

Welcome to the June 2023 edition of our Public Procurement Law Quarterly.

This quarter has seen advances in the passage of the procurement bill, a rare case on contract modifications and the release of a couple of procurement assessment and learning tools. We also have an update on the forthcoming implementation of the EU Foreign Subsidies Regulation (FSR).

Legislation

Procurement Bill

The bill has now completed the Commons Committee stage. During its passage, the Commons rejected all of the Lords' amendments to the bill. The government introduced a number of amendments to the bill (including around clarifying the debarment procedure and dealing with abnormally low tenders), which were adopted.

On 13 June 2023, the procurement bill entered the Commons report and third reading stages. The bill will then pass back to the House of Lords for the consideration of amendments.

In an update on 8 June 2023, the Cabinet Office confirmed that implementation of the bill is now anticipated in October 2024, following the promised six-month preparation period following royal assent.

The Cabinet Office has also announced the launch of a public consultation on the regulations that would be enacted under the bill should it become law. The consultation will be conducted in two phases:

- Phase 1 (opened on 19 June 2023 and will close on 28 July 2023) – Addressing areas of the Bill that would “*require lists, calculations or further definitions*”. These include:
 - The scope of “light touch regime” contracts and “reservable light touch services”
 - “Vertical” and “Horizontal” activities calculations (relevant to the replacement of the *Teckal* and *Hamburg* exemptions)
 - Utilities “intragroup turnover” calculations
 - Utility “turnover and supply” tests
 - Intra-UK procurement
 - Definitions of “central government authority” and “works” for thresholds
 - Disapplication of Section 17 of the Local Government Act 1988
 - Disapplication in regard to NHS procurement

- Phase 2 (July 2023):
 - Transparency obligations, including information to be included in the many new notices that contracting authorities would be obligated to publish under the bill.
 - Transitional arrangements for procurements that would be in progress at the time of implementation.

The consultation will be conducted online via the [gov.uk website](https://www.gov.uk).

EU Foreign Subsidies Regulation

The new FSR will enter into force on 12 July 2023. The FSR gives the European Commission the power to monitor and investigate subsidies granted by non-EU governments (such as the UK), public bodies and government-funded private entities that might distort competition in the EU. This includes a new mandatory notification rule in relation to public tenders.

The FSR introduces mandatory notification for businesses that have received financial contributions from a non-EU government when they participate in certain large public tenders. Notification is required if:

- The contract value of the tender is at least €250 million.
- In cases where the tender is divided into lots, the aggregate value of the lots applied for is at least €125 million.
- The bidding party, including its main subcontractors and suppliers, received financial contributions of at least €4 million from a single non-EU country in the last three years.

Notifications must be submitted before the contract is awarded. The European Commission has a 20-day preliminary review period or 110 days for complex cases that raise concerns. The contract cannot be awarded until the European Commission's review is complete.

Businesses that participate in large-scale or high-value public tenders in the EU should start assessing now whether they have received relevant “foreign financial contributions” in the last three years, and, if so, gathering the information about them that would have to be submitted in a notification. Note that the definition of foreign financial contributions, for the purpose of the €4 million threshold, includes transactions on market terms (e.g. payment received for works, services or goods supplied to non-EU governments or public bodies are likely to count towards the threshold).

Social Partnership and Public Procurement (Wales) Act

On 24 May 2023, Wales' first piece of primary legislation on public procurement received royal assent – the Social Partnership and Public Procurement (Wales) Act (the Act). The object of the Act is to improve social responsibility and well-being in public procurement through “social partnership” working.

Key provisions include:

- Imposing a “socially responsible procurement duty” on contracting authorities, which requires them to “seek to improve the economic, social, environmental and cultural wellbeing of its area by carrying out public procurement in a socially responsible way”: “Social responsibility”, in this context, means contributing to the seven “wellbeing goals” prescribed by section 4 of the Well-being of Future Generations (Wales) Act 2015. There are further, more detailed obligations imposed on the procurement of major construction projects and outsourcing services contracts.
- The establishment of a Social Partnership Council for Wales, which will (among other matters) advise Welsh ministers on “social partnership duties” and socially responsible procurement.
- An obligation on contracting authorities to publish a procurement strategy, which (among other matters) should record how the authority intends to carry out its procurement in a socially responsible way.

