Litigation under the new Procurement Bill

By Jonathan Lewis and Jack Castle

The Procurement Green Paper promised sweeping changes to UK procurement law. It expressed concern about the huge cost of procurement litigation. Now that the Procurement Bill has been published in the House of Lords, what effects would it have on procurement litigation if it became law?

Introduction

1. On 12 May 2022 the Procurement Bill (the "**Bill**") was published in the House of Lords and is currently being debated. With a little luck it will obtain Royal Assent sometime in mid-2023, with a minimum period of six months' notice before "*going live*". It is likely that the Bill will be amended in the coming months, given that the Government has already tabled some amendments. The current version is therefore far from set in stone. We also await a large quantity of secondary legislation that will give the Bill a substantial amount of detail that it currently lacks. This note considers a few elements of the current version of the Bill which have the potential to impact upon how procurement claims are litigated.

2. Generally, despite the sweeping promises of the Green Paper, the Bill does not appear to bring significant changes to the way in which procurement claims will be litigated or the kinds of disputes that are likely to arise. We certainly won't be litigating in a new procurement tribunal! That said, the available grounds of challenge to procurement decisions appear to be somewhat altered in certain respects.

Principles vs Objectives

3. Regulation 18 of the current Public Contracts Regulations 2015 (the "**PCR**") contains the "*Principles*" of procurement. They are firmly rooted in the relevant EU Directives and their open-market objectives. Regulation 18 provides that contracting authorities must treat economic operators equally and without discrimination and must act in a transparent and proportionate manner. It is rare to see a procurement claim in which some sort of breach of these principles, broadly framed, is not pleaded. Given their breadth and need to consult case law to establish their precise contours, it can be difficult to respond to such allegations.

4. Clause 11 of the Bill reflects a change of focus by establishing a series of "*Objectives*" for procurement, tailored to the new domestic context:

> 1. In carrying out a procurement, a contracting authority must have regard to the importance of—
>   a. delivering value for money;
>   b. maximising public benefit;
>   c. sharing information for the purpose of allowing suppliers and others to understand the authority's procurement policies and decisions;
>   d. acting, and being seen to act, with integrity.
> 2. In carrying out a procurement, a contracting authority must treat suppliers the same unless a difference between the suppliers justifies different treatment.
> 3. If a contracting authority considers that different treatment is justified in a particular case, the authority must take all reasonable steps to ensure it does not put a supplier at an unfair advantage or disadvantage.

5. Clause 82 also maintains a principle of non-discrimination against a supplier from a "*treaty state*".

6. However, transparency and proportionality are notable by their absence from the Objectives. Considerations of proportionality are relevant in specific circumstances identified in the Bill (see Clause 19(3) for example) and there are more specific transparency requirements (including "*Transparency Notices*", see Clause 43). But they do not appear as the overarching "*Principles*" that we are used to.

7. It also seems that the abstract, general principles of transparency and proportionality will not be used to ascertain the "*validity, meaning or effect*" of the Bill, because the Bill is not "*retained EU law*" under the European Union (Withdrawal) Act 2018 despite its similarity to the EU regime, and/or the procurement regime will (at least in large part) not be "*unmodified*" retained EU law (s.6(3) of that Act).

8. So it appears that Courts may no longer apply general principles of EU law and won't be bound by CJEU case law (it is unclear if elements of it may remain persuasive). This could mean that allegations of procurement law breaches become less abstract and become more focussed on the specific considerations in Clause 11 and other more concrete obligations in the Bill.

The Automatic Suspension

9. Under the PCR, the automatic suspension is imposed by reg.95. In determining whether to lift the suspension the Court must consider whether, if reg.95 were not applicable, it would be appropriate to make an interim order requiring the contracting authority to refrain from entering into the contract. Only if the Court considers that it would not be appropriate to make such an interim order may it make an order under paragraph reg.96(1)(a) lifting the suspension. This is set out in reg.96(2) PCR.

10. This formulation of the test brings into play the familiar *American Cyanamid* principles that apply to the grant of an interim injunction: (i) is there a serious issue to be tried; (ii) if so, whether damages be an adequate remedy for a party injured by the court's grant, or its failure to grant, an injunction; (iii) if not, where does the balance of convenience lie. These questions have been nuanced in the context of automatic suspensions over the years,[1] but no further detail is provided in the PCR itself.

11. The Green Paper proposed amending the test to be applied by the Courts when determining whether to lift the automatic suspension, so that "*it is no longer based on the test applied when granting an injunction, but is a more appropriate, procurement-specific test*" (§206).

12. Under the Bill the suspension is imposed by Clause 90. Unlike under the PCR where the suspension kicks in when the contracting authority "*becomes aware*" that the claim form has been issued, under Clause 90 the contracting authority must be "*notified*" that the claim form has been issued (Clause 90(1)(b)). The significance of this change in drafting is unclear, and the drafting may yet change. Importantly, Clause 90(3) introduces a new proviso that the suspension is not triggered if the contracting authority was notified of the commencement of proceedings after the end of any applicable standstill period.

