

Case summary: the importance of bringing a procurement claim within the appropriate time limits

29 June 2023

Altiatech v Birmingham City Council

The case concerned a procurement challenge made by Altiatech (Altiatech) against Birmingham City Council (Authority) regarding the Authority's direct award of a contract to a supplier under a framework agreement that Altiatech was not a party to. Prior to making the direct award, the Authority had a contract with Altiatech for the same services, which it terminated for convenience. A number of procedural and legal issues were considered by the Court, which are of interest to contracting authorities and procurement practitioners, in particular the importance of bringing a procurement claim within the appropriate time limits.

Facts of the case

The Authority contracted with Altiatech by way of a call-off agreement on 2 July 2021, to supply cyber security services for a total of three years, pursuant to the G-Cloud Framework Agreement. To the surprise of Altiatech, the Authority terminated its agreement with them on 29 March 2022, by way of the 90 days' notice under the termination for convenience clause, which did not require it to provide a reason for termination. On 29th of July 2022, the Authority submitted a revised termination notice to Altiatech.

On 15th of July 2022, the Authority made a direct award to Softcat plc (Softcat) under a different framework agreement called The North of England Framework Agreement (NEF). The Authority had become a party to NEF in May 2022. The award to Softcat was for the same product that Altiatech was previously supplying to the Authority.

A contract award notice was published by the Authority on 7 September 2022, in respect of the award of the new contract to Softcat. Altiatech made a complaint to the Authority about the termination of the agreement explaining that no reason had been provided, and that they had not been privy to the procurement process of the new award. On 19 October 2022, Altiatech issued a Claim Form to the Authority which was sent by post on 26 October 2022.

Altiatech alleged the Authority had breached its equal treatment and transparency obligations under Regulation 18 of the Public Contracts Regulations (PCR). In particular that the Authority had breached its duties under Regulation 18(1), 18(2) and 18 (3) of the PCR not to structure a procurement such that it would favour or disfavour particular economic operators. The relief that Altiatech was seeking was a declaration of ineffectiveness under Regulation 99 of the PCR and a financial penalty order.

The Particulars of Claim were posted on 8 November 2022 and deemed to have been served on 10 November 2022, 15 days after service of the Claim Form.

The Authority applied for summary judgement to strike out Altiatech's case on the grounds of both limitation and the late service of the Particulars of Claim.

The Authority's four limb argument for summary judgment was as follows:

1. Altiatech's Regulation 18 claims are time barred as its Claim Form was issued 30 days after Altiatech had acquired or should have

acquired the relevant knowledge of the claim as required by Regulation 92(2) of the PCR. (“the Limitation point”).

2. The Particulars of Claim issued by Altiatech were out of time, which were in breach of the Civil Procedural Rules (CPR) specifically CPR7.4(1) and (2) as affected by Regulation 92(2) of the PCR (“the Particulars of Claim point”).
3. Altiatech’s Particulars of Claim disclosed no reasonable grounds for pleading a breach of Regulation 24 of the PCR and should be struck out (“the Regulation 24 point”).
4. There was no realistic or proper basis for the claim for a declaration of ineffectiveness which should be struck out for that reason.

Limitation

The Court noted that in some cases “it may be necessary to identify with some care what are the facts which need to be alleged in order to constitute a valid claim... it is at least possible that while a letter before action is genuine and not intended to exaggerate the position, the author may have got it wrong as to what needs to be shown for a valid cause of action”. In most cases this is not a matter in issue but where it is, it is necessary for it “to be considered objectively and by reference to what the true legal position is”.

Following consideration of all the correspondence and the information that was available to Altiatech, the Court’s view was that whilst Altiatech had some information, “it did not have “knowledge of the facts sufficient to constitute a cause of action” which....was such as to enable the claimant to “come to an informed view as to whether there has been an infringement of the applicable provisions and as to the appropriateness of bringing the proceedings”.

In reviewing the correspondence between the parties and in particular the pre-action letter, it was accepted that the letter could be viewed in two possible ways. Either that Altiatech had (and thought it had) the essential information it needed to commence proceedings but wanted to see if the Authority might have some defence to them. This might have meant that for the purpose of Regulation 92 (2) of the PCR it already had the required knowledge. The alternative view is that the further information sought was necessary for Altiatech in order for it to have an informed view as to whether it really had the grounds to start proceedings. In this case the Court’s view was that “Altiatech still did not know the underlying reason for the Authority’s conduct. Even if Altiatech thought it had information to start a claim, in truth it did not”. This was not a case where the very existence of a letter before action demonstrated that the claimant had sufficient knowledge at that point of the relevant breaches.

Therefore, the Court decided that it was only on 7 October that Altiatech was able to come to an informed view as to whether it had a claim and it was appropriate to bring proceedings which followed on 19 of October. On that basis the Authority’s application to strike out fails and the Claim Form was issued in time.

