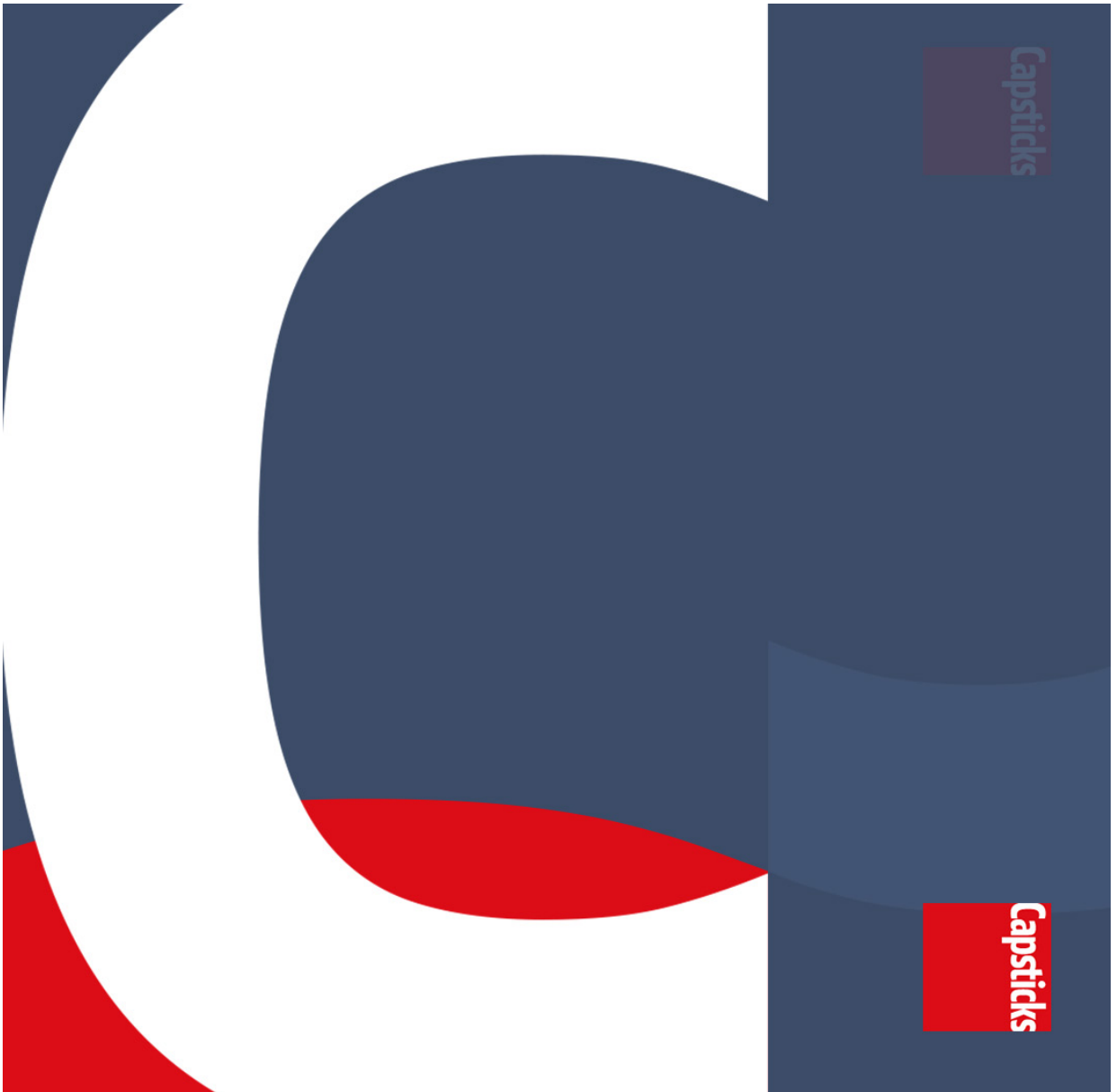


Procurement challenges



What we offer

The value and importance of public contracts to bidders means that procurement is a highly contentious area. We offer an experienced and responsive team of specialist procurement lawyers who advise on and manage procurement disputes, from early pre-action correspondence through to trial.

We act for bidders concerned at the procurement process and/or its outcome, and for contracting authorities who are faced with a challenge.

