

Procurement—withdrawal of challenged award decision ends automatic suspension (Aquila Heywood Ltd v Local Pensions Partnership)

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Local Government analysis: Local Pensions Partnership Administration Ltd (LPPA) awarded a contract under a framework. Aquila Heywood Ltd (Aquila) issued proceedings challenging the award on various bases. LPPA then withdrew the award decision and replaced it with a second decision in which Aquila was again unsuccessful. Aquila did not issue proceedings in respect of the second decision or amend its existing claim. The court held that the automatic suspension which arose under regulation 95 of the Public Contracts Regulations 2015 (PCR 2015), SI 2015/102 only prevented LPPA from awarding the contract pursuant to the first decision. Once that decision had been withdrawn and the bids re-evaluated, it served no further purpose. LPPA was therefore not required to refrain from entering into a contract pursuant to its second decision. LPPA's application to lift the suspension pursuant to PCR 2015, SI 2015/102, reg 96(1)(a) was unnecessary. Written by Jonathan Lewis, counsel, at Henderson Chambers.

Aquila Heywood Ltd v Local Pensions Partnership Administration Ltd [\[2021\] EWHC 114 \(TCC\)](#) (25 January 2021)

What are the practical implications of this case?

This is a short judgment which at first glance appears primarily to be concerned with costs issues. In fact, as Mr Justice Pepperall acknowledged, it deals with 'important questions as to the scope' of PCR 2015, [SI 2015/102, reg 96\(1\)\(a\)](#) (the automatic suspension). Disappointed tenderers have to issue their claims quickly due to the short limitation period while they are still engaging in constructive dialogue with the contracting authority. The automatic suspension is thereby triggered. Where legitimate concerns have been raised by the tenderer, a responsible contracting authority might well rewind the process to some earlier point and/or issue a new award decision. As the PCR 2015, [SI 2015/102](#) does not deal expressly with this situation, practitioners might well be uncertain as to the status of the suspension once the first decision is withdrawn. Clearly, if new proceedings are issued in respect of the new decision, a new suspension comes into effect.

This decision provides clear guidance to practitioners that where a challenged award decision is withdrawn, the automatic suspension naturally comes to an end. It is therefore unnecessary for a contracting authority to make any application for it to be lifted and, if it does, it may well find itself penalised in costs.

What was the background?

LPPA administers pension schemes on behalf of various local authorities. In July 2020, it issued an invitation to tender for a contract which would enable the rationalisation of its IT systems. In August, Aquila submitted a bid. In September 2020, LPPA informed Aquila that it had been unsuccessful and that the contract would be awarded to Civica UK Ltd (the first decision). As the contract was awarded under a framework agreement, by virtue of the exemption in PCR 2015, [SI 2015/102, reg 86\(5\)\(c\)](#), LPPA did not have to abide by a standstill period. Nonetheless, it voluntarily did so.

On 2 October 2020, Acquila issued proceedings. On 14 October 2020, LPPA conceded that errors had been made in the tender evaluation process and that proper records had not been made. It therefore decided to 'rewind' the procurement, withdraw the first decision and re-evaluate the submitted tenders. On 6 November 2020 it filed its defence in which it noted that first decision had been withdrawn and was of no effect, rendering the claim academic.

On 8 December 2020, LPPA again awarded the contract to Civica and again agreed to abide by a ten day standstill period. On 10 December 2020, LPPA wrote to Acquila seeking its consent to lift the automatic suspension, which it believed remained in place. In response, Acquila offered to discontinue its claim on the basis that LPPA pay its costs. On 18 December 2020, LPPA issued an application under PCR 2015, [SI 2015/102, reg 96\(1\)\(a\)](#) to bring the automatic suspension to an end. Acquila did not oppose the relief sought.

What did the court decide?

PCR 2015, [SI 2015/102, reg 95\(1\)](#) provides that where a claim form has been issued 'in respect of a contracting authority's decision to award the contract', the authority has become aware of it and the contract has not been entered into, the authority is required to refrain from entering into the contract. PCR 2015, [SI 2015/102, reg 95\(2\)](#) provides that this requirement continues until the court brings it to an end or the proceedings at first instance are determined, discontinued or otherwise disposed of and no order has been made continuing it.

Pepperall J relied upon *Pollen Estate Trustee v Revenue & Customs Commissioners* [\[2013\] EWCA Civ 753](#), [2013]1 WLR 3785 in deciding that he had interpret PCR 2015, [SI 2015/102, reg 95](#) by having regard to its purpose and interpreting its language, so far as possible, in a way which best gives effect to that purpose (at para [15]). He dismissed out of hand the argument that PCR 2015, [SI 2015/102, reg 95](#) did not apply in circumstances where there was no requirement to abide by a standstill period (because as was the case here, the contract was awarded under a framework agreement) (at para [19]).

He held that the purpose of the automatic suspension is self-evidently to ensure that the contracting authority does not act upon the challenged decision before either the challenge can be heard or the merits of such interim suspension considered upon an application for its discharge under PCR 2015, [SI 2015/102, reg 96\(1\)\(a\)](#), (at para [20]). Where, faced with a challenge, the contracting authority withdraws its original decision to award the contract and re-evaluate the bids received, it follows that the suspension serves no further purpose.

Pepperall J held that the natural reading of PCR 2015, [SI 2015/102, reg 95\(1\)](#) is that it prevents the contracting authority from entering into the contract 'pursuant to the challenged decision' (at para [22]). This construction is supported by the terms of PCR 2015, [SI 2015/102, reg 95\(2\)](#) since there is no need for the third category of case in which the suspension comes to an end (that the suspension lapses if the decision is withdrawn) if the authority is only required to refrain from contracting pursuant to the challenged decision (at para [22]). A construction of the regulation which 'does not limit the authority's freedom to enter into a contract where no other party has pleaded a claim challenging the decision to award such contract is entirely consistent with the underlying policy of the regulations, namely to strike a fair and sensible balance between the authority's contractual freedom and the need to protect economic operators seeking to challenge the lawfulness of the procurement exercise' (at para [23]). He noted that, should wider protection be necessary, the court has jurisdiction under PCR 2015, [SI 2015/102, reg 96](#) to make some alternative order.

A broader construction (that the automatic suspension continues to bite after the withdrawal of the challenged decision so as to prevent the authority from entering into a contract pursuant to a subsequent decision which is not the subject of any legal challenge) would serve no sensible purpose (at para [24]). Further, it:

'would unnecessarily fetter the authority's freedom of contract and require an entirely academic application in all such cases for no better reason than that the claimant had not yet got around to discontinuing what might (subject to the possibility of a subsisting damages claim) have become an academic challenge to an earlier decision' (at para [24]).

Case details

- Court: Business and Property Courts of England and Wales, Technology and Construction Court, Queen's Bench Division, High Court of Justice
- Judge: Pepperall J
- Date of judgment: 25 January 2021

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