

Brookhouse case: Court of Appeal decision in respect of time limits for procurement challenges

12 July 2024

Facts and High Court decision

In November 2023, the High Court handed down judgment in Brookhouse Group Limited v Lancashire County Council. In the case, the challenger issued its claim; seeking a Declaration of Ineffectiveness, four months after contract execution.

The position, at Regulation 93(2) of the Public Contracts Regulations 2015 (**PCR 2015**), is that a claim for a Declaration of Ineffectiveness must be issued:

1. within six months of contract execution; or
2. in the event that:

a) a contract award notice has been published; or

b) the public body has informed a bidder of the conclusion of the contract and provided a 'summary of the relevant reasons', to which the challenger would have been entitled to receive, pursuant to Regulation 55(2) PCR 2015, the time limit is reduced to **30 days** (beginning with the day after publication of the contract award notice or provision of information to the challenger).

During correspondence, the Council informed the challenger of the contract award, and its view that a procurement procedure was not necessary on the basis that the Development Agreement in question had arisen out of an agreement procured ten years earlier. As more than 30 days had elapsed from provision of this information to the challenger issuing its claim, the Council sought to have the challenger's claim struck out in its entirety.

The High Court held that the shorter 30-day time period did not apply because a "summary of the relevant reasons" provided pursuant to Regulation 55(2) is only applicable where a procurement process has been carried out. As the Council had not carried out a procurement, the reduced time limit did not apply, and the challenger's claim was within the six-month limitation period for an ineffectiveness claim.

The Judge confirmed that the only option for shortening this six-month time period, where a procurement process has not been conducted, is to publish a Contract Award Notice.

Court of Appeal decision

The Council appealed the decision, but the Court of Appeal (**CoA**) Judges upheld the High Court decision, confirming that the six-month limitation period would only be reduced where the "summary of the relevant reasons" is given to a challenger as part of a procurement process; or where a Contract Award Notice has been published. As neither of these circumstances applied, the relevant limitation period was six months, and the challenge was issued in time.

The CoA went on to say that despite the fact that the Council had supplied information to the challenger during correspondence, before the claim was issued, it would be "wholly wrong" to construe Regulation 93 in a way which would allow the Council to avoid its wider obligations to inform other economic operators of its intention to enter into a contract without competition (i.e., not just the challenger itself).

Comment

The case covers a very specific situation in which a Declaration of Ineffectiveness is sought. In this situation, the only way a public body may reduce the six-month challenge period is to publish a Contract Award Notice using the Find a Tender Service. This Notice will be made publicly available to any interested organisations; and, following the expiry of 30 days, the public body may be confident that its contract will not be subject to a successful ineffectiveness claim.

While it is natural for public bodies in such positions to avoid publishing details to the market, it is notable that the Court also took a dim view of the Council's attempt to circumvent the rules; reinforcing the position at Regulation 6(5), and repeated at section 4(3) of the Procurement Act 2023, that a procurement should not be designed in a way which seeks to exclude the application of the rules.

Once the Procurement Act 2023 is in force from 28 October 2024, there will be an increased focus on transparency and public bodies will be required to publish a notice indicating that they intend to make a contract award (before contract execution), as well as a Contract Details Notice within 30 days of execution, even when making a direct award. Consequently, the current loophole, where direct awards are not necessarily accompanied by a Contract Award Notice, will be closed.

Public bodies and challengers should also bear in mind that the general time limit for starting proceedings remains at 30 days from the date on which a challenger first knew, or ought to have known, that grounds for starting the proceedings had arisen. Had the challenger in this case been seeking damages (as most challengers do), rather than the specific Declaration of Ineffectiveness remedy, it would have been subject to limitation in issuing its claim months after being aware of its right to issue proceedings, regardless of the underlying position. It is a common tactic for public bodies to engage with challengers in pre-action correspondence in an attempt to 'time the challenger out'; and this approach is supported by an established body of Case Law.

For more information or enquiries relating to this High Court decision, please contact [Bradley Martin](mailto:bradley.martin@brownejacobson.com).

Key contact



Bradley Martin

Partner

bradley.martin@brownejacobson.com

+44 (0)330 045 2483

Related expertise

Services

Constitutional and administrative
law

Education law

Public procurement

Regulatory compliance for
schools and academy trusts