

Insights

WHAT'S THE DEADLINE? TIMELY GUIDANCE FOR PROCUREMENT CHALLENGES IN ALTIATECH LTD V BIRMINGHAM CITY COUNCIL [2023]

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SUMMARY

A recent Technology & Construction Court's judgment considers the procedural time limits that apply in procurement litigation.

The question of timing in bringing a claim in procurement challenges is not straightforward, requiring close examination of the interplay between the procurement regulations and the Civil Procedure Rules, by reference to the nature of the claims available.

Failure to understand and comply with the requisite timelines can often result in claims being limited or excluded altogether. This case is a timely examination of the rules surrounding time limits.

BACKGROUND

The case related to the potential late service of particulars of claim in a procurement challenge. Birmingham City Council (the "**Council**") ended its contract for provision of cybersecurity services with Altiotech exercising the "termination for convenience" clause, with no reasons given. The Council subsequently awarded a replacement contract to a new provider under a different framework agreement, to which Altiotech was not a party.

On 7 September 2022, the Council published its contract award notice, following which, Altiotech, concerned about the lawfulness of the Council's conduct, requested further information as to the reasons for termination of their contract. Correspondence was exchanged between the parties in the weeks that followed, however, the Council only ultimately disclosed its reasons for termination to Altiotech on 7 October 2022.

Unsatisfied with the response, Altiotech issued the claim form on 19 October 2022, which was deemed served on 26 October 2022. Particulars of claim followed on 8 November 2022 with

deemed service date on 10 November 2022. By its claim, Altiatech sought a declaration of ineffectiveness in respect of the new provider's contract, and argued a breach of equal treatment and transparency obligations on the Council's part under the Public Contract Regulations 2015.

A declaration of ineffectiveness ("DOI") is one of the most draconian remedies available in public procurement law, resulting in the Court effectively cancelling a public contract, prospectively, from the date of the declaration.

The Council applied for a strike-out of the claim on amongst others, grounds that:

1. The claim had been issued past the 30 day deadline counting from the date Altiatech became aware of the basis for its claim (which it alleged was the September 2022 correspondence); and
2. Altiatech was late with serving its particulars of claim.

The Council also argued that there was no realistic or proper basis for the claim for a DOI which should be struck out for that reason.

TIMING

The crucial question to answer in this case, as in many procurement challenges, was when did the time to issue proceedings start running for Altiatech?

ISSUING THE CLAIM

Pursuant to Regulation 92(2) of the Public Contract Regulations 2015, the "proceedings must be started within 30 days beginning with the date when the economic operator first knew or ought to have known that grounds for starting the proceedings had arisen". The Court relied on the test for knowledge summarised in *Uniplex (UK) Ltd v NHS Business Services Authority [2020] 2 CMLR 47*, namely, that the Claimant is considered to have the requisite knowledge at the point at which it can "come to an informed view as to whether there has been an infringement of the applicable provisions and as to the appropriateness of bringing proceedings"

The Court rejected the Council's argument that the 30 day limitation period had run from the contract award notice (on 7 September), when it became aware that a new contract was being awarded to the new provider. In order for Altiatech to make good a claim that the Council had breached the Public Contract Regulations, Altiatech needed to show that the procurement had been designed and implemented to avoid the Council contracting further with Altiatech. It could only do this once it had received disclosure of the rationale for the termination of the Altiatech contract.

The Court therefore concluded that Altiatech was only able to come to an "informed view as to whether there had been an infringement" on 7 October 2022. Altiatech was therefore timely in issuing its claim.

THE PARTICULARS OF CLAIM

The Court also examined the rules on timing for service of the particulars of claim. It found that, even though CPR Rule 7.4 read separately provides a 14 day period from the service of the claim form, when read together with Regulation 94(1) of the PCR 2015 the rules create a requirement for service of the particulars of claim no later than 7 days after the issue of the claim form. Altiatech was therefore 15 days late in serving its particulars.

The Court, however, was minded to grant a retrospective extension of time for service sought by Altiatech, as otherwise the claimant would lose its entire claim. The Court also held that the delay in this case, if at all, was “*very much at the lower end of significant and seriousness*”. As such, following the Denton principles for relief from sanctions, a retrospective extension could be granted. When examining this, the Judge considered the reasons for the delay in service of the particulars of claim. It was noted that Altiatech could have been in a position to serve its particulars of claim earlier had the Council been open about the reasons for termination of the Altiatech contract in the first place.

THE DOI CLAIM

As distinct from other claims under the Public Contract Regulations, a claim for DOI can be issued at any time up to six months after the facts giving rise to the dispute become known (subject to certain exceptions, which were not applicable in this case).

In this case, the Court did not accept the Council’s argument that a DOI case had been brought without merit, only in order to benefit from a longer limitation period and to avoid the 30 day time period (referred to above). However, the Court gave an express warning to practitioners that any attempt to do so would be given short shrift in the future.

However, the Court did criticise Altiatech’s failure to provide detailed particulars, and noted that Altiatech’s DOI argument was articulated for the first time at the hearing.

In substance, the Court followed Altiatech’s logic that the relevant conditions for a direct award (under regulation 33(8)(a)) may not have been met but that this did not, in and of itself, entitle Altiatech to claim a DOI under regulation 99. Instead, Altiatech had claimed that a breach of Regulation 33(8)(a) resulted in a consequential breach of Regulation 33(11), which would be grounds for a DOI under Regulation 99. The Court found such a consequential breach to be artificial for the purposes only of triggering a DOI. While failing to allow for a DOI in circumstances where the conditions for a direct award have not been met may be an oddity, it is nonetheless the effect of the Regulations. As such, this claim was struck out.

CONCLUSION

This case highlights the complex interrelationship between the Civil Procedure Rules and the public procurement rules, and the need for companies and public authorities to seek immediate advice on any prospective challenge to a procurement or risk falling foul of the strict timelines that apply to procurement challenges. In making its decision, the Court itself acknowledged that the timelines are tight and difficult to adhere to, but “*not impossible*”. While some comfort may be taken from the decision to grant a retrospective extension of time for service of the particulars of claim in this case, this will not always be available.

The Court’s confirmation that the 30 day time period will only start running when a potential challenger is in a position to take an “*informed view as to whether there had been an infringement*” provides helpful guidance to parties considering whether they yet have enough information to launch a challenge, especially given that there is often a difficult balance to be struck between having sufficient information and issuing a claim in time.

Whilst the strike-out of the DOI claim had no bearing on the limitation points discussed above, the case makes clear that no attempt should be made to bring a DOI claim solely to benefit from a longer limitation deadline. It perhaps also shows the need to particularise a procurement claim sufficiently, notwithstanding the short timelines in which such a claim must be brought.

Trainee Solicitor Agnieszka Bidzinska assisted with the production of this article

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