



How to Challenge a Procurement

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What we do

Specialists in:

- Construction Law, Dispute Resolution and Procurement
 - NEC3, JCT, ICE and FIDIC contract advice and preparation
 - Arbitration
 - Adjudication
 - Conciliation/Mediation
 - Litigation

What we do

- Examples of procurement services
 - Sitting on bid assessment panels
 - Drafting policies and procedures
 - Advising on, drafting and running procurements
 - Assessing and defending procurement challenges
 - Notices and disclosure
 - Bid management

Agenda

- How can you challenge a Procurement?
- What Happens if you do?

Woods v Milton Keynes

- Where there is a breach of the principles of transparency or equal treatment, the contracting authority has no “*margin of appreciation*”.
- Where there has been an error in the evaluation of bids, which involves a degree of judgment or assessment, a contracting authority does enjoy a margin of appreciation.



Woods v Milton Keynes

- A Court will only interfere with a scoring decision in circumstances where there has been a manifest error.
- Manifest error is broadly equivalent to *Wednesbury* unreasonableness – decision is so unreasonable that no reasonable person acting reasonably could have made it.

Time Limits

- Generally - within 30 days of being notified of decision or knew or ought to have known of infringement
- For seeking ineffectiveness - then within 30 days of
 - Contract award notice; or
 - Award decision notice; or
 - In any other case within 6 months of award
 - (Reg 92 (2))

One thing to take away

- 30 day time limit

Steps

- Speak to a procurement lawyer ASAP
- Letter before action
- Issue Proceedings
- Application to lift Automatic Suspension
- Judgement

Suspending Award Reg 95(1)

- Once an application to the court has been made the contracting authority must refrain from entering into the contract until:
 - Matter determined
 - Matter disposed of or discontinued
 - Court lifts suspension

Application to Lift Suspension

- *American Cyanamid*
 - Is there a serious issue to be tried
 - Are damages an adequate remedy
 - Balance of convenience

(after this judgement most cases settle)

Remedies

- When contract has not been entered into (Reg 97) the courts can;
 - Set aside decision of CA
 - Order CA to amend any document
 - Award damages for breach

Remedies

- When Contract has already been entered into (Reg 98), the Courts can:
 - Declare a contract ineffective
 - Impose alternative penalties and may make any necessary consequential order
 - Award Damages

Damages

- Only when breach is sufficiently serious
 - *EnergySolutions EU Ltd v Nuclear Decommissioning Authority* [2017] UKSC 34
- What is “sufficiently serious”?
 - Failing to award the contract to tender which should have been assessed as most economically advantageous
 - Breach of obligation relating to threshold requirement

Measure of Damages

- Put innocent party in position it would have been if breach not occurred;
 - Tender costs
 - Loss of chance to earn overheads and profit
(*Chaplin v Hicks*)

Questions?

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