Independent Review of Administrative Law - Call for Evidence

DLA Piper UK LLP Response

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Introduction

DLA Piper welcomes the opportunity to respond to the Independent Review of Administrative Law (**IRAL**)'s consultation on administrative law. DLA Piper's public law practice advises a range of clients including claimants and defendants in judicial review and other public law proceedings. In addition to advisory and contentious work for corporate clients, we are regularly instructed by both central and all tiers of local government as well as the devolved administrations on complex high-profile public law matters. DLA Piper is therefore well placed to respond to the IRAL's call for evidence, and we do so concisely below. At the outset, please note that this response does not purport to represent the views of DLA Piper as a firm. Rather, this response has been prepared by some of DLA Piper's public law lawyers.

Our response

Question 1: Are there any comments you would like to make, in response to the questions asked in the above questionnaire for government departments and other public bodies?

We are concerned that seeking input from the legal profession at this stage is arguably premature. A sequential approach whereby the responses to the specific questions put by IRAL to government departments on the impact of judicial review on them and any particular concerns this gives rise to was summarised and disseminated first would have assisted greatly in informing and directing our answers to the problems identified by such responses.

Subject to that preliminary caveat, in our view, judicial review is an essential part of a strong and functioning democracy and it is concerning that the questions asked in the questionnaire for government departments imply, contrary to this, that judicial review is an impediment to effective government. The first question asks the respondent to make "full allowance for the importance of maintaining the rule of law". The rule of law is a constitutional principle in the United Kingdom. One of the practical effects of the rule of law is that courts have the ability to strike down government action which is illegal and/or unlawful. Judicial review is the inherent jurisdiction of the High Court and the primary constitutional role of the judicial branch of government. Therefore, absent some other mechanism through which government action can be held to a correct legal and lawful standard, the importance of maintaining the rule of law requires that the courts must be able to carry this constitutional function, and any reform which attempts to hinder or prevent the courts from doing this would be, in our view, unconstitutional.

We support reforms to the judicial review procedure which would make it more effective for both claimants and defendants, and we have sought to provide some suggestions for further inquiry in our response. However we do not support reforms which weaken the ability of the courts in their supervisory jurisdiction to carry out their constitutional role, and we are concerned by the implication in the questionnaire that such a weakening could be justified in the interests of strengthening government decision making.

We make these comments in the context of growing concerns worldwide about the performance of democracies. In the January 2020 **report by the Centre for the Future of Democracy**, the authors

describe how across Western democracies "*growing political polarisation, economic frustration, and the rise of populist parties, have eroded the promise of democratic institutions to offer governance that is not only popularly supported, but also stable and effective*". In our view, the IRAL forms part of this picture of a lack of confidence in democratic institutions. Instead of strengthening the confidence of British citizens in UK democracy, an attempt to shift the balance of power so that it is further in favour of the executive will only risk adding to the perception of democratic malaise currently afflicting our society.

Further, the role of the judiciary in a free and democratic society, and in the context of a parliamentary democracy such as the UK, is to ensure that the executive branch of government is accountable and does not act beyond the powers and discretions afforded it by Parliament. The balance of power between the branches of government is finely balanced, though it has steadily been weighing more in favour of the executive branch through the expansion of the powers afforded by Parliament to the administrative state.

Over the past 20-30 years there has been a clear change in the style of government in the UK with a shift to a more presidential style of government not just at the heart of the national government but also mirrored in the structures for the devolved administrations and the way, at a local level, power has been centralised in the hands of mayors who wield considerable executive power in their regions. This trend has been matched by a clear and growing impatience within the executive at the governance structures and working methods of the civil service leading to policy development and decision making in many cases being channelled through different “informal” processes involving politicians and their “private" political advisers. This trend has also led to growing tensions between the executive and, at a national level, Parliament or, at a more local level, between the regional assemblies and councils whose role it is to scrutinise and hold their executives to account.

Whilst it is entirely possible to have sympathy with politicians who wish to deliver on their mandates and to take demonstrable action within the limited time window available to them before they next face the electorate, this desire cannot, and must not, be allowed to prevail at the cost of sacrificing either the rigour and quality of decision making or adherence to proper governance in the making and execution of decisions. This is a genuine worry as, in our view, a significant part of the current democratic malaise stems from a perception that the quality and effectiveness of policy development and decision making has declined. This is a powerful argument for ensuring that our systems of review remain strong and robust and flexible .