Particulars of claim

There was an issue between the parties as to when the Particulars of Claim should have been served. Altiatech argued that it is 14 days from the date of service of the Claim Form, which was served on 26 October, and which would mean the Particulars of Claim had to be served on 9 November. The Authority argued that it is 7 days from the date when the Claim Form had to be served – in this case as it was served on 26 October, which meant that when the Particulars of Claim were served on 9 November, they were 15 days late.

Having considered all the information, the Court’s view is that the effect of Regulation 94 (1) PCR and CPR 7.4(2) is that Particulars of Claim must be served within 7 days of the issue of the Claim Form. The Court noted that whilst this is a very tight deadline, it is not impossible. Further that the relevant 30-day limitation period can and will be used not just to draft Claim Form but also the Particulars of Claim. In this case, the Particulars of Claim was served 15 days late and should have been served on 26 October.

The Court was asked by Altiatech to deal with a retrospective application for an extension of time. In dealing with this application, the Court considered that the correct approach was to apply the usual Denton principles namely (1) whether the delay was serious or significant and (2) whether there is good reason for the default.

On the first principle, the Court decided that the delay was not serious or significant. Despite Altiatech’s Particulars of Claim being served 15 days following service of the Claim Form, the Authority did not raise this point until 23 December and if it was correct on its strike-out application, it could have raised the point as to late of service of the Particulars of Claim at the very start of its defence but chose not to.

On the second principle, the Court noted that Altiatech’s solicitor accepted that he had misunderstood the time for service of the Particulars of Claim, although the Court accepted that in this case it was understandable for the solicitor to take the view that he did. The Court noted that the analysis of Regulation 94 and its impact on CPR 7.4(2) is not straightforward. In the overall circumstances of the case, whilst the application for relief was not made until 15 days after Altiatech had been appraised of what the Authority had contended,

the Court also noted that the whole action might have commenced earlier had the Authority been open at the outset about the underlying reasons for its actions. Overall, the Court considered that not to grant relief from sanctions would be grossly disproportionate because it would deprive Altiatech of a claim of some substance. Therefore, relief from sanctions was granted to extend the time for the service of the Particulars of Claim retrospectively.

Based upon the above, this aspect of the Authority's argument failed and Altiatech were allowed to proceed with their claim.

Regulation 24

The Court's view of the claim under Regulation 24 of the PCR was that it seemed highly artificial because the whole of Altiatech's case was based on the Authority terminating their contract, to then approve another company through a different framework to create a new contract, due to wanting to cut ties with Altiatech. In addition to this, it was noted in the Particulars of Claim by Altiatech that there was a lack of equal treatment that did not add anything to the Regulation 18 claim. As such, it was deemed that this part of the claim had no real prospect of success and as such, it was struck out.

Declaration of ineffectiveness

The Court noted that the declaration of ineffectiveness claim was made in the barest terms as it did not even stipulate which part of Regulation 99 of the PCR is said to apply let alone why.

With regards to declaration of ineffectiveness claims, the Court provides some important guidance for procurement practitioners as follows:

- in general, a bare claim for a declaration of ineffectiveness is insufficient and is liable to be struck out. Either a claimant can allege a particular basis for the declaration of ineffectiveness sought by reference to the grounds in Regulations 99 of the PCR, or it cannot.
- "it is said that in truth a claim for declaration of ineffectiveness was only made so as to avoid the 30 day limit (which was not accepted as the reason for the claim in this case) but whether a claim for declaration of ineffectiveness is made for that reason or just because it is regarded as something as a routine pleading, this will not do in the future. Practitioners should therefore note the above".

Having considered the arguments and information presented in respect of the declaration of ineffectiveness claim, the Court considered that there is no real prospect of success for the declaration of ineffectiveness claim to succeed at trial and therefore this part of the claim was struck out.

Key lessons

The Altiatech judgement provides a shift from some earlier cases and important guidance for contracting authorities and procurement practitioners in respect of the following:

- Due to the operation of PCR and CPR rules, Particulars of Claim must be served within 7 days of the issued Claim Form;
- It is important to engage specialists early on to ensure procedural deadlines are complied with and the necessary information is set out in any claim made;
- On deadlines for procurement challenges - the 30-day clock begins when the challenger first knew or ought to have known that grounds for initiating the proceedings have arisen. This is a question of fact and correspondence in a procurement challenge will be carefully considered by the court to determine whether the claimant had the required knowledge;
- The conduct of parties throughout the procurement process can be a relevant consideration and have an impact on how certain claims are dealt with by the courts in proceedings. It is clear that the judge was not impressed by the conduct of the Council in the process;
- Bare claims for declarations of ineffectiveness are insufficient, the claimant is required to plead its allegations in respect of which part of Regulation 99 of the PCR it relies upon, and declarations of ineffectiveness must not be used as a routine pleading with a view to avoiding the 30-day limitation period;
- A court will partially strike out a claim, even if it is brought in the time, where it is deemed that any aspect of the claim does not have a reasonable prospect of success.

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