

Procurement Lawyers' Association (PLA) Response to the Disclosure Pilot suggested for the Business and Property Courts in England and Wales

- 1 This note is a response to the request for further consultation and feedback in relation to the Proposals for a Disclosure Pilot for the Business and Property Courts in England and Wales (**Disclosure Pilot**) on behalf of the Procurement Lawyers' Association (**PLA**).

Executive Summary

- 2 This note contains the PLA's request for an exclusion from the Disclosure pilot, in order to allow the PLA, in consultation with the specialist Judges in the Technology and Construction Court (**TCC**) who hear procurement cases, to produce an amended version of the pilot scheme with particular reference to the specific difficulties of disclosure in procurement cases. If the PLA's request is granted, the intention would be to produce proposals by the end of October 2018. However, if a response were required before that date, the PLA would obviously do its very best to work to an abbreviated timetable.

The PLA and Public Procurement Cases

- 3 The PLA is an organisation made up of over 350 members of procurement lawyers working within the field of EU procurement law, including private practice, in-house, public and private sector practitioners including solicitors, barristers and academics based in the UK and elsewhere.
- 4 The PLA seeks to represent the interests of its members by positively engaging with the courts, in relation to public procurement disputes, and in particular the TCC, which has become the primary court in which public procurement disputes are heard. Consequently, the PLA has recently worked in consultation with the TCC in developing the TCC Guidance Note on Procedures for Public Procurement Cases¹ (**TCC Guidance Note**). The TCC Guidance Note has now been included as Appendix H to the TCC Guide effective from 16 July 2017. The PLA represents lawyers who act for both contracting authorities and the economic operators who compete for contracts and so provides a balance between the competing interests.
- 5 Public procurement cases have become more frequent in recent years, as winning large public sector contracts becomes the subject of increasing focus and scrutiny. Public procurement claims typically arise out of allegations by a bidding entity of a breach of the EU Directive 2014/24/ EU (**Directive**) and/or the Public Contracts Regulations 2015 (**PCR**) (or alternatively the Concessions Contracts Regulations 2016 or the Utilities Contracts Regulations 2016, depending upon the nature of contracting authority) (**Regulations**) by the contracting authority. Typically such claims centre around the procurement process and evaluation conducted by the contracting authority.

Particular features of Public Procurement cases

- 6 Claims under the Directive and the Regulations raise unique procedural issues which have to be managed by the parties and the Court within a very short timescale. Often claims are commenced within the mandatory standstill period of 10 days from the date of a public authorities' decision about award of a public contract (Regulation 87 PCR). In almost every case, claims must be brought by a losing bidder against the public authority awarding the contract within 30 days of the date on which the bidder knew or ought to have known of grounds for a challenge (Regulation 92 PCR).
- 7 Once proceedings are issued, if the contract has not yet been awarded, there is a statutory "automatic suspension" of that award, leaving the winning bidder and contracting authority unable to sign the contract which is the subject of the contract award (Regulation 95 PCR). The authority must apply to the Court to have this suspension set aside, if it wishes to award the contract before a full trial of the

¹ The initial draft was produced by Sir Robert Akenhead, and then the PLA working party developed the draft in consultation with Sir Antony Edwards-Stuart, Mr Justice Fraser and Mr Justice Coulson.

claim takes place (Regulation 96 PCR). Such applications are assessed on the principles of interim injunctions as set down in American Cyanamid v Ethicon Limited [1975] AC 396. All of this gives very limited time for pre-action correspondence, which is further complicated by the fact that the parties frequently want their documentation to be dealt with confidentially, given the commercial sensitivity of bid information of the challenging bidder and any other relevant parties, including the winning bidder.

- 8 Given the nature of a procurement challenge, there is an inherent imbalance in the information and documentation available to the contracting authority on the one hand, which has controlled and documented the procurement process and the challenging bidder on the other, which has participated in the process but has very little visibility as to the internal workings and decision making of the contracting authority. This imbalance has been recognised by the courts in case law, which has acknowledged the need for early disclosure of documents by the defendant contracting authority in procurement cases, including Mr Justice Coulson in paragraph 20 of his judgment in the leading case of Roche Diagnostics Limited v The Mid Yorkshire Hospitals Hospital NHS Trust:

"20 in my view, the following broad principles apply to applications for early specific disclosure in procurement cases:

(a) An unsuccessful tenderer who wishes to challenge the evaluation process is in a uniquely difficult position. He knows that he has lost, but the reasons for his failure are within the peculiar knowledge of the public authority. In general terms, therefore, and always subject to issues of proportionality and confidentiality, the challenger ought to be provided promptly with the essential information and documentation relating to the evaluation process actually carried out, so that an informed view can be taken of its fairness and legality.

