


# Handling disputes during the standstill period under the Procurement Act 2023

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Now that the Procurement Act 2023 (the Act) is in force, contracting authorities should consider the effect of changes to the standstill period and the application of automatic suspensions under the Act, as well as the new test introduced for applications for interim remedies for aggrieved suppliers.

## Remedies under the Act

The remedies for an aggrieved supplier under the Act remain largely the same as under the Public Contracts Regulations 2015 (PCR2015), with an order setting aside a contract or modification under section 104 of the Act being the same as a declaration of ineffectiveness under regulation 98 of the PCR2015.

The time frame in which aggrieved suppliers can bring a claim for damages remains 30 days from when they first knew, or ought to have known about the circumstances giving rise to the claim. Where there has not been a standstill period, the period for seeking an order setting aside a contract remains the earlier of 30 days from when the aggrieved supplier first knew, or ought to have known about the circumstances giving rise to the claim or 6 months from the day the contract was entered into or modified. If the set-aside proceeding relates to a modification for which there was no standstill period or a contract where a section 53 contract details notice was not published, there is a longer period of 3 months from knowledge or constructive knowledge but still not later than 6 months from the contract or modification.

## Automatic suspension and changes to the standstill period under the Act

A key change introduced by the Act is to the standstill period and the application of the automatic suspension.

The mandatory standstill period for contracting authorities has changed from 10 calendar days after receipt of a standstill letter (notice of intention to award) under the PCR2015 to 8 working days beginning with the day on which a contract award notice is published under the Act.

Exemptions to the mandatory standstill period requirement are set out in section 51(3) of the Act, but contracting authorities may choose to observe a voluntary standstill period before entering into a contract.

An automatic suspension arises under section 101 of the Act where, during any applicable standstill period (whether mandatory or voluntary), proceedings are commenced by an aggrieved supplier under part 9 of the Act and the contracting authority is notified of that fact. The suspension, during which contracting authorities are prohibited from entering into the contract, lasts until the proceedings are resolved or the suspension is lifted by an order of the Court.

If proceedings are issued after the standstill period, an automatic suspension would not apply, and the contracting party could enter into the contract.

This differs from the previous regime under the PCR2015, which imposed an automatic suspension in all cases where a claim form had been issued relating to a contract award, regardless of whether there was a standstill period, provided the contract had not been entered

into.

This change is likely to lead to a rise in the number of formal requests from bidders to extend the standstill period, especially where bidders have sought further information that has not yet been provided by the contracting authority. It is important to note that when a contracting authority agrees to extend its standstill period, it must publish an amended contract award notice with a new standstill end date.

## Lifting the automatic suspension

In addition to changes to automatic suspension, the Act introduced a new test for the court to apply when granting interim remedies under section 102 of the Act, which includes an order to lift or modify an automatic suspension.

Section 102(2) of the Act requires the court to have regard to:

- (a) *the public interest in, among other things—*
  - (i) *upholding the principle that public contracts should be awarded, and contracts should be modified, in accordance with the law;*
  - (ii) *avoiding delay in the supply of the goods, services or works provided for in the contract or modification (for example, in respect of defence or security interests or the continuing provision of public services);*
- (b) *the interests of suppliers, including whether damages are an adequate remedy for the claimant;*
- (c) *any other matters that the court considers appropriate.*

We are yet to see how this test will be applied in court. However, it is clearly similar to the test in *American Cyanamid v Ethicon* [1975] UKHL 1, being whether there is a serious issue to be tried and, if so, whether the balance of convenience favours the interim order. Further, the statutory guidance on remedies gives an indication of how the court may exercise its discretion:

“However, in some circumstances, delaying entry into the contract or making the modification is problematic, for example, if the contract is to deliver certain defence or health-related services where delay would have unacceptable operational impacts. To allow for such situations, a contracting authority can ask the Court to lift or modify the automatic suspension, ie bring the suspension to an end or modify it (for example, provide for a shorter standstill period) and allow the contract to be entered into or the modification to be made immediately (or within a shorter period than would otherwise be the case).”

Lifting an automatic suspension may be more of an exception rather than the rule.

## Managing the risks of a claim

While the requirement to republish an amended contract award notice to extend a standstill period gives suppliers a longer period to commence proceedings to invoke an automatic suspension, contracting authorities can take appropriate steps to mitigate the risk of challenge by:

1. Ensuring those involved in carrying out procurements are made aware of the contracting authority's obligation to have regard to the objectives set out in section 12 of the Act, which include sharing information for the purpose of allowing suppliers and others to understand the authority's procurement policies and decisions, and acting, and being seen to act with integrity.
2. Acting transparently throughout the procurement by making sure information on the processes for awarding a contract and notices are clear and shared.
3. Promptly engaging with suppliers that raise queries with the view to resolving any issues without the supplier needing to bring protective proceedings during the standstill period.

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