

Legal Updates & News

Bulletins

UK Public Procurement Law Digest: Limitation Periods and Delays

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Court rules on the time limit for the bringing of procurement challenges

Under UK and European procurement rules, if a bidder wishes to challenge a government body's contract award decision, it has to notify the awarding authority of its intention to do so, and must do so "promptly and in any event within 3 months". A recent decision by the High Court in England shows that if it does not properly respond to a request for clarifications raised by a bidder, a contracting authority could deprive itself of the argument that a challenge brought by that bidder is time-barred.

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What is the case?

The case is *Amaryllis Limited v HM Treasury (sued as OGCBuyingsolutions) [2009] EWHC 962 (TCC)*, a decision made by the English High Court in respect of a claim brought by a furniture supplier, alleging that it was unlawfully excluded from participating in a framework arrangement for the supply of office furniture. The contracting authority made an application to strike out the claim, but this was denied by the court.

Why is this case important?

This case reinforces and clarifies a number of important principles relating to the 3-month limitation period that applies to claims against contracting authorities brought under the Public Contracts Regulations 2006 ("PCR").

For contracting authorities, this case highlights the importance of:

- responding as promptly and fully as possible to any request for clarification or information raised by bidders in respect of contract award decisions, because the culpability of a contracting authority in delaying any legal challenge that a bidder may subsequently mount against the contracting authority is a relevant factor which courts will take into account in determining whether or not a bidder brought proceedings within the 3-month limitation period (and possibly in determining whether an extension to this 3-month limitation period should be granted); and
- ensuring that the process and procedure adopted in the procurement process is as compliant with the

procurement rules as possible in the first place, e.g., by ensuring that the tender documentation leaves no doubt as to what the evaluation criteria and associated weightings are, and how bidders will be marked. This is particularly important because evaluation criteria/weighting are commonly scrutinised and challenged aspects of a procurement process.^[1] This is particularly important in light of the increased scrutiny to which the internal processes and procedures of contracting authorities will be subjected under the new public procurement remedies regime, which is due to be implemented in the UK by 20 December 2009.^[2]

For any bidder on a public contract, this case highlights the importance of:

- always remaining vigilant of any actual or potential breach by the contracting authority of the duties imposed by the procurement rules, as breaches of a duty coupled with a specific irrevocable act on the part of a contracting authority (e.g., the final decision to exclude a bidder, or the final decision to award a contract to a particular bidder) is what starts the clock for the purposes of the 3-month limitation period;
- acting promptly as soon as the bidder becomes aware of a flaw in the procurement process, without waiting to see the conclusion of the procurement process. This is particularly important where the grounds for mounting a legal challenge arises early in the procurement process e.g., during the PQQ stage in a procurement process conducted under a restricted procedure; and
- being as specific as possible in describing the flaws in the procurement process alleged to contravene the procurement rules, and leaving no doubt as to the intention to bring legal proceedings, when notifying the contracting authority of the bidder's intention formally to challenge the contracting authority's decisions.

What happened in this case?

In November 2007, OGCbuyingsolutions (“OGCbs”)^[3] published a contract notice in the *Official Journal of the European Union*, inviting expressions of interest to tender for a framework agreement for the supply, delivery and installation of furniture and associated services. The framework agreement was divided into six lots (with Lot 1 being the most valuable), and interested parties were required to submit a completed pre-qualification questionnaire (“PQQ”).

Amaryllis Limited (“Amaryllis”), a furniture supplier with track record of supplying furniture to the UK public sector, including major government departments, duly completed and submitted its PQQ in January 2008 before the stipulated deadline. In a letter dated 17 March 2008, OGCbs notified Amaryllis that it was successful on Lots 2 to 5, but unsuccessful on Lots 1 and 6. The letter gave no detailed information as to why Amaryllis was unsuccessful and merely gave the scores attained by Amaryllis and the scoring range of other suppliers.

At a meeting held on 9 April 2008, Amaryllis mentioned to OGCbs that Amaryllis was interested to know why it was unsuccessful on Lot 1, but no clarification was given by OGCbs. Amaryllis subsequently wrote to OGCbs on 15 April 2008, requesting a clarification as to why Amaryllis had been unsuccessful on Lot 1. OGCbs wrote back on 21 April 2008, but as noted by the court, this reply “*did not provide a clear or cogent explanation as to how and why the claimant had been unsuccessful on Lot 1*”, and amounted to “*a significant omission on the part of the defendant*”.

On 23 May 2008, Amaryllis wrote again to OGCbs, stating that Amaryllis believed that its response to the PQQ was not assessed fairly by OGCbs and that it would no longer be pursuing Lots 2 to 5. This was followed by a further letter dated 4 June 2008, in which Amaryllis made clear that it was intending to bring legal proceedings against OGCbs, explaining the rationale for its intention, and asking OGCbs to disclose, among other things, the basis on which OGCbs carried out the assessment of the PQQ, including the weighted scoring system and evaluation criteria used in the assessment of the PQQ.

According to the court, OGCbs' response to Amaryllis' request of 4 June 2008 was “*to say the least, unsatisfactory*”, and not until 8 July 2008 (after Amaryllis had commenced the proceedings on 16 June 2008) did OGCbs finally provide the clarifications sought by Amaryllis.

