

Need to Know Guide - Procurement Challenges

Taking prompt advice is essential as unsuccessful bidders have just ten days within which to issue court proceedings if they want to benefit from the automatic suspension provided for in the Regulations, which prevents the contracting authority from awarding the contract to anyone else.

Otherwise, there is a time limit of 30 days to issue proceedings. This guide sets out the key information about public procurement challenges that bidders and contracting authorities need to know under the Public Contracts Regulations 2015.

WHEN CAN TENDER OUTCOMES BE CHALLENGED?

First, check whether the tender involved is regulated by the Regulations. Only contracts tendered by public bodies are subject to the Regulations. This includes:

- Central government authorities
- Local authorities
- Other public bodies such as universities and NHS Trusts.

Tenders run by private companies are not covered and cannot be challenged under the Regulations.

Next, check the value of the contract. Most parts of the Regulations only apply to contracts which are above a certain threshold in value approximately:

- £118,000 for central government authorities
- £181,000 for local authorities and other public bodies where the contract is for the supply of goods or most types of services
- £4.5 million of public work contracts

However, even if most of the Regulations do not apply to the contract because it is below the threshold, there may still be some scope for challenge. This is particularly if there is the potential for these to be cross-EU border interest in the contract as all tenders conducted by public bodies must be conducted in accordance with general EU principles of transparency, equal treatment, non-discrimination and proportionality.

WHY MIGHT A UNSUCCESSFUL BIDDER WANT TO BRING A CHALLENGE TO A PROCUREMENT AWARD?

There are all sorts of reasons why a tender outcome may be susceptible to challenge. The main categories of challenge are:

If there is a problem with the evaluation of the tender for example the contracting authority might have-

- Wrongly excluded a bidder at the selection stage, perhaps did not pass mandatory questions or considered to be abnormally low.
- Favoured one bidder over another in its scoring.
- Not have applied the award criteria correctly.
- Changed the award criteria or weightings after bids have been submitted.
- Made mathematical errors in calculating or weighting the scores.

The contracting authority failed to comply with the procedural requirements imposed by the Regulations-

- Failed to advertise a contract which should have been advertised.
- Failed to provide the required debrief information as set out in the Regulations.
- Entered into a contract with the winning bidder before the standstill period had expired.
- Awarded a call-off contract under a framework agreement to a company which was not on the framework.

If there is a problem with the way the tender was designed -

The tender might impose requirements or award marks in a way which favours the incumbent supplier over other suppliers.

The tender documents might contain a mistake.

HOW DOES AN UNSUCCESSFUL BIDDER BRING A CHALLENGE?

Sometimes it is possible to resolve a challenge via correspondence between parties. If that is not possible, then the next step is to issue court proceedings. However, the Regulations impose very tight timescales, so the scope for negotiation by correspondence is limited. Often very quick decisions need to be taken on whether the merits and value of the claim justify issuing proceedings, which is an expensive step. For claims **valued at £200,000 or more**, which many procurement claims will be, the **court fee for starting the proceedings is £10,000**.

WHAT SHOULD A CONTRACTING AUTHORITY DO IF A PROCUREMENT AWARD IS CHALLENGED?

Unsuccessful bidders are often very disappointed to have lost a tender they may have spent many hours working on. It is important for contracting authorities to identify quickly those challenges where the bidder has raised a genuine complaint about the procurement award and those challenges which are unjustified.

If a mistake has been made during the tender process, this can often be rectified without the need to abandon the whole tender. In other cases, where the challenge is wrong or misconceived, the contracting authority will need to persuade the unsuccessful bidder why this is so or, failing that, be prepared to defend their award if they are sued.

WHAT INFORMATION SHOULD AN UNSUCCESSFUL BIDDER RECEIVE WHEN THE TENDER AWARD IS PUBLISHED?

A common challenge for unsuccessful bidders is obtaining the information they need to work out whether the bids have been marked correctly. Most of the relevant information will be held by the contracting authority. The Regulations require contracting authorities to publish an **Award Notification Letter** providing some information to unsuccessful tenderers but often this is insufficient.

There is often a tension between the interests of the unsuccessful bidder, who wants disclosure of all available information about the way their tender was marked, and the contracting authority, who want to avoid being involved in what they see as a pointless disclosure exercise where a disappointed bidder is 'fishing' for information which might support a challenge.

With only 10 days to decide whether to issue proceedings in order to prevent the contract award, a bidder needs to act very quickly to seek further information from the contracting authority. Generally, the contracting authority is expected to disclose the key information needed by the bidder to understand why they have lost, which usually includes disclosing the scoring reports. A contracting authority who refuses this level of disclosure may find they are disallowed from using the same evidence in support of an application to lift the automatic stay imposed when proceedings are issued.

