

# Case management issues in procurement claims (Accessible Orthodontics v National Health Service Commissioning Board)

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**Local Government analysis:** In a hearing conducted by telephone due to the coronavirus (COVID-19) pandemic, the court provided useful guidance on some issues that regularly surface in public procurement claims. It overcame technical difficulties which interrupted the hearing by handing down judgment on some issues and conducting a second hearing in respect of the remainder. The court had to decide three issues—an application to amend the particulars of claim, the claimant’s application for disclosure and the defendant’s application for security of costs. In respect of the application to amend, it reinforced the important distinction between amendments which constitute a new claim as opposed to those which merely provide further particulars to an existing claim. In respect of the security of costs application, it set out considerations as to how such applications might be dealt with in light of the pandemic. Written by Jonathan Lewis, barrister, at Henderson Chambers.

*Accessible Orthodontics (O) Ltd v National Health Service Commissioning Board*;  
*Accessible Orthodontics LLP v National Health Service Commissioning Board* [\[2020\] EWHC 785 \(TCC\)](#)

## What are the practical implications of this case?

Given the short limitation period in procurement claims, it is often the case that the information available for the purpose of settling the particulars of claim is somewhat limited with the result that claimants need to apply to amend their pleadings after limitation has expired. After early disclosure of documents by the defendant, claimants are often able to formulate their claims with a greater degree of focus and identify the real defects in the procurement. The lesson to be learned from this decision is that claimants should plead their claims broadly, identifying all potential breaches, so that any later amendments sought can be characterised merely as providing further particulars to existing claims.

In deciding to adjourn the defendant’s application for security for costs until a stay had expired, the court set out the kind of approach that courts might take to such applications in light of coronavirus pandemic:

[...] the effects of the present Covid-19 are so fast moving and uncertain that the factors relevant to an order for security can only be safely considered once that period [the stay] has expired: it seems unlikely that the Claimants, and those behind them, will be in the same position (for better or for worse) in six months’ time’, at para [44].

It is also notable that the defendant sensibly and reasonably made some minor concessions given the difficult circumstances under which the hearing was conducted.

## What was the background?

Two separate procurement claims were case managed together. The two claimants, small orthodontic service providers, challenged awards made under a dynamic purchasing system run by the NHS for the provision of orthodontic referral services. The procurements were governed the Public Contract Regulations 2015, [SI 2015/102](#) (PCR 2015) and fell within the ‘light touch regime’ (PCR 2015, reg 74–77).

The claimants were informed in September 2018/October 2018 that they lost by a fairly hefty margin. They issued proceedings in time alleging breaches of the PCR 2015, manifest errors in the scoring of their bids and breaches of the obligations to act in a transparent manner and to treat tenders equally. However, they made no allegations about the scoring of any other bidder’s bid.

In March 2020, the claimants applied to amend their pleadings. The majority of the amendments related to new matters that had arisen from disclosure given in June 2019. Ultimately, the defendant consented to these amendments without prejudice to its right to plead limitation points in response as

those amendments did not have wider implications for the conduct of proceedings and disclosure. However, it resisted the claimants' application to amend their pleadings so as to extend to errors in scoring other bidders' bids. It also resisted an application for disclosure and applied for security of costs.

### What did the court decide?

The claimants sought permission to allege that the feedback provided on winning tender in the debrief reports had in part been copied verbatim from the feedback provided in others lots. The defendant resisted the amendments on a number of bases, including that the allegations could have been made when the claim was issued (18 months earlier) and that they would materially increase the scope of disclosure. The court characterised the issue as whether the amendments amounted to a new breach of the PCR 2015 and thus a new claim which would trigger the need to bring proceedings or, alternatively, further particulars of an existing pleaded breach (at para [27]).

Relying upon *Perinatal Institute v Healthcare Quality Improvement Partnership* [2017] EWHC 1867 (TCC), the court held that if the amendments constituted a new claim and the 30-day limitation period (under PCR 2015, reg 92) had expired, it did not have power under [CPR 17.4](#) to grant permission for an amendment which would deprive the defendant of an accrued limitation defence. Whether an amendment amounts to a new claim in a procurement action depends on the nature and extent of both the breach and the nature and extent of the damage (relying on *D&G Cars Ltd v Essex Police Authority* [2013] EWCA Civ 514) (at para [30]). The court decided that the amendments did not constitute a new claim but provided further particulars to the pleaded claim that tenders were not evaluated in a transparent manner (at para [33]).

In respect of one of the claims, the court had to determine whether to grant the application for disclosure of documents relating to the scoring of some of the other tenderers' bids. It refused to do so for a number of reasons, including that, as a matter of principle, given that the documents relating to the other bidders are commercially sensitive, disclosure should only be ordered if 'truly necessary in the interests of justice—this is a relatively high hurdle to clear' (at para [40]). He also noted that as standstill letters should contain the necessary information, the court should be cautious in its approach.

### Case details

- Court: High Court of Justice, Queen's Bench Division (Technology and Construction Court)
- Judge: Roger Ter Haar QC (sitting as a deputy judge of the High Court)
- Date of judgment: 21 April 2020

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