Amaryllis' complaint was that OGCbs breached the core legal principles of transparency and equal treatment by, among other things, failing to indicate how the PQQ would be marked, and by failing to inform the bidders of the relative importance of the questions/topics in the PQQ. Faced with a claim in excess of £11 million, OGCbs sought to have Amaryllis' claim struck out by arguing that Amaryllis had failed to comply with two requirements of the PCR, which were prerequisite to the bringing of legal challenges under the PCR.

Under Regulation 47 of the PCR, a contracting authority's obligation to comply with the provisions of the PCR is a duty owed to bidders, and a breach of this duty is actionable by bidders who, as a result of such breach, "suffers, or risks suffering, loss or damage". Regulation 47(7) provides that an action under Regulation 47 must not be brought unless

- the aggrieved bidder has informed the contracting authority "of the breach or apprehended breach of the duty owed... by that contracting authority... and of its intention to bring proceedings under this regulation in respect of it" (Regulation 47(7)(a)); and
- the aggrieved bidder brings the proceedings "promptly and in any event within 3 months from the date when grounds for the bringing of the proceedings first arose unless the Court considers that there is a good reason for extending the period within which proceedings may be brought" (Regulation 47(7)(b)).

OGCbs argued that Amaryllis failed to satisfy both of these requirements. The court reviewed the relevant case law relating to the interpretation of Regulation 47, and summarised the legal position as follows:

- Any notice served by an aggrieved bidder on the contracting authority under Regulation 47(7)(a) must identify the particular breach complained of. A notice which merely alleges a breach without giving any indication of what the alleged breach might be is insufficient. However, a notice was sufficient as long as there was "a clear statement of the alleged breach by reference to the Regulations, and a stated intention to commence proceedings".
- The test in Regulation 47(7)(b) comprised three questions, namely:
 - The question of whether or not proceedings were brought within the 3-month limitation period. Here, in determining when the grounds for the bringing of the proceedings first arose, what matters is when the specific breach complained of actually occurred. This will be the point at which a specific irrevocable act takes place (e.g., the point at which the decision to exclude a bidder from the procurement process or to reject a bidder's tender is made),^[4] and the bidder becomes aware of all the facts relating to such act that are necessary in order to start proceedings.
 - The question of whether or not proceedings were brought promptly. In considering this question, one must look at the entire period, beginning with the date on which the grounds for the bringing of the proceedings first arose, and consider whether or not there was any culpable delay on the part of the bidder.
 - The question of whether or not the court should exercise its discretion to extend the 3-month limitation period (in cases where proceedings were brought out of time). Factors that are relevant in considering this question include, among others, the length and reason for any delay, the culpability of each party in respect of the delay, and any prejudice to the contracting authority flowing from such delay or by the grant of an extension.

In respect of the sufficiency of the notice, the court had little difficulty in finding that Amaryllis' letter of 4 June 2008 constituted sufficient notice of the breach alleged and of Amaryllis' intention to bring proceedings.

In respect of the 3-month limitation period, the court rejected OGCbs' argument that the clock started running when the PQQ was made available to the bidder, stressing that what mattered was when the irrevocable decision to exclude Amaryllis was made and when Amaryllis became aware of this. The fact that the PQQ contained an inherent defect was irrelevant, partly because Amaryllis' complaint was not related to the content of the PQQ, but rather, to the manner in which its response to the PQQ was evaluated.

On this basis, the court concluded that the limitation period started to run on 17 March 2008, when OGCbs wrote to Amaryllis informing Amaryllis of OGCbs' decision, and therefore Amaryllis was within the 3-month limitation period, having commenced the proceedings on 16 June 2008. The court also found that Amaryllis did act promptly in bringing the proceedings (even if it had done so very close to the end of the 3-month limitation period), commenting that "This is not a case in which the claimant waited to see the outcome of a tender process it always knew to be flawed before deciding whether or not to bring proceedings" and noting that, but for OGCbs' failure to promptly provide the information sought by Amaryllis, the proceedings would have been commenced sooner. In the court's opinion, even if the court was wrong in respect of the first two questions, it was still likely that the case warranted the granting of extension under Regulation 47(7)(b).

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Footnotes

[1] As highlighted by the facts of this particular case; also see previous examples discussed in [Sourcing Update, 4 December 2008](#) and [Sourcing Update, 4 February 2009](#).

[2] For further details on the new remedies regime, see [Sourcing Update, 7 May 2009](#).

[3] OGCbs (now renamed Buying Solutions) is an executive agency of the Office of Government Commerce in Her Majesty's Treasury, which procures goods and services on behalf of a large pool of public sector bodies in the UK, with the aim to maximise the value for money obtained by public sector bodies in the UK.

[4] For the purposes of the time limit for bringing proceedings against contracting authorities, where the flawed decision (e.g., a decision to adopt incorrect evaluation criteria) was capable of being remedied by the contracting authority prior to the submission of the final tender, the clock does not start until the contracting authority actually implements its decisions (e.g., the flawed evaluation criteria are actually applied in selecting the successful bidders). See *Henry Bros (Magherafelt) Ltd and others v Department of Education for Northern Ireland (No. 2) [2008] NIQB 105*, which is discussed in [Sourcing Update, 4 February 2009](#).