It is always open to the unsuccessful tenderer to make a **Freedom of Information Act request**. However, the statutory timescales for responding to a FOI request mean that the response will usually be received after the deadline for issuing proceedings has expired.

WHAT CAN AN UNSUCCESSFUL BIDDER CLAIM FOR?

If a tender has been wrongly awarded some or all of the following can be claimed for:

DAMAGES - To compensate the unsuccessful bidders for the profits it would have made had it been awarded the contract.

COSTS - Wasted tender costs.

STANDSTILL PERIOD - If the claim is issued within the standstill period, and the contract has not already been awarded, then there can be an order setting aside the contracting authority's decision to award the contract to the successful bidder.

DECLARATION OF INEFFECTIVENESS - Sometimes, even if the contract has already been awarded to someone else, the courts have the power to declare the award ineffective i.e. it is treated as if it never happened.

However, this remedy is only available for very serious procedural breaches of the Regulations, including failing to advertise a contract and entering into a contract before the expiry of the standstill period.

WHAT ARE THE TIME LIMITS FOR CHALLENGING A PROCUREMENT AWARD?

After the contracting authority has informed bidders of its decision, there must follow a ten-day 'standstill period' during which the contract cannot be awarded.

If an unsuccessful bidder issues court proceedings before the expiry of the standstill period. An automatic suspension comes into place which prevents the contracting authority from awarding the contract, unless the parties agree that the suspension will be lifted or the authority applies to court for an order lifting the suspension.

If an unsuccessful bidder is content to allow the contract to be awarded to another bidder and limit its claim to damages only. There is a deadline of 30 days for issuing proceedings. This runs from the date of knowledge, which means the date when the tenderer knew or strongly suspected that the contracting authority had committed a breach of the Regulations.

Often, the date of knowledge will be the date on which the tenderer received the decision notice.

However, for some types of breach the time limit will start running before the tender outcome has even been decided if, for example, it is believed that the authority's proposed scoring structure gives one bidder an unfair advantage, then the time limit will start to run from the date the tender documents are published.

WHEN CAN THE CONTRACTING AUTHORITY APPLY TO LIFT THE SUSPENSION?

If the automatic suspension has come into place because proceedings have been issued but the contracting authority wants to award the contract anyway, it can apply to the court for an order that the suspension is lifted. The court will apply a three-stage test when deciding whether the suspension should remain in place:

- 1. Is there a serious issue to be tried?** The unsuccessful bidder must show the court that there is a case for the local authority to answer. They do not have to show that they have a good case with strong prospects of success, but the court must be satisfied that they have an arguable claim which is not frivolous.
- 2. Would damages be an adequate remedy for the unsuccessful bidder?** Usually, the court will only uphold the suspension if the bidder can show that damages alone would not be an adequate remedy, for example because the bidder will suffer the loss of a large part of its workforce if the suspension is not maintained.
- 3. In whose favour does the balance of convenience lie?** The court will look at the prejudice the public body will suffer as a result of not being able to award the contract vs the prejudice the bidder will suffer if it is lifted. Contracting authorities may be able to persuade the court that the suspension should be lifted because otherwise vital services will be suspended until the case is resolved, which could take months or even years.

Often, it is difficult for bidders to persuade the court that the suspension should be upheld when the above tests are applied, and in most of the reported cases the suspension has been lifted. If the Court refuses to lift the suspension, it will generally make this conditional upon the bidder undertaking to compensate the contracting authority for any losses it suffers if, at trial, the Court finds that the challenges are unjustified.

The short timescale involved in challenging procurement awards means that both contracting authorities and bidders need to be aware of their legal position in advance of the tender award so that unlawful awards can be challenged and unjustified challenges can be defended.

LEGAL SUPPORT

We regularly advise clients on bringing and defending challenges to procurement awards under the Public Contracts Regulations 2015 (the Regulations) and other associated legislation which applies to utilities contracts, public concessions contracts and defence contracts. Although we are involved in court proceedings where this is necessary, we are often able to achieve excellent results for our clients without the need for formal legal action.

We act for both contracting authorities, advising them on how to avoid challenges and defending them if they do arise, and for unsuccessful bidders who wish to challenge award decisions where they believe errors have been made or processes have not been conducted in accordance with the law.




Chris Tayton

PARTNER

 [View profile](#)

 chris.tayton@clarkslegal.com

 0118 958 5321




Emma Butcher

PARTNER

 [View profile](#)

 emma.butcher@clarkslegal.com

 0118 958 5321



For more information on how we can help your business: clarkslegal.com
email: contact@clarkslegal.com · Reading: 0118 958 5321 · London: 020 7539 8000



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