In this context, a critical part of the checks and balances that form the UK constitution is that it is for an independent freely functioning judiciary to act as arbiter in the process of holding the executive to account. A key limb of that process is that the process of judicial review and the checks and balances built into that procedure have been predominantly of judicial origin and they have evolved over time through case law. Possible reform of that process has been the subject of review and reports by the Law Commission overseen by the judiciary. It is unclear why the current Government considers that this system should in some way be overridden.

However, if the Government is to intervene (especially if that is in anyway a response to the wholly exceptional circumstances that existed immediately before the last election) then it is not appropriate to review judicial review or the role of the courts in that context in isolation. Instead, a wider review that

considers the functioning of government, its relationship with Parliament and, in that context, the role and functioning of judicial review and other forms of oversight must be appropriate.

In any event, the IRAL's review is predicated on an implicitly false assumption: that judicial review is an impediment to good governance. In our experience as professional legal advisers (acting for both a diverse range of claimants and defendant public bodies, including central government bodies), judicial review encourages good governance. It polices executive decision-making processes and, as a result, invariably results in better policy outcomes. For example, the common law development of the duty of consultation through judicial review has meant that affected citizens and other persons are more involved and able to input into the policy making process. It is our experience as solicitors that the resulting policies are more effective as a result of consultation.

While judicial review is sometimes inconvenient for the government, seeking to restrict the judicial branch's constitutional function of supervising the legality and lawfulness of executive branch action with the aim of protecting flawed policy from the inconvenience of such scrutiny is not a solution that respects the rule of law or the separation of powers. If there is a risk that policy will be judicially reviewed, the government always has the option of legitimising the lawfulness of its policy by seeking to introduce legislation in Parliament which has the effect of codifying any policy that would otherwise be held to be illegal and/or unlawful under a judicial lens. The government can seek to legislate retrospectively to legitimise policy that has already been struck down through judicial review by seeking to introduce validating legislation. Whether there are limits to Parliament's law-making power has not been authoritatively determined, and accepted case law at this time does not support judicial review of the substance of legislation, and so it is currently anticipated that the Courts will not readily strike down primary legislation in any context.

As a final and speculative thought on this point, we note and agree with most of the conclusions drawn by Lady Hale in her 2018 Michael Ryle Lecture "*Should the Law Lords have left the House of Lords?*". There is no obvious benefit to the judiciary in the performance of their functions in maintaining such a link. However, we do question whether, the reverse is so true. Rather than being an anomaly or inconsistency, restoring the hybrid nature of the role of Lord Chancellor as a senior lawyer from the House of Lords free from the tyranny of the electoral cycle might have benefits in terms both of the quality / impartiality of the advice imparted to the executive and in ensuring effective relations between executive and the judiciary at time of possible tension.

Question 2: In light of the IRAL's terms of reference, are there any improvements to the law on judicial review that you can suggest making that are not covered in your response to question (1)?

Question 3: Is there a case for statutory intervention in the judicial review process? If so, would statute add certainty and clarity to judicial reviews? To what other ends could statute be used?

Question 4: Is it clear what decisions/powers are subject to Judicial Review and which are not? Should certain decision not be subject to judicial review? If so, which?

Question 5: Is the process of i) making a Judicial Review claim, ii) responding to a Judicial Review claim and/or iii) appealing a Judicial Review decision to the Court of Appeal/ Supreme Court clear?

Question 6: Do you think the current Judicial Review procedure strikes the right balance between enabling time for a claimant to lodge a claim, and ensuring effective government and good administration without too many delays?

Question 7: Are the rules regarding costs in judicial reviews too lenient on unsuccessful parties or applied too leniently in the Courts?

Question 8: Are the costs of Judicial Review claims proportionate? If not, how would proportionality best be achieved? Should standing be a consideration for the panel? How are unmeritorious claims currently treated? Should they be treated differently?

Question 9: Are remedies granted as a result of a successful judicial review too inflexible? If so, does this inflexibility have additional undesirable consequences? Would alternative remedies be beneficial?

Question 10: What more can be done by the decision maker or the claimant to minimise the need to proceed with judicial review?

Question 11: Do you have any experience of settlement prior to trial? Do you have experience of settlement 'at the door of court'? If so, how often does this occur? If this happens often, why do you think this is so?

Question 12: Do you think that there should be more of a role for Alternative Dispute Resolution (ADR) in Judicial Review proceedings? If so, what type of ADR would be best to be used?

Question 13: Do you have experience of litigation where issues of standing have arisen? If so, do you think the rules of public interest standing are treated too leniently by the courts?

We answer the above questions collectively below.