The Act is reflective of increasing moves by policy makers in recent years to utilise public procurement as a policy tool, including in the pursuit a wider sustainability and social policy objectives.

Implementation of Public Procurement Obligations Under UK Australia and New Zealand Free Trade Agreements

The public procurement aspects of the UK's free trade agreements with Australia and New Zealand have been implemented in two statutory instruments¹, which amend the Public Contracts Regulations 2015 (PCR), the Utilities Contracts Regulations 2016 (UCR) and the Concession Contracts Regulations 2016. These amendments came into force on 26 May 2023.

The main amendments include:

- Removing the possibility of using a prior information notice as a call for competition (PCR and UCR only).
- A rule requiring that contract values that cannot be estimated be valued at the procurement threshold for the relevant contract type.
- A prohibition on the termination of contracts with a view to avoid the Australia or New Zealand Free Trade Agreements.

Case Law

Altiatech Ltd v Birmingham City Council [2023] EWHC 1371 (TCC)

Background

The claimant, Altiatech Limited, entered into a call-off agreement with Birmingham City Council for the supply of cybertechnology. The council subsequently terminated the agreement for convenience, without explanation. Altiatech asked for clarification regarding the termination on 14 September 2022. It followed up again on 26 September and consequently discovered that the council had terminated the agreement because of a potential conflict of interest.

Altiatech asserted that this was in breach of the council's equal treatment and transparency obligations under Reg.18(1) and its duties under Reg.18.2 and Reg.18(3) of the PCR not to design a procurement with the intention of excluding or unduly disadvantaging certain economic operators.

Altiatech issued a claim form on 19 October 2022, which was deemed to be served on 26 October. The particulars of claim were deemed to be served on 10 November, 15 days after service of the claim form.

The council did not serve a defence, but applied for strikeout on the basis that:

- The claim form had been issued more than 30 days after Altiatech had acquired the relevant knowledge, on 14 September, to bring the claim. It was therefore time barred under reg.92(2) PCR.
- The particulars of claim were served 15 days late, in breach of CPR r.7.4(1) and r.7.4(2) and reg.94(1) PCR.

Held

Altiatech had issued its claim form for breach of equal treatment within the 30-day time limit under the PCR. Further, while it was alleged that Altiatech had served its particulars of claim 15 days late, it was nonetheless granted relief from sanctions and given a retrospective extension of time. This was on the basis that it would have otherwise been “grossly disproportionate” to time bar what was a substantive claim.

Key Takeaways

- Timelines for procurement challenges are short; the 30-day clock begins when parties “first knew or ought to have known that grounds for starting the proceedings had arisen”.
- Bidders can rely on the “full picture” argument; until then they cannot know whether they have grounds to bring proceedings.
- The particulars of claim had been served late due to the solicitor misunderstanding the time limits for service under Reg.94 PCR and CPR r.7.4(2). While the judge was lenient in this case, it stood as an important reminder to engage a procurement specialist when lodging claims under the PCR.

¹ Public Procurement (International Trade Agreements) (Amendment) Regulations 2023 (SI 2023/484) and Public Procurement (International Trade Agreements) (Amendment) (Wales) Regulations 2023 (SI 2023/506)

James Waste Management LLP v Essex CC [2023] EWHC 1157 (TCC)

Background

Under an integrated waste haulage contract (IWHC), Essex County Council sought to discharge its obligations for the disposal of waste collected by and for the borough and district councils (known as “waste collection authorities” (WCAs)) to Veolia. Under a separate framework agreement, the claimant, James Waste, provided services including haulage, transfer and disposal of waste. Initially James Waste profited significantly under this agreement, as it was proximate to the WCAs. However, the council amended the IWHC to add a waste transfer station more proximate to these WCAs than to James Waste, which another party to the framework agreement, Enover, benefitted from instead.

Held

The variation, or modification, of the IWHC was not considered sufficiently “substantial” (within the meaning of Reg.72(8) PCR) so as to rule it as impermissible.

