

The Remedies Directive

Complaints to the European Commission

As well as (or instead of) bringing an action before a national court, it is open to a supplier to lodge a complaint with the European Commission in Brussels at the following address: 200 rue de la Loi, 1049 Brussels. The Commission is responsible for overseeing compliance with the Procurement Directives and is used to handling complaints from individuals and firms.

Under the Remedies Directives, the Commission may invoke a "corrective" procedure when, prior to a contract being concluded, it considers that a clear and manifest infringement of EU procurement rules has been committed. In such a case, the Commission will notify the awarding authority and the relevant Member State Government of the circumstances of the alleged infringement. The Commission will set a time limit of at least 21 days (public sector) or 30 days (utility sectors) within which the national Government has to respond. In practice the awarding authority, through the medium of Government, is called upon to justify its conduct, rectify the infringement or suspend the award procedure.

In cases where the Commission is not satisfied with the explanations or actions of the awarding authority or the Member State Government, it may commence formal proceedings against the latter under Article 169 of the Treaty of Rome. Such an action may ultimately result in the European Court of Justice ("ECJ") issuing a ruling which condemns the Government in question for failing to fulfil its Community law obligations. In particularly serious cases, the Commission might also ask the ECJ to grant interim measures.

Alternative Dispute Resolution

Where a dispute arises relating to a procurement procedure, it will usually be in the interests of both sides (the authority and the supplier) to attempt to resolve the matter without embarking upon litigation. Hence, the supplier in question should consider informing the authority of its grievance, with a view to settling the matter in an amicable way. For example, the authority might be persuaded to remove a discriminatory technical standard or award criterion.

Where amicable discussions fail to resolve the matter, the parties could seek to reach a settlement through arbitration. The parties could agree to the appointment of an independent arbitrator drawn from a recognised body of independent arbitrators. Addresses for such bodies are given in the list of useful addresses at the end of this Guidance.

Where a dispute relates to procurement by a utility, a supplier may seek to invoke the conciliation procedure laid down in Remedies Directive 92/13 for the utilities sectors. Recourse to this conciliation procedure involves the following steps:

- i the supplier forwards a request for use of the conciliation procedure to the European Commission;
- ii the Commission asks the utility in question to state whether it is willing to take part in the conciliation procedure. The procedure can only continue if the utility gives its consent;
- iii the Commission proposes a conciliator drawn from a list of independent persons. Both sides must state whether they accept the conciliator and each side designates an additional conciliator;
- iv the applicant supplier, the utility and any other relevant candidate/tenderer have the opportunity to make representations to the conciliators; and
- v the conciliators endeavour to reach an agreement between the parties which is in accordance with Community law.

The utility or the supplier may withdraw from the procedure at any time. Unless the parties decide otherwise, each is responsible for its own costs.

United Kingdom

Implementation of the Remedies Directives

In the United Kingdom, implementation of the EU Directives on procurement has been achieved by way of the following statutory instruments:

- i the Public Works Contracts Regulations 1991 ;
- ii the Public Services Contracts Regulations 1993 ;
- iii the Public Supplies Contracts Regulations 1995 ; and
- iv the Utilities Contracts Regulations 1996 .

The first three sets of Regulations listed above govern the procurement practices of Central Government, local authorities and other public sector bodies. The Utilities Contracts Regulations 1996, on the other hand, apply to "utility" companies (most of them privatised) operating in the water, energy, transport and telecommunications sectors. (An indication of when the procurement rules are likely to apply and the types of infringement that may occur was given on the previous page and also Guidance 24/2001).

As well as setting out the substantive rules on procurement procedures, the above regulations (collectively "the Regulations") each include a section dealing with rights of recourse to the British courts. The remedies potentially available are described below.

The relevant forum

Proceedings under any of the Regulations must be brought in:

- i the High Court in England and Wales; or
- ii the Court of Session in Scotland; or
- iii the High Court in Northern Ireland.

Such a court is located in most large or medium-sized towns and cities throughout the United Kingdom.