In our view, it is impossible to consider reform of judicial review in a vacuum and without basic statistical analysis of the incidence of judicial review and how this has changed over the years. We believe that the panel should consider the following covering the period of the last 20-30 years:

a. The annual number of judicial review cases;
b. The number of cases granted permission (both in total numbers and as a percentage of the number of applications for leave being made);
c. The number of cases that were ultimately successful in whole or in part broken down both by reference to central government / local government and by subject matter category (e.g. immigration, environmental/planning, education, health);
d. The average duration of cases from issue to final judgment, and
e. The number of judges sitting in the Administrative Court or with a ticket to hear administrative cases in other courts.

This kind of statistical data is not readily available and we suggest that until it is, the IRAL cannot properly and sensibly address whether procedural reforms to judicial review are needed to "streamline the process", as they are asked to do by the Terms of Reference.

The limited evidence that is available in this area suggests that the numbers of judicial review applications are falling, not rising. For example, Tables 2.1 and 2.2 of the Civil Justice Statistics Quarterly: April to June 2020 show that in 2017, the number of applications lodged with the

Administrative Court dropped below 4,200 for the first time since 2000. This number further declined in 2018 (3,595 applications), 2019 (3,383 applications) and the first half of 2020 (1,448 applications). According to the Ministry of Justice Tribunal Statistics Quarterly: January to March 2020, 5,679 applications for judicial review were lodged in the Upper Tribunal in 2019/20, the lowest figure since the Tribunal began its work in 2013.

Nevertheless, one clearly significant factor that would conceivably result in greater numbers of claims for judicial review being brought in the past two or three decades would be the substantial growth in the role of the executive branch of government in making administrative decisions. If there has been a higher volume of decision making, then our hypothesis would be that the logical consequence will be a higher volume of dissatisfaction with decision making, and therefore a higher volume of legal challenges being issued in court.
Another potential variable effecting the number of judicial review applications may be related to shifts in the general quality of public law decision making in the administrative state over the past three decades, and the potential impacts of austerity on quality decision making.

Subject to these comments, we suggest possible areas of reform as follows:

Track system

The IRAL may wish to consider recommending the adaptation of some form of track system for judicial review cases. All cases would still be referred to a High Court judge at the leave stage but as well as considering leave the judge would have to certify whether the case was appropriate to be dealt with by the Administrative Court or whether given the complexity of the issues, their public importance or potential administrative impact the issues could be referred to the County Court, Crown Court or other appropriate tribunals in the first instance. If such an approach would free up capacity in the Administrative Courts as well as allowing a significant number of other “simpler” cases to be disposed of more quickly on a “fast track” basis that might help alleviate both the cost and the administrative burden on Government of addressing judicial review as well as managing the cost and resource risk for claimants.

Whilst this may condescend to a level of detail that is outside the scope of IRAL’s review we annex a paper we prepared on possible proposals for reform of the procedural law relating to procurement challenges as well as a subsequent note summarising a roundtable discussion of the issues raised. For IRAL’s purposes we highlight the fact that we cannot see any good reason to perpetuate the bizarre situation that currently exists whereby some cases are subject to the procedural regime under the Procurement Regulations but others are subject to judicial review . We also believe that this is a good example of an area of the law where the cost and burden on the government of legal challenge could be significantly ameliorated in many cases by referring cases below a certain value threshold to a specialist tribunal for determination.

Funding

If the Government is not prepared to provide legal aid for judicial review cases (except in limited circumstances) then it is inevitable that litigants will (particularly in high profile cases) turn to crowd funding to raise funds to facilitate litigation. Crowd funding is currently largely unregulated. This can result in spurious, politically motivated claims. In our view, the Government would be well advised to increase the availability of legal aid funding and in tandem introduce a regulatory regime for crowd

funding platform. This should reduce the number of quasi political changes to administrative action. Crowd funding , however, raises a series of potentially troubling issues around the advice on costs risk, merits and other factors that should be given to prospective funders before they are asked to donate as well as the appropriateness of initiating a speculative challenge when there is insufficient funding in place, for example, for the challenge to be advanced beyond the letter of claim stage. In many cases such claims are arguably vexatious and it is a waste of tax payer's money responding to them. There is a good case that law firms that wish to promote such claims should provide preliminary merits and related advice on an "at risk" basis and only if there is a substantive case with reasonable merit should crowd funding be permitted to proceed with potential funders having access to the advice before they commit .

