



Briefing

Procurement

Nash – Councils must consult voters on certain major procurements although a time limit for challenging Judicial Review saved the Authority

Synopsis of Key Points:

- Barnet LBC is outsourcing over £470m of services for a ten year period in two contracts with Capita with a claimed saving to the taxpayer of £165m plus substantial investment;
- Local opponents supported a challenge by campaigner Mrs Nash against the decision to award the first of the contracts in December 2012;
- In April the High Court agreed with Mrs Nash that Barnet had not properly consulted on the decision. Nonetheless, it rejected her claim on the basis that it had been brought too late;
- She appealed the timing issue and Barnet cross-appealed on the obligation to consult. The Court of Appeal gave judgment on her appeal on 2 August 2013.
 - It agreed with Barnet that the claim was too late; but
 - Made no comment on the obligation to consult. In that respect the High Court decision remains.
- Mrs Nash has requested permission to appeal the decision to the Supreme Court but in the meantime Barnet and Capita have signed the Contracts

Barnet's wholesale outsourcing

Barnet LBC decided to outsource the substantial proportion of its services in two contracts to the private sector (together valued at over £470m and intended to save some £165m over 10 years). Barnet intended to limit its delivery of services to conducting only *"those activities that only the Council can"*. After substantial analysis and consideration it issued the first OJEU notice for the proposed contracts in March 2011.

The proposal was controversial and widely debated locally. Nonetheless, the Council ploughed on and eventually in December 2012 concluded the procurement process for the first of the contracts with an announcement that it intended to appoint Capita. At this point, local activists (rallying behind a Mrs Nash) challenged the legality of the procurement and the process.

Mrs Nash's challenge

Mrs Nash was, in the words of the Court of Appeal, *"sceptical about the consequences of outsourcing and the efficiency saving."* She obtained legal aid funding and issued a claim in January 2013 initially alleging failures in compliance with the

public sector equality duty and the Council's fiduciary duty to residents alongside her main complaint (and the only one to survive to the Court of Appeal) that the decision to outsource had been made without *"proper, indeed any, consultation"*.

The High Court heard the case in April 2013. In essence the Judge rejected the allegations about equality and fiduciary duty to residents but agreed that Barnet had failed to consult before taking the decision to outsource. Although that was a breach of its obligations (presumably sufficient to have the procurement overturned in Judicial Review) it occurred at some point before March 2011 and consequently was out of time as all Judicial Reviews must be commenced within 3 months of a breach.

Hence, according to the High Court:

- The Council had an obligation to consult (under s3 of the Local Government Act 1999) before taking the decision to outsource these services;
- it had failed to do so; but
- Mrs Nash lost her chance by waiting until the procurement decision was made.

Mrs Nash appealed. On 2 August 2013, the Court of Appeal agreed with the High Court that Mrs Nash was out of time. It provided no comments on whether there was an obligation to consult.

Implications of this decision

This was a high profile case whose outcome was keenly awaited. It dealt with two key legal issues which directly affect authorities in general and Local Councils in particular. We are left with a hard-line decision on timings from the Court of Appeal and a debateable finding about consultation from the High Court (which may or may not be binding in future cases).

Time limits

The lesson is that challengers in procurement cases cannot wait for the outcome. If the decision they complain of is taken early in the process and they are aware of it – time is running against them. Authorities would be wise to use this to their advantage by weeding out claims by making decisions and publicising them early. Challengers must learn to act rapidly in any procurement when they see a policy decision they don't accept – even before award.

It must be said however that the window in which a Judicial Review can be brought in relation to a procurement decision is very narrow and hard to identify. It is a matter of technical and legal analysis which does not easily translate to sensible commercial interpretation. All parties should therefore seek advice whenever a potential issue becomes known to them.

Need to consult

This was a very substantial procurement decision. It affected the majority of the Council's activities. In those circumstances the obligation in the Local Government Act to consult constituents was triggered. However, now that it is clear that a large procurement generally can trigger such an obligation, any substantial project may need to be reconsidered for the need to consult before procuring. At what point a procurement is considered normal business which does not require the additional level of consultation is a matter for interpretation and potential future litigation.

What constitutes consultation is however a little clearer. General consultation (e.g. in relation to annual accounts or financial plans which necessarily refer to procurement policies) is insufficient. Consultation must be direct and relate to the specific decision to enter the procurement project.

Councils, Authorities, bidders and local interest groups can all take something from this decision. It may well go to the Supreme Court in due course where these issues will be ventilated again.

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