

TCC Guidance Note on Procedures for Public Procurement Cases

Public procurement cases provide unique challenges to litigants and the Courts. The 10 day standstill period and 30 day limitation periods, coupled with an imbalance of information as between challenger and Authority, as well as applications to lift the automatic suspension of contract award, means they often require urgent hearings at a very early stage.

The Technology and Construction Court has introduced a Guidance Note on Procedures for Public Procurement Cases, which is Appendix H to the TCC Guide. The aim of the Guide is to provide guidance for parties on the management of such claims, and applies from 17 July 2017.

The bulk of the Guidance is focussed on how the parties should interact before any action has been commenced, on confidentiality at all stages of the litigation and upon the accommodation of non-parties whose interests are engaged by the litigation.

Pre-Action Process and ADR

There is often great urgency in commencing proceedings in procurement cases due to the 10 day standstill period after a contract has been awarded. The following pre-action process is recommended:

1. The potential claimant should send a letter before claim to the contracting authority which:
 - a. identifies the procurement process to which the claim relates;
 - b. explains the grounds then known for the claim;
 - c. requests any information sought from the contracting authority;
 - d. suggests the remedy required;
 - e. makes any request for an extension to the standstill period and/or request not to enter into the

contract for a specific time and/or request not to do so without a specified period of notice to the potential claimant; and

- f. proposes an appropriate, short time limit for a response.

2. The contracting authority should:

- a. promptly acknowledge receipt of the letter before claim;
- b. give notice of its solicitor's details;
- c. indicate whether the standstill period will be extended and, if so, by how long;
- d. provide any information as soon as possible to which the claimant may be entitled; and
- e. send a substantive response within the timescale proposed, or as soon as practical thereafter.

3. Having exchanged correspondence and information, the parties should continue to make appropriate and proportionate efforts to resolve the dispute without the need to commence proceedings.

The parties are expected to act co-operatively and reasonably in dealing with all aspects of the litigation, including requests for extensions of time, amendments following disclosure, and in providing one another with information including the information referred to in Regulation 84 of the Public Contract Regulations 2015 (as amended). Indeed, the

aim should be to avoid the need to issue proceedings simply to obtain early specific disclosure.

Alternative Dispute Resolution is encouraged, and the court may order a stay of proceedings, create time in the timetable, or make an ADR order in appropriate cases.

Confidentiality

Many procurement disputes will feature confidential information (such as documents submitted as part of tenders) and so the Guidance provides extensive advice to parties and the court relating to maintaining confidentiality during any disclosure exercise. Confidential documents should be marked as "Confidential", and it is recommended that such materials are provided on coloured paper so that their status is immediately apparent.

It may be justified for documents (including pleadings or statements) to be provided in a redacted form. A schedule should be produced which provides justifications for any redactions. At an appropriate stage the court should be provided with an unredacted (but clearly labelled) copy of the document.

Confidential materials may most appropriately be passed through the allocated judge's clerk and, further, where necessary, a party can request the Court gives an order restricting inspection of court files, whilst providing redacted versions



available for public inspection. The relevant paragraphs of the Guide (27 – 31) were cited with approval by Mr Justice Coulson in *Bombardier Transportation Limited v Merseytravel* [2017] EWHC 575 (TCC). The Judge was commenting on a draft of the Guide at that date, but there have been no changes to those paragraphs in the published version.

If confidentiality rings are established to facilitate the disclosure of confidential information, with the court's focus being on who should be admitted to the ring and the terms of the undertakings which any member of the ring may be required to give. In respect of clients and internal lawyers this should be done at an early stage. The range of factors which the court will consider includes the role and responsibilities of the person; the extent of the risk that competition will be distorted as a result of disclosure to them; the extent to which that distortion can be avoided or controlled by the terms of the disclosure; and the impact of any restrictions on that individual.

The terms of the undertakings will generally preclude the use of the material other than for the purposes of the proceedings and prevent disclosure outside the ring. They will also control the storage and copying of the material, and direct its return or destruction at the conclusion of the proceedings. Additional terms are suggested to account for possible concerns relating to competition, including undertakings not to be involved in future procurements for a period of time.