Standing

We think that the common law principles on standing have become confused over time and often appear to be given little weight. Clarification of some kind – e.g. through amendments to the CPR – to provide clarity on standing would assist both claimants and defendant public bodies. Standing should continue to be interpreted broadly as a matter of judicial discretion but there should be a greater onus on applicants either to show why they are directly impacted by a decision and thus should have standing or why a particular decision is of sufficient importance that the standing of the prospective challenger should not be a material factor in permitting a review to proceed.

In particular, we think the courts could arguably be more sceptical in their approach to the selection of challengers by prospective claimants as clearly this is done in many cases with the intent of choosing someone who is sufficiently impecunious to restrict future costs risk. We think a duty on lawyers to identify to the court not just the named challenger but any organisation or wider group that that individual represents or is affiliated to might assist.

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Procurement Law Reform

Let's start the discussion

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Introduction

It remains likely that with effect from 1 January 2021 the UK will have severed its ties with the European procurement law regime and the UK will have become a freestanding member of the GPA in its own right with far greater autonomy under the direct aegis of that treaty regime to regulate its own internal procurement laws and procedures. It has long been the case that Europe has dictated the substantive law, including for example the Remedies directive and a raft of highly influential decisions from the European Court of Justice that have materially influenced how procurements have been managed in the UK. In some areas the UK has been able to respond and achieve its own policy objectives or, at least, to dilute those of Europe in particular through exercising its right to determine the procedural rules for procurement challenges within the UK.

Making critical procedural decisions for arguably ulterior or at least defensive reasons was never going to be optimal in terms of producing a coherent body of procurement law. Instead, it has become increasingly clear over the last 20 years that this dynamic has led to a series of procedural anomalies and tensions that has arguably led to the UK's procurement challenge regime being one of the most dysfunctional in Europe, if not the world. This could be eliminated with effect from next January and thus we now have the perfect opportunity to take a step back and consider precisely how we might shape our procurement laws and procedures for the future.

The purpose of this paper is to help trigger a preliminary debate by flagging in summary form some of the more glaring problems – both contentious and non-contentious – which we have encountered in recent years whilst highlighting at a high level some potential ideas for change / reform that may or may not warrant further discussion.

Potential Ideas for Reform

At the highest and arguably most radical level is the question of whether the UK effectively abandons its current procurement regime wholesale. In Australia both at a Commonwealth and a State level the key levers for enforcing procurement regulation are administrative in nature with larger procurements having to appoint an independent probity adviser to report on the conduct and outcome of the procurement process and a separate regulator has responsibility for investigating corruption or other improper practices. The role of the courts is largely restricted to the regime that existed in the UK before the introduction of the PCR with legal challenges being restricted to judicial review and/or claims based on a breach of an implied contract (Blackpool and Fylde Aerodrome case). The level of actual procurement challenge in Australia (as a very new signatory to the GPA) is still extremely low and the perception is that the regulatory approach works well and is not too cumbersome or costly to operate. Australia is therefore an alternative model that could potentially provide the UK with a radically different form of regulation for government contracting whilst still remaining compliant under the terms of the GPA.

The most obvious alternative to wholesale reform is to retain the current basic structure for procurement regulation in the UK but invite a sharing of ideas as to what is or is not working well from both sides of the contracting authority and contractor divide and come up with a regime that actually works in a more functional manner and which maximises the potential for effective administrative resolution of procurement issues (on both sides of the divide) rather than often locking people into a "rush" to legal challenge.

With this in mind we highlight below a series of issues which we consider have contributed to the current dysfunction / confrontational approach in our challenge regime or lead to frustrations for procurement professionals looking for more user friendly procedures in day to day management of public purchasing processes:

1. Procedures

Do we need all the procurement procedures currently on offer in the PCR? The level of outsourcing and public private partnerships in the UK has left public sector bodies with enhanced commercial and procurement structuring skills. The more flexible approach to regulating purchasing in the utilities sector should be considered, where contracting authorities have free access to the negotiated procedure. The principles of transparency and equal treatment would still apply, and lessons learned from preliminary market engagement and early preparation of procurement documentation should not be allowed to fall away. With those general principles in mind, authorities would be able to structure dialogue and/or negotiation phases to suit the requirements of the contract they are letting. This will remove the costs of determining whether competitive dialogue or competitive procedure with negotiation (CPN) (both of which currently rely on the same permitted grounds for use) is the right path to follow for a procurement, and the risk of being caught out when the more limited approach to negotiation in CPN precludes ultimate development of the most sustainable and value for money solution.

2. Sectors

Having determined the optimum choice of procedures and appropriate levels of further regulation to engender transparency, impartiality and equal treatment, in the interest of costs and advisor familiarity is there any reason not to use the same rules across all sectors – transport, defence, utilities, concessions and public purchasing?