Bidders: maximising the prospects of a successful challenge

We can provide advice on:

- Your options for pursuing redress, which may include legal proceedings, a complaint to NHS Improvement and/or a public law claim.
- The time-scale for bringing a challenge.
- The strength of your complaint.
- The documents you might be entitled to early disclosure of, including how to apply case-law principles to exert pressure on a contracting authority to provide disclosure and/or making or defending specific disclosure applications.
- The costs and time required to pursue a challenge.

Contracting authorities: preventing challenges

During the procurement process, we can provide advice on:

- Risk management, including a review of high-risk and often challenged areas such as clarification questions, the design and application of qualitative criteria, and standstill/debrief letters.
- The preparation of tender documents and correspondence with bidders.
- Revisions required to the procurement processes to avoid the prospect of a successful challenge.

If a claim is pursued, we will provide advice about:

- The merits of the challenge, including your options to resolve the proceedings as quickly as possible, with a clear recommendation.
- Your disclosure obligations.
- The merits of an application to the court to lift the suspension of the contract award to enable you to award the contract to your preferred bidder, thereby realising the benefits of the new contract.
- How to manage the litigation, including advising you in relation to the use of alternative dispute resolution such as mediation.

On resolution of the challenge

For commissioners, we can provide:

- A "lessons learned" training document and/or presentation. For example, we have recently provided training to contracting authorities to help them improve their evaluation and moderation processes and record-keeping, areas which are often challenged by bidders.
- Advice on or drafting of tender documentation for future procurements.

For bidders:

- Advice on how to improve your bid and what clarification questions to ask the contracting authority.

The benefits

We are best placed to advise you because we have:

- The legal and practical knowledge to bring or respond quickly to challenges to minimise the operational disruption for contracting authorities and their service users, or to enforce rights for bidders.
- A focus on healthcare, housing and emergency services sectors which means that we regularly advise clients on handling ancillary operational, reputational and financial risks associated with procurement disputes.
- The depth of staff to ensure the work is carried out as cost-effectively as possible.
- Unrivalled experience in the High Court applying on behalf of public sector clients to lift the suspension of the contract award process, including:
 - Solent NHS Trust v Hampshire CCG [2015] EWHC 457 (TCC)
 - Counted4 Community Interest Company v Sunderland CC [2015] EWHC 3898 (TCC)
 - Kent Community Health NHS Foundation Trust v DGS and Swale CCG [2016] EWHC 1393 (TCC)
 - Sysmex (UK) Ltd v Imperial College Healthcare NHS Trust [2017] EWHC 1824

Examples of our work

Application to lift the suspension of the contract award process (contracting authorities)

In *Sysmex v Imperial*, we acted for a commissioner of a high-value managed pathology equipment procurement, which was challenged by the second-placed bidder on the basis of scoring errors and breaches of the procurement rules. Following the commencement of a claim, we urgently provided advice on the process for, and merits of, an application to the High Court to set aside the automatic suspension of the contract award process triggered by the proceedings. This involved the urgent preparation of detailed witness evidence in support of the application which was heard at a hearing at the High Court.

Outcome: The court agreed to lift the suspension which enabled our client to award the contract to its preferred bidder, thereby realising the financial, operational and clinical benefit of the new pathology contract.

Errors in scoring challenges (bidder)

We acted for an unsuccessful healthcare bidder to challenge the decision of a local authority in relation to the award of a sexual health services contract. The case involved allegations of errors in scoring. We reviewed and assimilated a large volume of disclosed documentation in order to put together a persuasive claim which persuaded the local authority to settle.

Outcome: As a result of the challenge, the commissioner agreed to pay our client a large sum of money in exchange for discontinuing its claim.

Evaluation process and record-keeping (contracting authorities)

We recently advised a large NHS hospital trust in London in relation to a bidder challenge to the award of a high-value patient transport contract. We provided urgent advice which identified weaknesses in the client's evaluation and moderation processes and record-keeping. We advised the client that rather than incur the time, cost and risk in seeking to defend the challenge, it should re-wind the tender to enable final tenders to be re-scored based on revised guidance to evaluators and moderators.

Outcome: By remedying the procedural defects in the process, the commissioner minimised the disruption to the procurement process, thereby enabling it to proceed with the award of a contract to its preferred bidder.

Want to know more?

Please visit our website: www.capsticks.com or if you would like to speak with us, please get in touch with one of our team.

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