

## Need to Know Guide - Procurement Challenges

We regularly advise clients on bringing and defending challenges to procurement awards under the Public Contracts Regulations 2015 (the Regulations) and other associated legislation. This is an area where taking prompt advice is essential, as very short timescales apply if a bidder wishes to bring legal proceedings challenging the award of the contract. This guide sets out the key information about public procurement challenges that bidders and contracting authorities need to know.

### When can tender outcomes be challenged?

Tenders are only subject to the Regulations if they are run by public authorities (including central government authorities, local authorities, universities, some utility companies and NHS trusts), and are above a certain threshold (approximately £118,000 for central government authorities and £181,000 for local authorities and other public bodies). However, if the Regulations do not apply to a contract because it is below the threshold, there may still be some scope for challenge, because all tenders must be conducted in accordance with general EU principles of transparency and equal treatment if there is the potential for there to be cross-border interest in the contract.

### Why might an unsuccessful bidder want to bring a challenge to a procurement award?

Common reasons that a procurement award may be susceptible to challenge include:

- There is a problem with the way the tender was designed (e.g. if awards marks in a way which favours the incumbent supplier over other suppliers).
- There is a problem with the way the bids were evaluated (e.g. the award criteria were not applied correctly, or mathematical errors were made in calculating the scores).
- The contracting authority failed to comply with the procedural requirements imposed by the Regulations (e.g. the tender was not advertised when it should have been).

Contracting authorities are required to publish an Award Notification Letter providing some information to unsuccessful bidders about the reasons for their decision, but often this does not contain sufficient information to allow a tenderer to assess whether it has a strong legal claim. Generally, where a challenge is intimated, the contracting authority should disclose the key information needed by the tenderer to understand why they have lost, such as the evaluation reports and records.

### What can an unsuccessful bidder claim for?

If a tender has been wrongly awarded, bidders can claim some or all of the following, depending on the circumstances:

- Damages to compensate the unsuccessful bidders for the profits it would have made had it been awarded the contract.
- Wasted tender costs.
- An order that the contract be awarded to the unsuccessful bidder.
- A declaration that the award of the contract is ineffective i.e. it is treated as if it never happened. However, this remedy is only available for very serious types of breaches of the Regulations.

### What are the time limits for challenging a procurement award?

After the contracting authority has informed bidders of its decision, there must follow a ten day "standstill period" during which the contract cannot be awarded. If an unsuccessful bidder issues court proceedings before the expiry of the standstill period, an automatic suspension comes into place which prevents the contracting authority from awarding the contract. The parties can agree that the suspension will be lifted, or the contracting authority can apply to the court for an order lifting the suspension.

If an unsuccessful bidder is content to allow the contract to be awarded to another bidder and limit its claim to damages only, there is a deadline of thirty days for issuing proceedings. This runs from the "date of knowledge", which means the date when the tenderer knew that the contracting authority had committed a breach of the Regulations. Usually, the date of knowledge will be the date on which the bidder received the decision notice. However, for some types of breach the time limit will start running before the tender outcome has even been decided.

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