3. Legal challenge

There should arguably be a single all-encompassing jurisdiction/procedure for all forms of procurement related legal challenge getting rid of the currently difficult distinction leading to parallel JR/PCR cases in a variety of instances causing confusion over limitation periods and the radically different procedural rules for judicial review and PCR cases. This should be true for all cases above / below threshold. Alternatively, one option would be to have different tiers so that Central Government procurement is regulated and enforced differently from procurement undertaken by local government, NDPBs and utilities.

The current requirement for all PCR challenges to be dealt with in the High Court has failed (if that was the intention) to act as a deterrent to challenges but has arguably blunted the beneficial effects of using challenges to enhance procurement practices and spread knowledge of best practice more broadly. Serious thought should be given to emulating some or all of the best practice from across the continent:

a. Establish a speedy specialist tribunal with regional centres to deal with all procurement related litigation (whilst a radical departure for the UK this could be an area where a more inquisitorial style approach to proceedings would have real merit – see comments on disclosure and confidentiality below). This option should be considered both as an option for all public procurement or alternatively as a second tier jurisdiction covering local government, NHS bodies and similar entities.
b. Allow an option for authorities to build adjudication or arbitration into ITTs as a means to resolve procurement issues rather than through the courts or a tribunal
c. Provide an expedited paper only procedure for the tribunal/arbitrators to deal with preliminary clarification/interpretation issues in relation to ITTs and/or the conduct of a procurement
d. Restrict the jurisdiction of any tribunal or arbitrator to dealing with issues of any breach of procurement law and directing rectification/resolution of the breach. Require any claim for damages or compensation to still be brought in the High Court in civil proceedings but only if initial breach has been established by the tribunal.
e. Ensure that the automatic stay remains but obviate the need for distinct applications to lift the stay on *Anisminic* type grounds by having the whole dispute resolved more speedily within a tighter timeframe.

4. Disclosure

The current regime – as it has emerged through case law – is arguably unsatisfactory in most procurement cases. A contracting authority is expected to provide early disclosure at point of issue

(which mirrors obligations in judicial review) but is then also obliged to provide standard disclosure once a claim is underway. This is very often disproportionate to the issues in dispute and often the bulk of disclosure relates to issues more connected to quantum of loss rather than a determination of whether and to what effect there has been a material breach of procurement law: it adds to the complexity and cost of the proceedings (particularly regarding confidentiality and IP information) and, of course, the costs of the proceedings.

5. Witness Evidence

In the alternative there is a case that even if High Court litigation is retained this could, certainly as far as liability is concerned, be based on witness evidence prepared in judicial review style without the need for witnesses at trial unless the court has ordered cross examination on a specific issue.

6. Costs

Consideration should be given in the context of a tribunal structure to abolishing costs awards in most cases so each party bears their own costs but is not at risk of the others. An alternative would be to cap costs liability to maximum bands linked to the value of the contract being procured so any adverse legal cost is proportionate to the value of the contract at stake.

7. The perverse incentive for incumbent challenges

There is no doubt that in many cases where the profitability of a contract is materially greater to an incumbent than the cost of litigation (especially if that also disrupts a competitor) there is a perverse incentive to challenge so as to allow the incumbent to continue contractual performance beyond the date when their contract was due to terminate. Consideration should be given to the net profit earned by such a challenger through continuing to perform the contract during the period of any unsuccessful challenge being accounted for either (1) in diminution of their total damages claim if their challenge is successful (in such cases this will almost always be restricted to wasted bid costs – as even though their challenge was legitimate it is additional profit they would not otherwise have earned); or (2) should be accounted for to the public authority if their challenge is ultimately unsuccessful as they should not profit from unsuccessful litigation. This would go a long way to deterring vexatious commercial challenges.

8. Limitation

Should we reform the current unsatisfactory and one sided approach to limitation so that if a bidder has clearly raised an issue by way of clarification or otherwise during the bid process, time for them to challenge on that issue will not start to run until an award notice is issued – so they only need to challenge if they have in practice been prejudiced by the potential default? The current regime where the innocent party who is not under any legal duty in terms of compliance with procurement law will be prejudiced (because they are forced to bring a claim (possibly with a High Court issue fee of £10,000) at a time when they cannot demonstrate any causal loss), whilst the breaching party will be advantaged by their own failure to detect or rectify their breach (absent deliberate concealment) is perverse and arguably alien to normal concepts of procedural justice in the UK. Should we extend the

limitation period for damages claims in respect of ineffectiveness claims to 6 months from contract award so it is in-line with the liability limitation period, or (in-line with the proposal above) bar damages claims until liability has been established with the consequences of a potential declaration of ineffectiveness being deferred to the High Court as well as damages?