The exact choice of court will depend on the location of the authority and the complainant, but it would be usual for the action to be brought in the court located nearest to the authority in question or in London (if the proceedings are to be commenced in England or Wales). Addresses of the regional headquarters of the High Court and Court of Session are given at the end of this Guidance.

Available remedies

The remedies potentially available to a complainant under the procurement Regulations fall into three categories, which are each described in turn below.

Interim orders

The complainant may ask the court to issue an interim order (or "injunction"), which suspends the allegedly defective award procedure or suspends the implementation of any decision or action taken by the awarding authority in the course of such a procedure. It is important to note that such interim measures may only be granted if the contract in question has not been entered into between the authority and a third party. After the contract has been entered into, the only remedy available is damages (see Damages below). It is therefore in the interests of the complainant to lodge his request for interim measures as rapidly as possible. In order to obtain an interim order, a complainant must first show that there is a serious case to be tried (though not necessarily that he has a better than 50% chance of succeeding) at the final trial. This is not in general a difficult hurdle to overcome. More importantly, the complainant will need to persuade the court that the "balance of convenience" lies in favour of granting such an order. In applying this test, the court is likely to consider various factors, including the following:

- i whether it would cause greater hardship to grant or refuse the order. The court might decide, for example, that suspending the contract procedure would be against the public interest because it would delay the provision of important services to the public;
- ii whether damages would provide an adequate remedy to the complainant if the injunction is not granted;
- iii the relative strength of each party's case.

As the name suggests, interim measures are granted at an interim or "interlocutory" stage in the proceedings, without there being a full trial of the issues in question. These issues remain to be ruled upon at the subsequent, full trial.

Set-aside and amendment orders

The High Court has the power to order the setting aside (or annulment) of any decision or act taken unlawfully in a procurement procedure. This could be the decision to award the contract to a particular supplier or any earlier decision in the procedure, such as the one pre-selecting a shortlist of candidates to tender. The set-aside order would take the form of a final injunction: that is, one that is given at the full trial (rather than at an interim or interlocutory stage) and which is intended to be permanent in effect. The factors determining whether the Court will grant such an order are likely to be similar to the ones set out above in relation to interim measures.

Where there has been an infringement of the procurement rules, the High Court may also order the awarding authority to amend any documents. This power could be used, for example, to require the alteration of discriminatory technical specifications or the extension of unduly short time limits.

Set-aside and amendment orders, like interim measures, may only be granted if the contract in question has not yet been entered into.

Damages

Regardless of whether or not a contract has been entered into, the High Court is empowered to award damages to a supplier who has suffered loss or damage as a consequence of a breach of the procurement rules. The Regulations do not expand upon the principles governing the availability and amount of damages. The only exception is under the Regulations applicable to utilities which state that, where the complainant establishes that an infringement deprived him of "a real chance" of winning a contract, he shall be entitled to damages covering his costs of preparing a tender and participating in the award procedure ("bid costs"). Otherwise, British courts are likely to apply existing principles of domestic law when considering claims for damages.

In order to obtain damages, complainants will be required to prove that the authority has committed a breach of the Regulations and that this breach has caused him harm or damage. Depending on the facts of the case, the damages award may cover all or part of the complainant's bid costs and/or the loss of the potential profit that he would have made on the contract.

It appears that a complainant will not be required to prove that, in the absence of the breach, he would necessarily have won the contract at stake. A reasonable chance of winning the contract ought to be sufficient. On the other hand, the damages award might be reduced by a certain percentage in order to take into account the possibility that the complainant's bid would have been unsuccessful in any event.

Who may apply?

The rights of action laid down in the Regulations are available to any person who sought, or who seeks, or who would have wished, to be the person to whom a relevant contract is awarded. In other words, the remedies are potentially available to any supplier who had an interest in being engaged to carry out the contract in question. This will include suppliers who participated in the award procedure, as well as any others who would have done so but for the infringement.

The only further qualification is that the complainant must be a national of and established in an EU Member State or in certain other European countries listed in the Regulations.

Time limit for bringing actions

Under each set of Regulations, legal actions must be brought promptly and in any event within three months from the date when the grounds for bringing the proceedings first arose, unless the Court considers that there is a good reason for extending the period within which proceedings may be brought.