There is also the suggestion that two-tier confidentiality rings may be used, where employees within the ring are provided with more limited materials (for example, technical material but not pricing information) than external representatives.

There is specific guidance on applications to lift suspensions.

Suspension Lifting Applications

The Guidance is clear that the court can lift the statutory suspension that prevents the contracting authority from entering into the contract in question, and it is anticipated that any such application will be brought on expeditiously. That said, however, it is recognised as important that the respondent should have enough time to submit evidence and for any evidence in reply to be provided.

Recent case law (*Alstom v London Underground*) provides guidance as to the timing of applications to lift the suspension and applications for disclosure; in general

terms, it is better for early disclosure (if sought) to be given in advance of the hearing of an application to lift the automatic suspension. Where the suspension is lifted only in appropriate cases will a stay of such an order be given. The stay will typically be 1-2 working days, allowing the Court of Appeal to set a timetable.

The Guidance also covers various other aspects of litigation.

Institution of Proceedings

The Claim Form and the Particulars of Claim must be served within 7 days after the date of issue, and provision is made for pleadings containing confidential information to be lodged with the court in both a non-confidential and confidential format.

Judicial Review

If the claimant has decided that it is also necessary to bring judicial review proceedings, the Guidance makes clear that the case will be heard and managed together with the TCC proceedings by a TCC judge who is also a designated judge of the Administrative Court. It is open for the TCC judge, having considered the claims, to either direct that the case will be heard by a TCC judge or, if appropriate, transfer the case to the Administrative Court.

CMC

It may be appropriate for an early CMC to be held so that decisions can be made related to issues like fixing trial dates or specific anticipated applications.

Cost Budgeting

Given the uncertainty or speed of proceedings it may not be possible for realistic costs budgets to be prepared, and so it is recommended that claimants write to the court before or at the same time as applying to fix the CMC and apply for an order that the parties need not serve costs budgets within the normal time frame.

Specific or Early Disclosure

Given the obvious importance of early disclosure in enabling claimants to properly plead their case, contracting authorities are encouraged to provide their key decision making materials at a very early stage. The issue of disclosure will also be

considered at the CMC.

The importance of disclosure was recently highlighted by Coulson J in *Alstom Transport UK Ltd v London Underground Ltd and another* [2017] EWHC 1406 (TCC). Often contracting authorities will seek to argue that the claimant has failed to show a serious issue to be tried, and the court must be astute to prevent contracting authorities from gaining an unfair advantage by giving only limited disclosure and then relying on the absence of such documents or evidence when pleading its defence or when making an application to lift the automatic suspension.

Interested Parties

Often the successful bidder will wish to be involved in proceedings between the contracting authority and an aggrieved tenderer and the Guidance expressly accounts for this by confirming that its interests can usually be considered and addressed by the court without it being necessary for the interested party to become a full party to the proceedings. The Guidance recommends that the interested party be put on notice of the proceedings and be provided with pleadings and supporting evidence, and then it is for that party to apply to be represented (if it so wishes) in writing as soon as practicable. In *Cemex UK Operations Limited and v Network Rail Infrastructure Limited* [2017] EWHC 2392 (TCC) the Court held that a non party to the litigation whose interests were engaged could be made an interested party for the purpose of specific applications.

Trial and Judgments

Consideration should be given to confidentiality in terms of what may be reported and who should be present in the courtroom. As much of the trial as possible should be open to all who wish to attend, and any restrictions should be legitimate, fair and proportionate.

Much the same themes underlie the Guidance's approach to judgments, which will be handed down as open documents save in the most exceptional circumstances, though confidential information will be contained in a separate schedule.

The Guidance Note was drafted by a working group of the Procurement Lawyers' Association, chaired by Sarah Hannaford QC and Fionnuala McCredie QC of Keating Chambers, with extensive input from TCC Judges both current and retired.