9. Feedback / Evaluation

We should introduce a requirement that in any case where a public authority cancels a procurement and decides to retender (as opposed to re-evaluating) the winning bidder is entitled to see the feedback provided to the losing bidders. In any case where the public authority either decides to re-evaluate or cancel a tender post sending out an award notice the winning bidder must be provided in advance with a copy of any objection or challenge leading to the decision plus a statement of the justification for determining that cancellation or re-evaluation.

10. Confidentiality

Should we reform regulation 21 of the PCR to create a presumption of confidentiality for key elements of a tender unless and until, in the case of the winning bid, the contract has been concluded and there is no risk of any re-evaluation, and:

- require public authorities not to provide feedback that breaches confidence except on terms that ensure that no individuals within an unsuccessful bidder who have received such feedback can or will be involved in any re-tender?
- require public authorities to construct ITTs (in line with best practice) so as to avoid pricing mechanisms that can be "reverse engineered" so a losing bidder can accurately estimate the pricing of the winning bidder's bid in any subsequent related procurement process? Whilst feedback must be provided, the courts have repeatedly failed to understand how fundamentally unfair the disclosure of a winning bidder's pricing is to a losing bidder [in any case where there is to be a straight re-tender especially where the contract is likely to be re-let in a relatively short timeframe so factors impacting pricing will have remained largely static.

11. Confidentiality rings

The current regime is unsatisfactory and often over-convoluted. The PCR could be extended to provide in advance for a model confidentiality ring (to be tailored by the parties only following court/tribunal approval on a by exception basis) or the courts should more actively exercise their case management powers to compel the early agreement of a ring. The lack of a ring in certain cases should not be used as a pretext by public bodies to delay appropriate disclosure so as to try to disadvantage a prospective challenger in terms of the limitation period within which to bring a challenge. If as happens on the continent any tribunal was permitted to adopt a more inquisitorial type approach there would be considerable scope for the tribunal to view commercially sensitive material itself and then decide what should or should not be disclosed to a challenger. This could potentially get closer to the regime used in competition related inquiries by the Competition and Markets Authority for sharing commercially sensitive material with third parties.

12. Exclusion

Recent experience in the UK and on the continent shows that the current regulations around discretionary exclusion are far from clear with considerable ambiguity as to how an authority decides to disqualify, how such a decision should be publicised, how other public bodies take account of such an exclusion and/or how a decision is made that a body has sufficiently "self-cleaned?". Should decisions to exclude be made public and should other public bodies be under a duty to consider exclusion where any such notice is extant? The High Court would be far too cumbersome but if there was a tribunal instead then arguably a declaratory ruling could be obtained to confirm exclusion if disputed and/or to terminate the exclusion if a bidder claims to have self-cleaned. In particular, some of the discretionary grounds are arguably too rigid – eg past performance but only if a court (or similar) has effectively ruled on the complained of behaviour. This requirement hopefully avoids subjective victimisation of bidders but equally it is potentially so rigid as to render the whole mechanism redundant. This has led to initiatives such as UK Cabinet Offices PPN on past performance – which has not been received particularly well.

13. Abnormally low tenders

There have been repeated high profile failures by authorities to ensure that they are getting genuine and sustainable value for money. One issue here is a need to ensure that evaluation criteria are genuinely directed to achieving outcomes that are MEAT so that "price" is not allowed to be the dominant factor. Further, the current caselaw has arguably created a bizarre Catch 22 whereby the rules on abnormally low tenders are only engaged in those cases where an authority wishes to exclude an abnormally low bid, and leaves wholly unresolved any guidance as to the threshold or other factors that determine when an authority is obliged to undertake such a consideration in the first place. It is ironic that other bidders often have a far clearer understanding of when a competitor has put in an unsustainably low bid and where that has happened an authority has decided to proceed with them regardless, then arguably there should be additional constraints on the ability to vary or otherwise alter the contract in future. In particular, if a tenderer puts in a low bid as part of a deliberate policy to try to gain market share then they should be obliged to show that they have the financial resources to perform the contract on its terms for the duration of the term unamended. Further, given the repeated experience of unsustainably low contract bids failing, often due to a bidder making unrealistic assumptions about movements in future economic / fiscal conditions then "gambling" in that way should arguably become a ground for discretionary exclusion if established.