The time limit begins to run from the date when the challenged conduct occurred. For example, if the plaintiff is complaining that he was improperly disqualified in a pre-qualification exercise, he would have (at most) three months to commence any court action as from the date of the authority's decision to exclude him. The Court might, however, exercise its discretion to extend the three month time limit if, for example, the authority fails to inform the complainant immediately of its decision to exclude him. In such a case, the time limit ought to start to run only from the date on which the complainant became aware (or ought to have become aware) of the decision to exclude him.

Procedure

Duty to give notice

Proceedings under the Regulations may not be brought unless the complainant has first informed the awarding authority of the breach or alleged breach and of his intention to bring proceedings in respect of it.

A ruling of the High Court has indicated that this is a strict procedural requirement and that any failure to inform the authority both of the alleged breach and the intended action will render the action inadmissible. It is advisable that such notice is given in writing.

Applications for interim orders

A complainant who seeks an interim measure such as an injunction will deal with the matter by an application by means of a summons to the Court together with a supporting affidavit (sworn statement). This may initially be dealt with by the Court before the summons and affidavit are served on the other party (ie. ex parte) but will then be dealt with at a subsequent hearing at which the other party may be present (inter partes). A claim for an interim injunction will not normally involve oral evidence but will, instead, involve lawyers making submissions to the judge on the basis of the affidavit evidence.

The summons for interim relief may be issued prior to, simultaneously with, or after the issue of a writ (see Ordinary court procedure below) but, where the summons is issued prior to the issuing of a writ, it would be usual for the complainant to have to give an undertaking to issue and serve a writ. The applicant for an injunction will usually have to give an undertaking that he will pay damages for any loss suffered if, at the final hearing of the proceedings, the application for the injunction loses the case. Similar (but not identical) procedures apply in relation to interim injunctions in the context of judicial review proceedings (see below).

Ordinary court procedure

Proceedings in the High Court are normally commenced by writ. This must be endorsed with either a full statement of the plaintiff's claim or a concise statement of the nature of the claim and the relief or remedy being sought. Once the court has issued the writ, it must be served on the defendant within 4 months. A series of formal documents (pleadings) then pass between the parties setting out their respective cases. The pleadings should contain only material facts and should not normally contain statements of law. The plaintiff's first pleading is his Statement of Claim (which may be part of the writ). The defendant subsequently answers with a Defence, and other pleadings may follow. Pleadings are deemed to close 14 days after service of the last pleading in the action, although the court may permit further amendments.

After the close of pleadings, the rules of the High Court provide that discovery shall automatically take place between the parties to the action. Discovery comprises two stages: disclosure by way of a list of documents by one party to the others of all relevant documents; and inspection by the other party of such of those documents as are not legally privileged. The scope of discovery is very wide and extends to all documents that are or have been in a party's possession, custody or power relating to any matter in question in the case, save for those which are legally privileged (eg. communications between a party and his solicitor).

Within one month of close of pleadings the plaintiff must take out a summons for directions. This provides an opportunity for the court to consider the preparations for trial of the action. Among other things, the directions will deal with witness statements and expert evidence.

Witness statements are prepared in order to support a case and are the equivalent of the factual oral evidence that is to be given if the witness is called at trial. They should therefore be comprehensive, as evidence of matters not covered in the statement will only be permitted at trial with the leave of the court. Expert evidence may be appropriate in some procurement proceedings. Experts will be able to give opinion evidence on any relevant matter on which they are qualified to speak. Witness statements and the reports of expert witnesses must normally be disclosed to the other parties in advance of the trial.

The case will normally be tried by a single Judge of the High Court without a jury and is usually in public. At the trial the parties are normally represented by lawyers (usually barristers) who make submissions on their behalf and examine and cross-examine witnesses, who give oral evidence.

Duration of proceedings

Interim measures can be sought and obtained almost immediately in the High Court in cases of urgency. The applicant would be required to set out the urgent circumstances in an affidavit to the Court. The time taken for the matter to proceed to full trial and final judgment varies greatly from case to case and depends to some extent upon the workload of the division of the High Court in which the case is lodged. As a very general estimate, the time lag between initiation of the proceedings and the final judgment can be anything from one to two years.

