Procurement—time limits where there are multiple breaches (Bromcom Computers v United Learning Trust)

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Local Government analysis: The defendants conducted a procurement under the Public Contracts Regulations 2015 (PCR 2015) for a contract to supply a cloud-based management information system. The claimant was unsuccessful and issued proceedings. The defendants applied to strike out the claim/seek summary judgment on the basis that proceedings had not been commenced within the 30-day period provided for in the PCR 2015. His Honour Judge Eyre QC dismissed the majority of the application, having found that the claim was brought in time given that the initial information provided to the claimant as to why it was unsuccessful was insufficient to give it grounds for starting the proceedings. Written by Jonathan Lewis, barrister, at Henderson Chambers.

Bromcom Computers plc v United Learning Trust and another [2021] EWHC 18 (TCC)

What are the practical implications of this case?

During the course of a procurement, it is essential that tenderers and their advisors ask themselves whether the actions of the contracting authority which they suspect to be breaches of a duty are 'multiple breaches of the same duty or breaches of separate duties' (at para [32]). If they are multiple breaches of the same duty, in other words, further particulars of the same breach, they should issue proceedings within 30 days of the first breach. If they are breaches of separate duties, the 30-day time period will start to run in respect of each separate breach. While, in their pleadings, claimants often set out multiple duties owed by contracting authorities, a court will be astute to determine where a duty is merely one aspect of a broader duty rather than a self-standing duty in its own right (see para [47]).

Where unsuccessful tenders are drip fed the reasons why they were not successful (for example, by way of informal notifications, debrief sessions etc), they should be wary of regarding the provision of further information as restarting the limitation period. However, the mere fact of being told that it has been unsuccessful and provision of some explanation for that decision does not of itself mean that a tenderer ought to have known that it had grounds for bringing proceedings at that point.

What was the background?

The defendants operated a number of academy schools. In October 2019, they commenced a procurement for a three-year contract to supply a cloud-based management information system for schools. The claimant provides specialist software for use in schools. It was one of two bidders who were invited to supply final tenders in the procurement exercise. It did so but was unsuccessful.

On 30 March 2020, the claimant was sent an email informing it that it had been unsuccessful. On 31 March 2020, it received a formal feedback letter which did not comply with the requirements of PCR 2015, SI 2015/102, reg 86. On 1 April 2020, an oral debriefing session was held remotely. The defendants then provided the claimant with further documents. On 3 April 2020, a further oral debriefing session was held remotely. Various correspondence followed, including a letter from the claimant's solicitors on 14 April 2020 requesting further information. On 22 April 2020, a fresh PCR 2015, SI 2015/102, reg 86 notice was issued which stated that the letter of 31 March 2020 was to be disregarded. On 23 April 2020, the defendants provided the claimant with a document containing further information.

On 18 May 2020 the claimant commenced proceedings alleging breaches of the PCR 2015, SI 2015/102 (it identified a number of breaches in respect of both the price evaluation and quality evaluation (at paras [26]–[27])). The defendants argued that time started to run from 3/4 April 2020 whereas the claimant said that it did not have the necessary knowledge until 22 April 2020 at the earliest (at para [30]).

What did the court decide?

The claimant identified five duties which it contended were breached by the defendant (at para [24]). HHJ Eyre QC was quick to note that some were 'different formulations of the same duty' (at para [25]). For example, the PCR 2015, SI 2015/102 do not impose a separate duty on a contracting authority to act without making manifest error—the presence or absence of manifest error is the standard used to determine whether there has been a breach of the underlying duty (at para [47]).

Two issues called for determination (at para [32]):

- first, whether the claim alleged multiple breaches of the same duty or breaches of separate duties
- second, when the claimant knew or ought to have known that it had grounds for commencing proceedings

PCR 2015, SI 2015/102 reg 92(2) provides that proceedings must be started within 30 days beginning with the date when the economic operator first knew or ought to have known that grounds for starting the proceedings had arisen.

The court relied upon the Court of Appeal's decision in *Sita UK Ltd v Greater Manchester Waste Disposal Authority* [2011] EWCA Civ 156, [2011] 2 CMLR 32, where it set out the approach to be taken in determining both the matters of which knowledge is required for the purposes of PCR 2015, SI 2015/102, reg 92(2) and the degree of knowledge required. The standard is knowledge of the facts 'which apparently clearly indicate, though they need not absolutely prove, an infringement'. A claimant need not know that it has 'a real likelihood of success'. Further, a claimant need not know 'the detailed facts which might be deployed in support of the claim' but need only know 'the essential facts sufficient to constitute a cause of action'. This assessment is made in the context of 'the principle of rapidity' which is 'at the core' of the timetable laid down by the PCR 2015, SI 2015/102. As HHJ Eyre QC put it:

> 'What is needed is knowledge of material which does more than give rise to suspicion of a breach of the Regulations but that there can be the requisite knowledge even if the potential claimant is far from certain of success.' (at para [16])

The judge then considered the consequences of there being multiple allegations of breach (at para [18]). Relying on *Sita*, he drew a distinction between multiple breaches of the same duty and breaches of distinct duties. If the allegations are on proper analysis different breaches of the same duty then a potential claimant has the requisite knowledge when it knows or ought to have known of facts clearly indicating a breach of that duty. The time period is not extended simply by the potential claimant learning at a later stage of further separate breaches of the same duty even if they occurred before or after the breaches already known (at para [18]). If, however, the potential claimant learns of facts indicating a breach of a different duty then it may be the position that time begins to run anew in respect of a claim alleging a breach of that duty.

The judge found that the eight breaches alleged all related to the conduct of the evaluation process (at paras [48] and [52]). He said that, while that process involved a number of elements, it was nonetheless a single exercise. Hence, the separate breaches alleged were breaches of the same duty and particulars of the same infringement (at para [49]). He held that the extent of the claimant's knowledge is to be determined by reference to matters of substance and not form (at para [56]). The focus in on what the claimant knew rather than being concerned with what it did not know. The way in which the claimant acquired knowledge is not conclusive. However, the manner in which and the means by which information was provided to the claimant 'are by no means irrelevant'—'It is too simplistic to say that a potential claimant either knows or does not know a particular fact and that how that knowledge was acquired is irrelevant' (at para [57]). This is because the way in which the knowledge of a particular fact was acquired can be relevant in assessing whether in the circumstances a potential claimant ought to have known that proceedings were merited. It is notable that PCR 2015, SI 2015/102, reg 86 requires details to be provided in writing.

While the question was finely balanced, HHJ Eyre QC concluded that the claimant did not have the requisite knowledge until its receipt of the satisfactory PCR 2015, SI 2015/102, reg 86 notice (22 April 2020) (at para [63]). It was not until then that the claimant could regard itself as having grounds for bringing proceedings, when it was in possession of facts which clearly indicated an infringement. He noted that the position might well have been different if the initial letter had been compliant with PCR 2015, SI 2015/102, reg 86. Further, any deficiency in a procurement exercise needs to have had at least a potential impact on the outcome and so to have caused loss or a risk of loss before

proceedings could be commenced. The initial information provided to the claimant was insufficient to allow the claimant reasonably to assess that question.

Case details

- Court Business and Property Courts of England and Wales, Technology and Construction Court, Queen's Bench Division, High Court of Justice
- Judge: HHJ Eyre QC
- Date of judgment: 7 January 2021

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