14. Framework agreements

There is a general sense of laxity around how frameworks operate in practice:

- The lack of clarity around the extent to which the criteria for the evaluation of mini-competitions need to be specified in the framework and the extent to which criteria used to allow a bidder to qualify for the framework can then be re-opened in a mini-competition;
- The failure to require feedback and a standstill period for mini-competitions is arguably now an anomaly with a wide divergence of practice between authorities in how they behave even when using the same framework. Often authorities who were not involved in establishing a framework

will use it to draw down goods or services when they don't properly understand how it has been structured and/or where they nonetheless want to materially alter the evaluation criteria. This is messy and often an abuse of the framework mechanism.

- Framework Agreements could potentially be an area where some form of arbitration or adjudication mechanism could be built in as an alternative process for resolving procurement disputes in a quick and cost-effective manner.

There should be far greater clarity on the restrictions on single provider frameworks so that goods and services to be drawn down under a single provider framework are clearly defined and priced in advance to establish the price/scope of any services or goods being acquired under such a framework or the nature of the work to be undertaken as there will be no further competition on this. Single provider frameworks should not be used as a way to allow one preferred contractor to effectively be referred a large amount of wholly generalised work with no clarity as to the price or other terms having been set in advance.

15. VEATs

There is arguably a need for greater clarity on the difference between VEATs and the two scenarios in regulation 72 which require notices to be advertised that they have been relied on for a contract change. This appears to be an unintended lacuna in the current drafting of the PCR because the latter notices are the two which were previously included as a requirement in the rules regulating the conduct of the Negotiated Procedure Without Notice. It appears that if one wants to limit the risk of a subsequent ineffectiveness legal challenge (or curtail the time period for the making of such a challenge) you have to unilaterally advertise, but neither the standard VEAT form nor the standard regulation 72 transparency form, anticipate what should be done in this instance.

16. Industrial, environmental and social value

Sustainable purchasing should not be inhibited by legislation whose original purpose was to open up a market economy across Europe. Legal uncertainties (including that award criteria must relate to "the subject matter of the contract") have limited evaluation of sustainable public procurement policies, such as apprenticeships and broader environmental and social sustainability concerns, within the procurement process itself. Reformed procurement law introduced into the UK should clarify that award criteria and technical specifications in support of these policy objectives have equal status to those relating to what is actually being purchased. Certainly industrial, social and environmental objectives can enhance long term value for money, and should be competed whilst a contract is still in procurement, rather than subsequently seeking to include the authority's requirements in the contract agreed with the preferred bidder.

Conclusions

Whilst time may be limited procurement law is an obvious area of regulation where the UK is likely to take back full control over how procurements are conducted next year. As we hope this article highlights at a very summary level there are numerous areas where the potential for reform should at least be debated and should presumably be considered through the prism of how the UK now wishes to structure its domestic market for public contracting as it in turn seeks to encourage UK business to adopt an increasingly global as opposed to European centric approach to business. Procurement regulation by its very nature needs to consist of a series of checks and balances that protect and positively promote the interests of both public sector and private sector participants in the public / utility contracting markets. It may be that at this juncture little changes but it would be unfortunate if that was an outcome reached by default rather than as a result of careful and well informed consideration.

This brief article is our initial contribution to that process of consideration. We intend to contribute further through public engagement and more detailed and considered analysis of options for change and the reasons why such change may be worthy of further thought.

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Procurement Law Reform - Let's start a discussion

Webinar Bitesize Feedback - Procedural reform

9 July 2020
By: Richard Bonnar | Dr Frank Roth | Robert Smith | Paul Stone

DLA Piper's panel discussion webinar held on 1 July 2020, launched our client discussion paper "Procurement Law Reform – Let's Start a Discussion" Panel members from DLA Piper UK, DLA Piper Germany and Keating Chambers had a lively debate on the merits of potential options for reform and which changes might produce a better model for procurement regulation in the UK post Brexit.

This is the first of a series of bitesize summary reports providing feedback from the debate.

This first paper addresses the question of overall procedural reform for procurement challenges through the courts, and the way challenges should be managed in the UK going forwards.

Subsequent bitesize papers will summarize the discussions and conclusions relating to potential reform options in connection with limitation periods, framework contracts, modification of existing contracts, streamlining procurement procedures and confidentiality, disclosure and debriefing.