(b) That this should be the general approach is confirmed by the short time limits imposed by the Regulations on those who wish to challenge the award of public contracts. The start of the relevant period is triggered by the knowledge which the claimant has (or should have) of the potential infringement. As Ramsey J said in Mears Ltd v Leeds City Council [2011] EWHC 40 (QB), "the requirement of knowledge is based on the principle that a tenderer should be in a position to make an informed view as to whether there has been an infringement for which it is appropriate to bring proceedings".

(c) However, notwithstanding that general approach, the court must always consider applications for specific disclosure in procurement cases on their individual merits. In particular, a clear distinction may often be made between those cases where a prima facie case has been made out by the claimant (but further information or documentation is required), and those cases where the unsuccessful tenderer is aggrieved at the result but appears to have little or no grounds for disputing it.

(d) In addition, any request for specific disclosure must be tightly drawn and properly focused. The information/documentation likely to be the subject of a successful application for early specific disclosure in procurement cases is that which demonstrates how the evaluation was actually performed, and therefore why the claiming party lost. Other material, even if caught by the test of standard disclosure, is unlikely to be so fundamental that it should form the subject of a separate and early disclosure exercise.

(e) Ultimately, applications such as this must be decided by balancing, on the one hand, the claiming party's lack of knowledge of what actually happened (and thus the importance of the prompt provision of all relevant information and documentation relating to that process) with, on the other, the need to guard against such an application being used simply as a fishing exercise, designed to shore up a weak claim, which will put the defendant to needless and unnecessary cost."

- 9 Furthermore, similar disclosure issues arise in relation to the timing of applications for the specific disclosure of documents as against the application by the contracting authority to lift the automatic suspension. In those cases the court is keen to ensure that parties are not disadvantaged by a lack of timely disclosure, as was reflected by Mr Justice Coulson's judgment at paragraph 14 in Alstom Transport UL Ltd v London Underground Ltd and another [2017] EWHC 1406 (TCC):

"14 In my experience, on applications to lift the suspension, contracting authorities regularly argue that the claimant has failed to identify a serious issue to be tried. This is itself a slightly

surprising tactic, because the threshold for showing a serious issue is quite low, and the claimant regularly surmounts it. But if there is a dispute about whether or not there is a serious issue to be tried, in circumstances where a claimant has raised what appears to be a bona fide application for specific disclosure, the court will be astute to prevent a defendant from obtaining an unfair advantage by refusing to disclose the documents sought, and then relying on the absence of such documents to argue that there is no serious issue to be tried."

- 10 A further complication to the process of disclosure of documents in public procurement cases is the confidential nature of many of the documents involved. This particularly relates to requests for the disclosure of commercial tender responses of bidders (and most often the winning bidder), which will include pricing information and other highly commercially sensitive information, disclosure of which is sought by the unsuccessful challenging bidder, who is usually a direct competitor of the successful bidder. Consequently, it is frequently the case that it is necessary for the parties to agree and the court to order the use of a confidentiality ring, by which certain defined confidential information can only be disclosed to appropriate "Relevant Advisors", usually legal advisors of the challenging bidder. Those Relevant Advisors have to provide additional strict undertakings not to provide such Confidential Information to their clients. Subsequently only redacted copies of documents will be disclosed outside of that confidentiality ring to client representatives of the challenging bidder.
- 11 Such confidentiality ring arrangements create unique challenges in the process and administration of the disclosure of documents in procurement cases, including the need for all such Confidential Information to be clearly marked, printed on coloured paper, held securely and further redacted copies prepared for disclosure outside of the confidentiality ring, and for a separate court file on the public record.

