



## New time limit for procurement-related judicial review

Dissatisfied with a public procurement decision? The new time limit now in force leaves little time to do anything about it, with claimants being warned that it may be too late by the time the procurement decision is made.

A combination of changes to court rules and recent judgments have meant legal proceedings must now be commenced within days or weeks of a complaint arising.

### Background

Many claims by potential or disappointed bidders for alleged breaches by contracting authorities during tendering processes are brought as high court claims for breach of statutory duty using the route provided for by the Public Contracts Regulations 2006 (as amended) (the "PCR"). Where a successful claim is brought under the PCR, certain remedies, such as damages and a declaration of ineffectiveness of any contract entered into as a consequence of the procurement process are available.

However, since most contracting authorities are public bodies, they may also be susceptible to applications for judicial review of the lawfulness of decisions reached in relation to procurement. An application for judicial review might, for example, be made by a non-bidder who is nevertheless affected by the way in which the tender process has been conducted, but is unable to bring a claim under the PCR, or by a bidder who is unable to get the remedy it wants outside judicial review.

In October 2011, the time limits for commencing claims under the PCR were substantially reduced so that any claim must be commenced within 30 days of the date when the claimant "knew or ought to have known that grounds for starting the proceedings had arisen".

This resulted in claims under the PCR having a different time limit to claims brought by way of an application for judicial review, which the Civil Procedure Rules (the rules that govern civil court proceedings) require to be filed "promptly and in any event not later than three months after the grounds to make the claim first arose". The requirement to issue a claim promptly was largely removed as a result of *Uniplex (UK) Limited v. NHS Business Services Authority* and consequently a firm three month period was permitted.

Claimants could consequently wait until the very end of the three month time limit for issuing applications for judicial review, causing considerable difficulties for contracting authorities who faced a longer wait before they could be certain that their procurement decisions would not be challenged.

Actions under the Public Contracts Regulations or Utilities Contract Regulations	30 days of knowing
Actions to prevent the contract being executed	Standstill period - 10 days
Actions to declare a contract ineffective	30 days of knowing and within 6 months of contract.
Judicial review in relation to public (government) contracting	30 days of knowing
Judicial review of non public contracting	3 months
Other actions, implied contract, negligence, misfeasance etc	Various

Where the grounds for the claim arose on or after 1 July 2013, claimants considering making an application for judicial review of a decision governed by the Public Contracts Regulations 2006 now have a reduced time limit of just 30 days.

However, potential claimants must be aware that they may, for the purposes of the time limit, be deemed to have grounds for commencing their claim much sooner than they expect.

This note explains the new time limit and the potential pitfalls for claimants in procurement-related claims.

## Government reform of judicial review

In December 2012, the Government published a number of proposals for the reform of judicial review with the objective of reducing the burden placed on public authorities by unmeritorious claims.

The Government has now decided to proceed with a number of its proposals, including the shortening of time limits for seeking a judicial review in order to bring it into line with the existing 30 day time limit for commencing claims under the PCR.

## New time limit for judicial review of decisions governed by the PCR

Where the subject of the judicial review is a decision affected by the duties owed by contracting authorities to bidders under the PCR (including any applicable EU law obligations such as the obligations to treat bidders equally and in a non-discriminatory and transparent way), the time limit for commencing judicial review is, as of 1 July 2013, the same as that for commencing a claim under the PCR, namely 30 days after the Claimant knew or ought to have known that grounds for starting the proceedings had arisen.

The time limit applies not only to potential bidders and bidders, but also to third parties who would not otherwise have a claim for breach of statutory duty.

The limit does not apply to bids which do not deal with obligations under the PCR, resulting in bids under the UCR or outside the regulations not being caught. This maintains a two-tier time-limit for certain procurement claims.

## A note of caution

The trigger for commencing proceedings is knowledge of facts that may indicate that there are grounds for commencing proceedings. Grounds may arise long before a final decision on the award of a contract has been reached, with the consequence that potential Claimants should be considering whether it is appropriate to start proceedings before the contracting authority has finally decided to award a contract.

This is not a new problem arising from the reforms. A very recent example is the Administrative Court's refusal to grant permission to apply for judicial review in *R (on the application of Nash) v Barnet London Borough Council*.

Mrs Nash complained (among other things) of failure to consult. That failure was early on in the process and more than 3 months before the final decision and the application for judicial review. Nonetheless the Court found that she could not wait until the final decision was made before issuing proceedings. The case is being appealed with the hearing expected in July 2013.

## I am a bidder - what should I do if I suspect that I have grounds for a claim?

As illustrated above, the 30 day time limit for commencing a claim concerning a procurement decision may take effect long before the authority has reached a decision as to the award of a contract. Time may even start running at the very outset of the procurement process if, for example, the decision to procure is the subject of the challenge, or if the alleged breach is apparent from the pre-qualification questionnaire or invitation to tender.

If you have knowledge of facts, at any stage, which may indicate that the authority has breached its duties under the PCR, you should seek legal advice without delay. Failure to raise the issue there and then could well prevent you from relying on the breach once the procurement process has been concluded.

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