



## Medicure fails in locum doctor framework challenge – guidance on challenging the award of call-off contracts

Some useful guidance on challenges to call-off contracts under a Framework Agreement has been given by Mr Justice Coulson in *Medicure Ltd v The Minister for the Cabinet Office* (29 June 2015).

The judgment reinforces that where there is a failure properly to apply a call-off mechanism under a Framework Agreement, any claim for breach of that mechanism is against the party responsible for implementing the call-off.

Where a separate party (in this case the Cabinet Office) is responsible for the initial procurement of a Framework Agreement, but is not responsible for the process of entering into individual call-off contracts, no claim may be brought against it.

Authorities which use existing Framework Agreements, such as those procured by the Crown Commercial Service or Eastern Shires Purchasing Organisation, must continue to ensure that they correctly apply the call-off mechanism under such contracts, or run the risk of a challenge being brought against them.

### Facts

Medicure Ltd, the Claimant, claimed that it had been excluded at pre-qualification questionnaire (“PQQ”) stage for a Framework Agreement due to shortcomings in its experience of managing the provision of locum doctors from a supply chain (provision of “Managed Services”). Yet the Framework Agreement in question was operated to allow direct provision of locum doctors from bidders’ own resources (provision of “Direct Services”). The claim failed due to a failure to make out any of the complaints on the facts.

In 2012 the Cabinet Office conducted a procurement to put in place a multi-supplier Framework Agreement for the supply of locum doctors, including temporary staff. Successful suppliers who were awarded a place on the Framework Agreement could be called upon to provide locum doctors, subject to separate call-off contracts entered into between the supplier and a customer.

Medicure Ltd submitted a tender, but was not successful in being awarded a Framework Agreement. However, it had submitted a separate tender as part of a consortium. The consortium was not called upon during the term of the Framework Agreement by any customer to supply locum doctors.

### Issues

Medicure Ltd claimed that the Cabinet Office operated the Framework Agreement in a materially different way to that represented in the procurement.

It claimed that:

- the Framework Agreement required Managed Services only and the Cabinet Office had varied the Framework Agreement, or was using it improperly, by allowing the provision of Direct Services;
- alternatively, if the Framework Agreement did allow for the provision of Direct Services, Medicure Ltd’s tender was wrongly excluded because of its lack of experience of providing Managed Services (rather than Direct Services).

### Decision

Medicure Ltd’s claim that there had been a material change in the way that the Framework Agreement was operated as against the way in which it was procured, failed on the facts.

Coulson J found that the OJEU Notice, the tender documents and the Framework Agreement envisaged the provision of both Managed Services and Direct Services. In any event, had this argument been made out, a claim for improper use would only lay against the customers (the contracting authorities) that entered into individual call-off contracts, and not the Cabinet Office, at Framework Agreement level.

Coulson J went on to find that Medicure Ltd had answered several aspects of the PQQ inadequately and had been fairly excluded from the tender for the Framework Agreement due to its lack of experience of providing Managed Services. In any event, a challenge to the validity of the tender process was now out of time.

## Contacts

If you would like any further information on the above, please contact John Houlden or Patrick Parkin in our Procurement team or your usual Burges Salmon contact.



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