Approach of the TCC Guidance Note

- 12 The PLA worked in collaboration with the TCC to address the particular challenges of the management of disclosure of documents in the TCC Guidance Note. The TCC Guidance note encourages an early exchange of information at a pre-action stage where possible (paragraphs 5(2), 6 and 7). Often in practice, given the very short timescales and in particular the 10 day standstill period and 30 day limitation period, proceedings can be issued within a matter of days of an award decision meaning that very limited, if any, disclosure of information will have been provided in the pre-action period. Consequently, it is usual in such cases for multiple successive pleadings and claim forms to be issued, as disclosure is provided by the contracting authority to the challenging bidder in stages. Multiple claim forms are issued because of difficulties in amending pleadings within a 30 day limitation period.
- 13 It is also usual for there to be early contested applications for specific disclosure and to lift the automatic suspension.
- 14 This is reflected and dealt with in the TCC Guidance Note, including at paragraphs 24 to 26 thereof, which provide specific guidance in relation to specific and early disclosure of documents in public procurement cases.

The Disclosure Pilot and Public Procurement Cases

- 15 The PLA accepts and fully understands the need for a change to the rules in relation to the disclosure of documents to reflect the way in which documents are now created and stored in litigation generally. Indeed, many of the issues identified in the Disclosure Pilot proposals are frequently encountered in public procurement cases. However, given the unique features of many public procurement cases, in which one party holds the vast majority of documents and the challenging bidder has none or very little, there is a real risk of injustice to remove the current provisions and practices in relation to the disclosure of documents in public procurement cases.
- 16 In particular, to require only "Basic Disclosure" at the time of statements of case, and in any case only if such disclosure constitutes less than 500 pages of documentation, creates potentially serious consequences in relation to both the timing and extent of early and specific disclosure provided in public procurement cases.
- 17 With regards to timing, in light of the unique time pressures in public procurement cases referred to above, a requirement that a defendant contracting authority only provides Basic Disclosure at the time of serving its Defence causes serious issues with timing in that:

- a) Without access to key documentation, a challenging bidder is unlikely to know if grounds to issue a claim exist, meaning the challenger suffers serious prejudice in the event that such documents exist and are not disclosed and a decision is therefore made not to bring a claim at all; and/or
 - b) Delaying such disclosure until the time of the Defence is likely to increase the necessity of claimants bringing only generic and under particularised claims, which ultimately requires the issue of further additional claim forms and/or the significant amendment of pleadings, along with the associated increase in risk and costs to both parties.
- 18 With regards to the limitations in the definition of Basic Disclosure, it is often the case that the early and specific disclosure required to be provided by contracting authorities, particularly in large public sector contracts, will significantly exceed 500 pages and yet be entirely necessary, appropriate and proportionate to be provided at an early stage, as such documents are often readily available and easily accessible by the contracting authority immediately following a procurement process. The early disclosure of such documents is necessary as part of a transparent procurement exercise to allow the disappointed bidder to review the lawfulness of a public procurement.

The PLA's proposals

- 19 The PLA therefore requests that public procurement cases issued in the TCC be specifically excluded from the Disclosure Pilot. Public procurement cases can then continue to be actively case managed by the TCC in accordance with the TCC Guidance Note, to ensure consistency and a fair and proportionate approach to disclosure.
- 20 The PLA acknowledges the need for the development of the disclosure rules to accommodate the change in the way documents are created, stored and held in the 21st century and to ensure that disclosure is a targeted and proportionate process. The exclusion sought above would allow time for the PLA to form a specialist working group to produce a version of the disclosure pilot with particular regard to the unique challenges and difficulties imposed by public procurement cases. The PLA would therefore welcome the opportunity to work with the TCC Judges and the Working Group to produce proposals for disclosure of documents in public procurement cases which make the necessary changes to improve the overall disclosure process and meet the aims of the Disclosure Pilot.
- 21 If the PLA's request is granted, the intention would be to produce proposals by the end of October 2018. However, if a response were required before that date, the PLA would obviously do its very best to work to an alternative, abbreviated, timetable.
- 22 This submission has been copied to Mr Justice Coulson (as he is until 8 March 2018), the recently retired Head of the TCC and Mr Justice Fraser, his successor. Both Judges were involved in the drafting of the TCC Guidance Note. It is hoped and anticipated that the exercise at paragraph 20 above will be conducted with the full support and engagement of the TCC.

On behalf of the PLA

Bill Gilliam
Clare Dwyer
Louise Dobson
Ryan Geldart
Addleshaw Goddard LLP

Fionnuala McCredie Q.C
Keating Chambers

28 February 2018