Procurement Law Reform - Let's start a discussion

Webinar Bitesize Feedback - Procedural reform

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DLA Piper's panel discussion webinar held on 1 July 2020, launched our client discussion paper "Procurement Law Reform – Let's Start a Discussion" Panel members from DLA Piper UK, DLA Piper Germany and Keating Chambers had a lively debate on the merits of potential options for reform and which changes might produce a better model for procurement regulation in the UK post Brexit.

This is the first of a series of bitesize summary reports providing feedback from the debate.

This first paper addresses the question of overall procedural reform for procurement challenges through the courts, and the way challenges should be managed in the UK going forwards.

Subsequent bitesize papers will summarize the discussions and conclusions relating to potential reform options in connection with limitation periods, framework contracts, modification of existing contracts, streamlining procurement procedures and confidentiality, disclosure and debriefing.

Overall Procedural Reform for Procurement Challenges

No one on the panel or amongst the audience was an advocate for abandoning the current approach to enforcement of procurement obligations through some form of legal challenge by bidders. Our discussion paper had highlighted that in Australia, for example, there is a far greater emphasis on administrative control and regulation of procurements with independent vetting of the conduct of procurements to ensure proper compliance and, as a result, legal challenge is very much a fallback to be used in rare and relatively extreme cases. This was not seen as being a sensible option for the UK which would take us back to the regime that existed before the introduction of the original Procurement Regulations (PCR). Instead, there was a clear consensus amongst the panel that reform of the existing procedures was to be preferred to any wholesale change.

Fionnuala McCredie QC highlighted the merits of full High Court litigation. She stressed the rigour taken by specialist judges in the Technology and Construction Court to ensure that challenging bidders receive justice, and that procuring authorities are compelled to make full and detailed disclosure of all relevant documents so that properly informed assessments can then be made of what the consequences of any breach might be. She emphasised that this approach has repeatedly produced very high quality outcomes and is effective in ensuring that in the case of large scale high value procurements, public authorities are properly held to account and justice is done.

By way of comparison Frank Roth of DLA Piper's Cologne Office explained that in Germany distinct specialist

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tribunal manage all procurement challenges regardless of value or complexity. This tribunal normally takes only seven to nine weeks to resolve a challenge (compared often to a year or longer in the UK to get to a full trial). The procedure is very cost effective and the perception in Germany (across both the public and private sectors) is that it has led to a high quality and effective means of regulating procurements. On average across the entirety of Germany there are about 1000 challenges per year and the perception is that the tribunal has been an effective tool for defining best practice and keeping public authorities “honest” in the way in which they manage procurements.

Paul Stone, from DLA Piper UK, highlighted that the current High Court approach to all litigation under PCR might produce a high quality final result but such a highest common denominator approach was extremely cumbersome, costly (including potentially very high issue fees) and overly rigorous in the vast majority of procurement cases. In reality, this often has the effect of producing perverse results which exacerbate rather than help resolve problems.

There are many cases where rather than defending a robust procurement decision, public bodies (particular at times of austerity) have conceded weak challenges (often threatened by incumbents who wish to perpetuate their existing contract). This leads to a successful bidder being deprived of a contract and forced into a second tender process (often in circumstances where a losing incumbent now knows the price they have to beat). This is clearly inappropriate. If procurements below a particular threshold were to be subject to a lighter touch quicker and cheaper procurement challenge regime this would allow potential issues, either during the conduct of a procurement, or post evaluation to be resolved effectively - with the emphasis being on issue resolution before a contract is concluded, rather than compensation or ineffectiveness post contract.

Frank Roth confirmed, for example, that in Germany the procurement tribunal deals purely with administrative matters in terms of whether a procurement has or has not been conducted effectively. The tribunal has no jurisdiction to deal with matters of compensation. If a bidder who has challenged wishes to issue a compensation claim then they need to bring a separate case before the German High Court, but they may only do so if their original challenge was successful. In practice, this rarely happens. A similar model in the UK would clearly lead to quicker, far more effective justice and would allow many procurement problems to be resolved at far lower cost, in a way that would deliver justice to bidders more effectively.

Fionnuala McCready QC agreed in principle with this approach but subject to clear caveats that there should be a right of appeal to the High Court from any tribunal decision, the Judges in the tribunal should be experienced specialists and there should be an upper threshold in terms of value above which cases should go direct to the High Court. Clearly, if the tribunal follows the German model and has a purely administrative role then the question of damages would become secondary.

The consensus on the webinar panel was very clearly that for lower value procurements below a threshold of say GBP2 million, a tribunal system could be a far quicker and more cost effective / proportionate means of dealing with procurement challenges.

A distinct issue considered by the webinar panel was the current lack of consistency between different regimes for procurement challenge in the UK. All other EU jurisdictions appear to have a single legal regime for dealing with the overwhelming bulk of procurement challenges. The panel could see no good reason why the scope of PCR should not be expanded to cover all challenges under a single unified procedural regime, with only limited exceptions for specific cases such as concessions or defence procurements where it is clear that additional considerations apply (though in both those cases the procedural regime mirrors the PCR). The current position, where a procurement is outside the scope of the PCR (for example where the procurement procedure followed the Rail Regulation (1370/2007). and civil proceedings need to be issued in parallel with judicial review proceedings creates unjustified procedural complexity and confusion that serves no discernible purpose. Bringing the entirety of the regime within the scope of PCR would streamline the process, and should be very easy to achieve.

If you agree, disagree or think there are other considerations that need to be taken into account we would very much like to hear from you. Please contact Paul Stone or Louise Huson.

Read other articles in the series

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