

Need to Know Guide - Procurement Challenges under the Procurement Act 2023

The Procurement Act 2023 (the “Act”) is due to come into force on 24 February 2025, introducing the most significant changes to procurement law we have seen in nearly twenty years. The Act will apply to all new public sector procurements which commence on or after 25 February 2025, while the Public Contracts Regulations 2015 will continue to apply to procurements started before that date and to call-off contracts awarded under framework agreements concluded before that date. Our Need to Know Guide on Procurement Challenges under the old regime can be found [here](#).

Taking prompt advice is essential if you want to challenge the outcome of a procurement, as unsuccessful bidders have just eight working days within which to issue court proceedings if they want to benefit from the automatic suspension provided for in the Act, 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 Act.

WHEN CAN TENDER OUTCOMES BE CHALLENGED?

First, check whether the tender involved is regulated by the Act. Only contracts tendered by public bodies are subject to the Act. 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 Act.

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

- £139,688 for central government authorities
- £214,904 for local authorities and other public bodies where the contract is for the supply of goods or most types of services
- £5,372,609 for public work contracts

If the Act does not apply to a contract because it is below the threshold, there is very limited scope for challenging the outcome. However, contracting authorities do still have some basic obligations, including an obligation to advertise the contract.

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. Under the Act, contracting authorities must comply with key overarching procurement principles. These are:

- Having regard to the importance of delivering value for money, maximizing public benefit, sharing information and acting with integrity;
- Treating suppliers equally and taking all reasonable steps to ensure suppliers are not put at an unfair advantage or disadvantage;
- Having regard to the barriers which SMEs may face and considering how they can be removed or reduced.

Breaching one or more of these overarching principles may give rise to a challenge, for example:

Evaluation challenges – where a contracting authority may have:

- Excluded a bidder at the selection stage, perhaps because they wrongly considered that the bidder did not pass mandatory questions or considered their bid to be abnormally low.
- Favoured one bidder over another in its scoring, in breach of the equality principle.
- Not 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.

Procedural challenges – where the contracting authority may have:

- Failed to advertise a contract which should have been advertised.
- Failed to provide the information which it is required to include within the Assessment Summary (the contents of which must include significantly more information than bidders were entitled to under the old Regulations).
- Entered into a contract with the winning bidder before the standstill period had expired.
- Awarded a call-off contract under a framework agreement in breach of that agreement.

If there is a problem with the way the tender was designed – for example:

- The tender might impose requirements or award marks in a way which favours the incumbent supplier over other suppliers in breach of the equality duty.
- The tender breaches the rules on technical specifications.
- 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 Act imposes 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 £10,569**.

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. Historically the information contracting authorities were obliged to provide to bidders under the Public Contracts Regulations 2015 was often insufficient, and contracting authorities took an inconsistent approach to the level of information provided. The Act introduces a new requirement for bidders to be provided with an **Assessment Summary**, which must contain, for both the bidder and the successful tenderer:

- The scores for each award criterion and sub-criterion.
- An explanation for each score by reference to the relevant information in the tender. There will no longer be any requirement for authorities to provide the 'characteristics and relative advantages of the successful tender' or make a comparison between successful and unsuccessful bids, but Government Guidance does say that a supplier reading the two sets of information alongside each other will be able to ascertain the relative advantages.
- If relevant, the reasons why an unsuccessful tenderer was disqualified.

Even with the enhanced level of information which will be available to bidders under the Act, there will often still be 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 eight working 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 suspension 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 an 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 provided the breach is sufficiently serious.

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.

SET ASIDE: Sometimes, even if the contract has already been awarded to someone else, the courts have the power to set aside the contract award. However, this remedy is only available for very serious procedural breaches of the Act, 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 an eight working 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 Act.

Often, the date of knowledge will be the date on which the tenderer received the Assessment Summary.

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. Under the Act, the court will apply a new test when deciding whether the suspension should remain in place, and must consider:

1. The public interest in, among other things, upholding the principle that public contracts should be awarded in accordance with the law, avoiding delay in the supply of the goods, works or services provided for in the contract;
2. The interests of suppliers, including whether damages are an adequate remedy for the claimant; and
3. Any other matter the court considers appropriate.

This is a different formulation to the test under the Regulations but may in practice be very similar or even identical; we anticipate that, just as with the test under the Regulations, it will often be difficult for bidders to persuade the court that the suspension should be upheld when the new test is applied. 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. 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.



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