

Standing to bring a public procurement challenge—key considerations (Community R4C v Gloucestershire County Council)

23/07/2020

Public Law analysis: In a preliminary issue trial, the court considered the provisions of the Public Contracts Regulations 2015 (PCR 2015) relating to standing to bring a claim. The claimant's case was that the council had unlawfully amended and extended an existing contract instead of conducting a full public procurement exercise and that, had such an exercise been run, it would have assembled a consortium to bid for the contract and might have won it. In a lengthy judgment, His Honour Judge Russen QC hammered home the fact that a potential challenger has to establish on the balance of probabilities that it has a 'material interest' in the procurement in order to bring a claim under PCR 2015. It is not sufficient, in order to meet the requirements of PCR 2015, reg 91, for a claimant to say that it has established only a more than fanciful case that it has, through noncompliance with the regulations, lost a more than fanciful opportunity. Written by Jonathan Lewis, barrister, at Henderson Chambers.

Community R4C Ltd v Gloucestershire County Council [\[2020\] EWHC 1803 \(TCC\)](#)

What are the practical implications of this case?

This decision carefully limits the circumstances in which public procurement challenges may be brought. The court stressed that it is only 'economic operators' in the UK or another European Economic Area state to whom the duty to comply with PCR 2015, [SI 2015/102](#) is owed. This duty is not also owed to persons or entities who seek to identify the entirety of their economic operation upon the hoped-for contract which later becomes the subject matter of the procurement claim (at para [149]).

The court's reasoning was backed by detailed consideration of the underlying EU case law. Its rationale is clear—if the duty were to be extended to those whose operations were merely putative, rather than real, then 'that would open the class of potential claimants to include pretty much anyone, no matter how slim the prospects might be of the claimant then establishing in the litigation a lost chance in accordance with the test addressed in the previous section of this judgment' (at para [150]). In short, the requirement that the applicant should have an interest in the relevant public contract would 'become nebulous and unworkable' and PCR 2015 would become 'potentially oppressive to contracting authorities' (at para [151]).

It follows that those entities considering procurement challenges ought to assess carefully whether they can establish on the evidence, on the balance of probabilities, that they were economic operators with at least some presence on the market at the time that a procurement exercise did or should have taken place and would have been in a position to satisfy the relevant selection criteria.

What was the background?

In 2013, Gloucestershire County Council (the council) entered into a contract in relation to waste disposal. In 2016 it entered into a similar contract with the same contractor. The subject matter of both contracts was an energy from waste plant which recovers energy from the treatment of municipal waste. The council maintained that the later contract simply amended the earlier one in accordance with the procedure set out in the earlier contract.

CR4C was concerned about the environmental impact of the contract and would have liked to propose a recycling plant to exist alongside the waste plant. It contended that the 2016 contract was a new contract in public procurement law terms—the amendments were material in that they changed the economic balance in favour of the contractor in a manner not provided for by that earlier contract. It maintained that the 2016 contract was not within any of the exceptions set out in PCR 2015, [SI 2015/102, reg 72](#).

CR4C sought damages on the basis that it lost a significant chance of its tender qualifying as the most economically advantageous tender and so being awarded an alternative waste disposal

contract. It maintained that this loss of a chance was that it would have formed a consortium with three other entities to bid for such a contract with the council had the council run a procurement exercise as it was required to do.

What did the court decide?

PCR 2015, [SI 2015/102, reg 2](#) defines an 'economic operator' as 'any person or public entity or group of such persons and entities, including any temporary association of undertakings, which offers the execution of works or a work, the supply of products or the provision of services on the market'. This definition addresses two matters—the form or structure which the economic operator may take and what it is that entity actually does (at para [152]).

In order to fall within the definition, an entity must have at least an occasional market presence (*Consorzio Nazionale Interuniversitario per le Scienze del Mare (CoNISMa)*, [Case C-305/08](#)). The court held that the decision in *CoNISMa* reinforces the point that the PCR 2015 offer a potential remedy to those who actually offer work, products or services in the relevant market as opposed to those who are only able to say they would like to be given the opportunity to do so (at para [155]).

Under PCR 2015, [SI 2015/102, reg 89](#) the council, as a 'contracting authority', owed economic operators a duty to comply with PCR 2015. PCR 2015, [SI 2015/102, reg 91](#) deals with 'enforcement of duties through the court'. PCR 2015, [SI 2015/102, reg 91\(1\)](#) provides that 'a breach of the duty owed in accordance with regulation 89 or 90 is actionable by any economic operator which, in consequence, suffers, or risks suffering, loss or damage' (emphasis added). The court rejected the argument that the concept of being an 'economic operator' adds nothing to the inquiry into the viability of a claim under PCR 2015, [SI 2015/102, reg 91\(1\)](#) given that regulation clearly confines any claim that may exist to one made by an economic operator (at para [148]).

In order to analyse CR4C's cause of action, the court considered hypothetically what would have happened had there been a competition at the relevant time (at paras [65] and [70]). CR4C maintained that it would have formed a consortium which would have had a significant chance of success in the putative tender exercise (at para [66]).

In analysing PCR 2015, [SI 2015/102, reg 91\(1\)](#), the court considered and distinguished the decision in *Mears v Leeds City Council* [[2011](#)] [EWHC 2694 \(TCC\)](#). It found that *Mears* was not actually about standing to bring a claim (at para [119]). Further, *Mears* did not establish that to come within PCR 2015, [SI 2015/102, reg 91](#), an economic operator need only establish the existence of a risk of loss to a lower threshold test than the balance of probability (at para [122]). Nor did it establish that PCR 2015, [SI 2015/102, reg 91](#) only operates to weed out claims by those with no more than fanciful claims. Hence, the decision in *Mears* did not water down the test of actionability under the Regulations to a point where a claimant is not even subject to the civil burden of proof (at para [122]).

It is clear that PCR 2015, [SI 2015/102, reg 91](#) does not preclude an award of damages simply because of the inevitable uncertainty produced by a hypothetical inquiry (at para [124]). The burden of proof which initially applies to a claimant seeking to recover damages for loss of a chance is properly evaluated as 'real' or 'substantial', as opposed to 'fanciful' or 'speculative' (at para [125]). The upshot of this reasoning is that a person is first required to establish an interest in the procurement before establishing it is protected by the extended concept of harm (at para [136]).

The language of PCR 2015, [SI 2015/102, reg 91\(1\)](#) really encapsulates the concept of a 'material interest' (at paras [105] and [119]). However, whether or not a claimant can go on to establish such an interest is separate from the anterior question of whether or not it can establish it was an economic operator at the relevant time (at para [151]). The latter question involves some analysis of the 'track record' of the person at least to the extent of testing its existing status in the market at the relevant time (at para [151]). Both questions are to be determined on the balance of probabilities.

After a very detailed analysis of the evidence, the judge concluded that CR4C was not an economic operator which could have pre-qualified having regard to any selection criteria that could have been lawfully imposed upon it by the council. He noted that CR4C had not even been registered and did not have a legal personality when the hypothetical procurement would have taken place (at paras [163] and [201]). Nor was CR4C offering the relevant works or services then (at para [202]). Indeed, it would not have been able to provide the requisite details in any tender (at para [204]). The judge nonetheless went on to consider whether it would have had any prospect of qualifying and found that it did not (at paras [207] to [259]).

Case details

- Court: Queen's Bench Division, Technology and Construction Court (Bristol District Registry), High Court of Justice
- Judge: Judge Russen QC (sitting as a High Court judge)
- Date of judgment: 17 July 2020

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