Key Takeaways

- The judge considered the profit made by Veolia under the amendment of the IWHC (£775,000) against the wider value of the IWHC as a whole (£300 million) when concluding whether the variation, or modification, was “substantial”.
- The tests in Reg.72 (1) (a)-(f) PCR (which create a safe harbour for the modification of contracts and framework agreements without a new procurement procedure), should be interpreted narrowly because they amount to derogations from the general rule set out in Reg.72 (9) PCR that a new procurement procedure is required for all modifications of the provisions of a public contract.
- For Reg.72(8)(b)(ii) PCR to be satisfied, it is sufficient for a claimant to show that there is a real (as opposed to fanciful) prospect that another tenderer would have won the modified contract *because of* the conditions newly introduced.



InHealth Intelligence Limited v NHS England [2023] EWHC (TCC)

Background

NHS England procured child health information services, and bids had to be logged via an e-portal. The claimant, InHealth, tried to submit a tender, but errors in the e-portal meant that it missed the deadline for doing so. InHealth claimed it had been unlawfully prevented from participating in procurement.

The invitation to tender (ITT) stated “[t]he Contracting Authorities will not consider any tender response received after the stated deadline and failure to submit a response by the deadline will result in the exclusion of the bidder from participating any further in this procurement.” Furthermore it said, “[t]he e-tendering portal In-tend does not accept files with the same name”.

InHealth initially uploaded a document that formed part of its bid on to the e-portal, but in the wrong place. When InHealth tried to upload it (the same document) in the correct place, the e-portal would not permit this, as it identified that InHealth was trying to upload the document in two locations, with the same name. InHealth sent a message via the e-portal six minutes before the deadline (noon), asking for help. The message was acknowledged 52 minutes after this deadline, but the matter was not resolved. InHealth was excluded from the competition.

Held

InHealth outlined it was excluded due to an ineffective e-portal and that, under Reg.56(4) PCR, NHS England had discretion to allow it into the procurement notwithstanding its non-compliance. The court rejected this, noting that it “*had failed to comply with the clearly stated deadline for reasons which were, unfortunately, its fault*” and that “*the consequences for failing to submit a compliant bid by the deadline were clearly spelt out and clearly understood*”. The ITT had clearly outlined that documents with the same name would not be accepted. InHealth failed to submit a bid within the relevant deadline.

Key Takeaways

- Despite InHealth contending that NHS England had discretion to allow it into the procurement notwithstanding its non-compliance, there is always a wider duty of the authority to ensure transparency and proportionality of procedure as a whole.
- However, where a tenderer’s failure to submit a bid was squarely the fault of the contracting authority and where one or more bidders had been unfairly prejudiced, action should be taken by the contracting authority to remove this prejudice.
- From a practical perspective, where tenderers face complex or time-consuming uploading procedures for their bids, it is advisable to start the process well before the deadline.

Other Updates

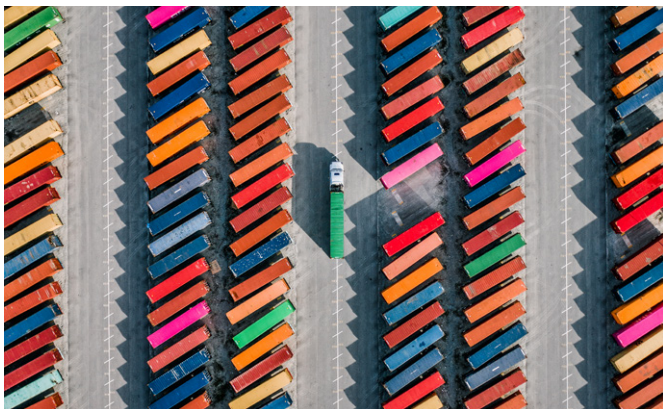
NHS England Launches Evergreen Sustainable Supplier Assessment Tool

NHS England has launched the [“Evergreen Sustainable Supplier Assessment” tool](#), which allows supplies to complete a self-assessment in order to evaluate their progress against the NHS supplier net zero roadmap.

The tool will also act a way for NHS organisations to share information on supplier’s “maturity” in achieving their net zero ambitions.

National Cyber Security Centre Launches Supply Chain Risk Management Learning

The National Cyber Security Centre has launched an [e-learning package](#) to help procurement professionals manage cyber security risk in the supply chain.



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