Overall Procedural Reform for Procurement Challenges

No one on the panel or amongst the audience was an advocate for abandoning the current approach to enforcement of procurement obligations through some form of legal challenge by bidders. Our discussion paper had highlighted that in Australia, for example, there is a far greater emphasis on administrative control and regulation of procurements with independent vetting of the conduct of procurements to ensure proper compliance and, as a result, legal challenge is very much a fallback to be used in rare and relatively extreme cases. This was not seen as being a sensible option for the UK which would take us back to the regime that existed before the introduction of the original Procurement Regulations (PCR). Instead, there was a clear consensus amongst the panel that reform of the existing procedures was to be preferred to any wholesale change.

Fionnuala McCredie QC highlighted the merits of full High Court litigation. She stressed the rigour taken by specialist judges in the Technology and Construction Court to ensure that challenging bidders receive justice, and that procuring authorities are compelled to make full and detailed disclosure of all relevant documents so that properly informed assessments can then be made of what the consequences of any breach might be. She emphasised that this approach has repeatedly produced very high quality outcomes and is effective in ensuring that in the case of large scale high value procurements, public authorities are properly held to account and justice is done.

By way of comparison Frank Roth of DLA Piper's Cologne Office explained that in Germany distinct specialist

tribunal manage all procurement challenges regardless of value or complexity. This tribunal normally takes only seven to nine weeks to resolve a challenge (compared often to a year or longer in the UK to get to a full trial). The procedure is very cost effective and the perception in Germany (across both the public and private sectors) is that it has led to a high quality and effective means of regulating procurements. On average across the entirety of Germany there are about 1000 challenges per year and the perception is that the tribunal has been an effective tool for defining best practice and keeping public authorities “honest” in the way in which they manage procurements.

Paul Stone, from DLA Piper UK, highlighted that the current High Court approach to all litigation under PCR might produce a high quality final result but such a highest common denominator approach was extremely cumbersome, costly (including potentially very high issue fees) and overly rigorous in the vast majority of procurement cases. In reality, this often has the effect of producing perverse results which exacerbate rather than help resolve problems.

There are many cases where rather than defending a robust procurement decision, public bodies (particular at times of austerity) have conceded weak challenges (often threatened by incumbents who wish to perpetuate their existing contract). This leads to a successful bidder being deprived of a contract and forced into a second tender process (often in circumstances where a losing incumbent now knows the price they have to beat). This is clearly inappropriate. If procurements below a particular threshold were to be subject to a lighter touch quicker and cheaper procurement challenge regime this would allow potential issues, either during the conduct of a procurement, or post evaluation to be resolved effectively - with the emphasis being on issue resolution before a contract is concluded, rather than compensation or ineffectiveness post contract.

Frank Roth confirmed, for example, that in Germany the procurement tribunal deals purely with administrative matters in terms of whether a procurement has or has not been conducted effectively. The tribunal has no jurisdiction to deal with matters of compensation. If a bidder who has challenged wishes to issue a compensation claim then they need to bring a separate case before the German High Court, but they may only do so if their original challenge was successful. In practice, this rarely happens. A similar model in the UK would clearly lead to quicker, far more effective justice and would allow many procurement problems to be resolved at far lower cost, in a way that would deliver justice to bidders more effectively.

Fionnuala McCready QC agreed in principle with this approach but subject to clear caveats that there should be a right of appeal to the High Court from any tribunal decision, the Judges in the tribunal should be experienced specialists and there should be an upper threshold in terms of value above which cases should go direct to the High Court. Clearly, if the tribunal follows the German model and has a purely administrative role then the question of damages would become secondary.

The consensus on the webinar panel was very clearly that for lower value procurements below a threshold of say GBP2 million, a tribunal system could be a far quicker and more cost effective / proportionate means of dealing with procurement challenges.

A distinct issue considered by the webinar panel was the current lack of consistency between different regimes for procurement challenge in the UK. All other EU jurisdictions appear to have a single legal regime for dealing with the overwhelming bulk of procurement challenges. The panel could see no good reason why the scope of PCR should not be expanded to cover all challenges under a single unified procedural regime, with only limited exceptions for specific cases such as concessions or defence procurements where it is clear that additional considerations apply (though in both those cases the procedural regime mirrors the PCR). The current position, where a procurement is outside the scope of the PCR (for example where the procurement procedure followed the Rail Regulation (1370/2007). and civil proceedings need to be issued in parallel with judicial review proceedings creates unjustified procedural complexity and confusion that serves no discernible purpose. Bringing the entirety of the regime within the scope of PCR would streamline the process, and should be very easy to achieve.

If you agree, disagree or think there are other considerations that need to be taken into account we would very much like to hear from you. Please contact Paul Stone or Louise Huson.

Read other articles in the series

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