

Challenging procurement decisions by way of Judicial Review - the key principles

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Procurement for public sector bodies is (subject to some exceptions) normally governed by the Public Contracts Regulations. This means that any legal challenge to an award decision will usually come under the Public Contracts Regulations and needs to be brought by way of a Part 7 Claim in the Technology and Construction Court. However, it is important for public bodies to remember that any award decision is, like the vast majority of decisions made by public bodies, subject to the principles of judicial review. Here are some of the key considerations to keep in mind when considering the risk of a judicial review challenge and some of the points that can be taken if defending such a claim.

1. Judicial review should only be used where no other adequate remedy is available.

It is a “remedy of last resort”. Essentially this means that judicial review will not be available to challenge a procurement decision if the procurement was conducted under the Public Contracts Regulations and the party who is challenging the decision is classed as an economic operator (see Regulations 2 and 91 of the Public Contracts Regulations).

2. Only decisions made by public bodies in pursuit of their public functions can be judicially reviewed

As set out above, however, an award decision following a procurement exercise will satisfy this test.

Third, the party bringing the judicial review claim must have standing (as defined by section 31(3) of the Senior Courts Act 1981). As the High Court recently confirmed in *Good Law Project v Secretary of State for Health and Social Care* [2022] EWHC 2468 (TCC), a non-economic operator will have standing if:

1. They have sufficient interest in compliance with the public procurement regime in that they are affected in some identifiable way by the challenged decision; or
2. The gravity of a departure from public law obligations justified, even if they are not personally affected. As a failure to comply with the regulations is an unlawful act, a public body should still be subject to review by the Court, even if there isn't an economic operator which wants to bring a challenge.

4. It is generally the case that the limitation period for bringing a judicial review claim is longer (three months) than under the Public Contracts Regulations (see CPR 54.5)

However, if the claim is governed by the Public Contracts Regulations, the judicial review claim must also be filed within the time within which an economic operator would have been required by regulation 92(2) of the Public Contracts Regulations (i.e. 30 days beginning

with the date the economic operator first knew or ought to have known that grounds for starting the claim had arisen).

5. The recognised grounds for judicial review are limited to:

1. **Illegality** – this may include a breach of a contracting authority's obligation under the Public Contracts Regulations or a failure to comply with some other statutory obligation in awarding a contract.
2. **Procedural unfairness** – such as a failure to treat tenderers equally, or cases of apprehended or actual bias.
3. **Irrationality** – for example, if the contract was wrongly awarded based on the evaluation criteria or other policy reasons.

6. The relief available by way of judicial review is wider than that under the Public Contracts Regulations

7. The High Court has issued specific guidance for managing judicial review challenges to procurement decisions

Which may include transferring the claim from the Administrative Court to the Technology and Construction Court (see paragraphs 12-20 of Appendix H of the Technology and Construction Court Guide for more detail).

Browne Jacobson's specialist [procurement litigation team](#) has the experience and expertise to guide public bodies through any challenges received under either the Public Contracts Regulations or by way of judicial review. Please contact us with any questions about this article or to discuss what steps you should take if challenged by an unsuccessful bidder.

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