13. As well as applying to new contracts, Clause 90 also applies to the suspension to "*convertible contracts*" – where a contract has already been entered into, it may not be modified once the suspension is triggered.

[1] E.g.: *Covanta Energy Ltd v Merseyside Waste Disposal* Authority [2013] EWHC 2922 per Coulson J at [34] and [48], *OpenView Security Solutions Limited v The London Borough of Merton Council* [2015] EWHC 2694 per Stuart-Smith J at [10]-[15]; *Alstom Transport UK Ltd v London Underground Ltd* [2017] EWHC 1521 per Stuart-Smith J at [20]-[22]; *Lancashire Care NHS Foundation Trust v Lancashire County Council* [2018] EWHC 200 per Fraser J at [16]-[18].

14. The Court may lift the suspension by making an order under Clause 91. Clause 91(1) appears to widen the range of orders that the Court can make, including an order suspending "*the making of a modification of a contract or performance of a contract as modified*". The test is found in Clause 91(2), which the Explanatory Notes say "*sets out a test…*" that will "*…replace application of the common law test in the 1975 American Cyanamid case and will notably apply to any decision to lift the automatic suspension*".

15. Clause 91(2) requires the Court to "*have regard*" to three matters:

    a. The public interest in ("*amongst other things*") (i) upholding the principle that public contracts should be awarded, and contracts should be modified, in accordance with the law, and (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.

16. Unlike under the PCR, there is no hypothetical question as to whether it would be appropriate to make an interim order if the automatic suspension was not in place. It is perhaps for this reason the draftsperson thinks that the *American Cyanamid* test has been abandoned. Whilst that might technically be true as a matter of form, it is doubtful in terms of substance.

17. First, in most procurement disputes, that there is a serious question to be tried is conceded by the contracting authority, so as to become a non-issue. Second, the adequacy of damages remains key. Third, the other factors listed in Clause 91(2)

naturally fall to be considered under the balance of convenience and are already taken into account by the Court where the facts of the case raise them.

18. It is therefore not quite right to say this is a new test. Rather, parts of the old test have been codified, perhaps with certain matters given slightly more weight than they would have had in the past. The results will likely be the same whether under the old or new test as currently drafted.

Award Notices and the Standstill Period

19. Contract award notices are currently governed by reg.86 PCR. Regulation 86(2) PCR sets out the basic information to be contained in such notices, including the award criteria the reasons for the decision, including "*the characteristics and relative advantages of the successful tender*" and so on. It is common to find disappointed tenderers complaining that reg.86 has been breached even when they have been provided detailed award decisions.

20. The Green Paper stressed the Government's desire to increase transparency by requiring the publication of more information about public procurements. It was proposed that contracting authorities would need to publish basic disclosure information, covering the information currently required by reg.84 PCR (the Individual Reports requirement) with the contract award notice (§166).

21. Chapter 5 of Part 3 of the Bill deals with matters arising after the award of a contract, including standstill periods and notices. Clause 48 requires the publication of a "*contract award notice*" which will have to contain the information prescribed in regulations made under Clause 86. However, before doing so, the contracting authority must provide an "*assessment summary*" to each supplier that submitted an assessed tender, and such summary must contain information about the contracting authority's assessment of the tender and the most advantageous tender submitted in respect of the contract (where they are different) (Clause

48(4)). Clause 51 imposes an additional obligation to publish a "*contract details notice*" after concluding a public contract (as well as, in some circumstances, to publish the contract terms).

22. The requirement to publish a contract award notice does not apply to a defence and security contract awarded under a defence and security framework or directly awarded contracts (Clause 48(6)). However, assessment summaries must still be provided in these cases. It therefore appears that contracts awarded under non-defence and security framework agreements will now require award notices.

23. Subject to seeing what specific requirements are imposed in respect of contract award notices, this all looks a bit like more of the same. It looks for the moment that the Government has not entirely followed through with proposals to require contracting authorities to hand over a wealth of documentation to participating tenderers upon award of a contract.

24. It is also more of the same with standstill periods (see reg.87 PCR) which are covered by Clause 49 of the Bill. The only change appears to be that the new period is eight working days beginning with the day on which a contract award notice is published, rather than the end of the 10th day after the relevant sending date (which is the position under reg.87(2) PCR). This is a sensible, practical change.

Conclusion

25. The Bill does achieve one important goal – it simplifies the various EU Directive-derived regulations that currently make up the procurement regime into one Act. That said, it appears that further important detail will now be found in secondary legislation, such that not all procurement law will be found in one place. Further, the Government's use of home-grown terminology might well introduce uncertainty, which in turn is likely to generate more litigation.

26. It does not seem that Bill will bring dramatic changes to the procedural aspects of how procurement claims are litigated. The mechanics of bringing claims to Court remain recognisable, with the strict time limits staying largely as they are. The real change may be a move away from EU general principles towards a potential greater alignment with "*mainstream*" English administrative law. One can only hope that the move from Principles to Objectives results in more focussed claims.

Jonathan Lewis

Jack Castle

22 June 2022