Procurement review bodies: taking stock

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Session 1: Overview of procurement review systems – the United Kingdom

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Introduction

- This is a very basic introduction to the UK review system
- It focuses on the position in England/Wales – Northern Ireland is very similar in most important respects – court procedure differs in Scotland, but substantive system of remedies is essentially the same
- Some aspects (length and cost; remedies; automatic suspension) will be elaborated in Sessions 2, 3 and 4

The main challenge mechanism

- Claim under Public Contracts Regulations 2015 Part 3 (or Concession Contracts Regulations 2016, Utilities Contracts Regulations 2016, or Scottish equivalents)
- UK legislation very largely tracks minimum requirements of Remedies Directive
- Claim must be brought in High Court (Court of Session in Scotland) – no legal requirement to seek/offer internal review; no tribunal system; arbitration unusual (unknown?) – no need for any separate administrative law or other proceedings to set aside challenged decision – court fees are significant, especially if claimant seeks damages
- No formal rules about which part of High Court hears procurement cases, but vast majority now in Technology and Construction Court (usually in London for English claims) – no specialist procurement judges, but most TCC judges now have some relevant experience (and occasionally a lot)
- Adversarial rather than inquisitorial process

Anatomy of a High Court procurement claim brought under Regulations

- Short time limits (usually 30 days from actual/constructive knowledge of grounds for challenge, though 6 months where claiming ineffectiveness)
- Notification of claim triggers automatic suspension
- Vast majority of claims brought under CPR Part 7 (though alternative, more streamlined Part 8 procedure could be used for cases where no serious disputes of fact) – procedurally, procurement claims treated much like any other commercial litigation – active case management by judges at various stages, potentially including costs budgeting
- Typical features of Part 7 claims going to trial include: early exchange of detailed statements of case; wide-ranging disclosure of documents; exchange of witness statements; and oral evidence with cross-examination of all controversial witnesses – expert evidence unusual – issues relating to calculation of damages may well be deferred until after liability and other issues of principle decided

Along the road to trial

- Many procurement claims terminate at an early stage – e.g. withdrawal by claimant after fuller factual picture emerges, or abandonment of procurement by defendant after taking further advice on claim – sometimes claimant and defendant reach financial settlement – claimant may lose interest if suspension lifted and contract signed – confidential mediations frequently held in claims which proceed, though often this is close to trial
- High proportion of cases involve either negotiation between parties about lifting/maintaining automatic suspension, or contested applications to lift suspension – focus on whether damages an "adequate remedy", where "balance of convenience" lies, whether claimant has offered cross-undertaking in damages, and (sometimes) the apparent merits
- Trial may be expedited if contract remains unsigned (but even expedited trials may not happen for several months in complex and fact-heavy cases)
- Other pre-trial disputes are typically about whether the parties (especially the defendant) have given adequate disclosure, and about the terms of access to confidential information

The trial and after

- Number of claims reaching stage of a judgment following trial remains small
- Losing party generally has to pay bulk of winner's legal costs
- If contract already signed, then damages is essentially only remedy unless ineffectiveness alleged – if contract not signed, court still has discretion to award only damages, but setting aside challenged decision is more likely
- On current caselaw, damages only to be awarded if breach is "sufficiently serious", but some suggestion that many breaches of procurement obligations will pass this test
- Possibility of appeal to Court of Appeal, but permission of trial court or CA itself is required – no oral or fresh evidence on appeal – factual findings of trial court hard to overturn – can be further appeal to Supreme Court in cases involving significant legal issues, but unusual
- References to CJEU have always been rare in UK procurement cases (presumably because of low numbers reaching trial + delays associated with references) – option would disappear following Brexit

Subsidiary challenge mechanisms

- Claims for judicial review – typically where no/doubtful standing of claimant as economic operator, sometimes for claims outside ambit of Directives
- Claims for breach of statutory duty under European Communities Act 1972
- Commission infraction proceedings
- Specific statutory challenge/complaint procedures in a few sectors (e.g. NHS, rail)

What works? What does not?

Some personal thoughts for discussion in later sessions:

- System provides very effective scrutiny of procurement decisions concerning big contracts, for claimants who have sufficient resources and self-interest to pursue claims to trial
- But is it too much geared to challenges to the evaluation process by those who have participated in competitions and come second? Is it serving the (arguably greater) public interest in tackling impermissible direct awards and modifications, improper use of frameworks, illegitimate award criteria etc? Is there any realistic scrutiny of smaller scale contracts?
- Too much focus of time and resources on whether suspensions to be maintained, and too dependent on attitudes of individual judge? Can it be said that contract awards are held up by litigation either for too long or not at all?
- Is it too hard for authorities, caught between winning and losing bidders, to rewind the process where necessary?

Potential specific reforms?

- An independent complaints and enforcement body (perhaps funded by a levy on turnover from public sector contracts)?
- Reform criteria for maintaining suspension? - look again at adequacy of damages, open-ended cross-undertakings etc
- Incentivise claimants who are prepared to have claims adjudicated on paper or at short hearings with minimum disclosure and no/limited oral evidence, and caps on damages/costs recovery? Could this be by arbitration?
- Change time limits to discourage “rush to litigation” and allow proper scrutiny of VEAT notices, but also provide authorities with more certainty?
- Remove any “sufficiently serious” requirement for damages awards, and introduce presumptions of (modest) loss alongside caps on damages as percentage of contract value? Give court powers to give direct or endorse proposals for re-performing specified stages of procurement?