS Foundation Trust v Newcastle Primary Care Trust and Others* [2012] EWHC 2093 (QB) saw an NHS Foundation Trust challenge the decision of four PCTs not to award the Foundation Trust (FT) a contract to provide diabetic retinopathy screening services (DRS) in the North of Tyne and Gateshead regions.

The issue of proceedings by the FT triggered an automatic suspension of the PCTs' procurement process and required them to refrain from entering into a contract with the successful bidder until the proceedings were determined.

The PCTs, however, successfully applied to lift the automatic suspension to enable them to award the contract to the successful bidder, despite the unresolved nature of the FT's claim. The court decided:

- the loss to the FT in not being awarded the contract was insufficient to demonstrate damages would not have been adequate remedy. Instead, damages would not be an adequate remedy for the PCTs if the suspension did was to continue, because the PCTs would suffer prejudice to the exercise of their functions, and so it was in the best interests of prospective patients for the suspension to be lifted;
- continuing the suspension would affect patients and those providing the service. Further, it was not just to allow the FT to provide an 'interim service' pending the outcome of the litigation, given the PCTs had concerns about that, and there would be considerable delay in the conclusion of that litigation and therefore the commencement of the contract.

This case underlines that:

- an automatic suspension is capable of being displaced. There is no presumption to retain it. It should be challenged where the 'balance of justice' lies in favour of allowing the contract to proceed. Disruption to the provision of services is likely to be a key factor;
- those challenging contract awards should expect defendants to apply for an automatic suspension to be lifted and should be in a position to demonstrate to a

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court why the suspension should continue pending (possibly lengthy) proceedings. This will involve demonstrating why damages will not be an adequate remedy for any loss.

Extending the time limit for a procurement challenge: “good reason”

The case of *Turning Point Limited v Norfolk County Council* [2012] EWHC 2121 (TCC) saw a challenge to a procurement award decision struck out for being brought out of time.

Turning Point alleged various breaches of public procurement rules in a tender for drug and alcohol treatment services. In particular, Turning Point claimed that the information provided by the Council during the tendering stage was inadequate and incomplete.

Procurement regulations require legal proceedings to be brought within 30 days of the date the challenger knew, or ought to have known, of the grounds of challenge. Evidence demonstrated that Turning Point knew and believed that the information the Council provided was inadequate and incomplete more than 30 days prior to commencing legal proceedings. Further, Turning Point knew by the time it submitted its tender that its concerns had not been remedied by the Council.

However, a challenger can apply to the court to extend the 30 day time limit for bringing proceeding if they can persuade the court that there is a “good reason” for doing so. The court did not consider that there was a good reason to extend the time limit in this case. In addition to the reasons in the paragraph above, the fact that Turning Point only sought a short extension (14 days) did not in itself constitute a “good reason”.

The decision provides some additional assistance as to what constitutes a “good reason” for extending the 30 day time limit. The court said:

“[a] good reason will normally be something which was beyond the control of the given Claimant; it could include significant illness or detention of relevant members of the tendering team”.

This case:

- reinforces the strict approach the courts will take to adhere to the 30 day time period for bringing a procurement challenge;
- underlines the necessity of seeking legal advice quickly if you believe there may be grounds for challenge;
- outlines the very limited circumstances in which a challenge can hope to extend the 30 day time bar.

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