If the case raises difficult questions of EU law, the national court may refer questions of interpretation to the European Court of Justice for a so-called "preliminary ruling". Such a reference would be likely to add at least two years to the duration of proceedings in the national court. In practice, this kind of reference is only made in a small minority of cases.

Finally, it should be noted that any appeal against the High Court ruling to the superior courts (see below) will add many more months of delay before the case is finally decided.

Judicial review

An alternative, and completely distinct, approach is to proceed by way of judicial review. This is the traditional procedure by which third parties have been able to challenge the actions and decisions of public authorities in the UK. The existence of the Regulations means it is no longer obligatory to challenge public procurement decisions by way of judicial review, but this option is still open (as confirmed by the statement in the Regulations that their application is without prejudice to the availability of other remedies).

The aggrieved person wishing to bring judicial review proceedings must initially apply to a Judge of the High Court for leave to do so. This is perhaps the main drawback of using judicial review rather than bringing an ordinary action under the Regulations. Indeed, the existence of the latter avenue could be one reason why a judge refuses to grant leave for judicial review. Any application for leave must be made promptly and, in any event, within 3 months from the date when the grounds for the application arose unless there is good reason for extending the period. If leave is granted (which may involve consideration of papers only or a hearing open to the public), the substantive application proceeds and the matter is heard by a Judge or Judges of the High Court (and is normally open to the public).

Judicial review proceedings are usually determined by reference to affidavit (rather than oral) evidence without some of the other formal procedures which apply in ordinary civil cases. There is often little or no discovery.

The following remedies are available in judicial review proceedings: an order restraining the decision-making body from acting outside its jurisdiction (prohibition) or quashing and requiring it to reconsider the matter (certiorari); an order requiring the body to carry out its judicial or other public duty (mandamus); the granting of a declaration as to the rights of the parties; the granting of an injunction; and, depending on the type of claim, in limited circumstances, an award of damages against the decision-making body. It can be seen that these remedies closely overlap with those available under the Regulations, although the right to damages is much more limited.

There may be circumstances in which it is advantageous for a complainant to bring an action alleging infringements of the Regulations by way of, or in combination with, an action for judicial review. This is a complex issue upon which the complainant may well need to take legal advice.

Is it necessary to engage a lawyer?

It is normal practice in High Court litigation for both parties to instruct solicitors to act on their behalf, both in order to deal with the complicated procedural requirements and to present each side's arguments on the law and merits. Furthermore, under the rules governing High Court practice, most oral submissions can only be presented by counsel (ie. a barrister rather than a solicitor). Consequently, it is usually necessary for the instructed solicitors to instruct counsel (complainants cannot usually instruct a barrister directly themselves). The cost implications of instructing lawyers are considered below.

It is possible for a complainant to represent himself in the proceedings, but this is very rare and not generally recommended.

Costs of proceedings

A relatively small court fee, in the sum of £500 in this type of case, is payable upon the commencement of proceedings. More importantly, a complainant will need to bear in mind the cost of instructing lawyers in order to pursue litigation. The overall cost of doing so will depend on the gravity, complexity and duration of the case and is difficult to predict at the outset.

It is normal practice for the High Court to order the unsuccessful party in the litigation to pay a large part of the legal costs of the successful party. This is an additional risk to be taken into account when embarking upon litigation. Moreover, if the complainant was successful in obtaining an injunction at an interim stage but ultimately lost the case at the final hearing, he might find himself liable to pay damages to the defendant under the terms of a cross-undertaking in damages. Complainants are often required to give such a cross-undertaking in order to obtain the injunction.

Rights of appeal

Once the High Court has laid down its judgment, the unsuccessful party may seek to appeal the ruling to the Court of Appeal. In some cases the leave of the judge or the Court of Appeal may be needed. This means that permission is required before the appeal can be brought and courts will consider a number of matters, including the prospect of success, when deciding whether or not to grant leave. The judgment of the Court of Appeal may in turn be appealed, with leave, to the House of Lords, which is the highest judicial authority in the UK.

Enforcement of judgments

It is highly unlikely that an awarding authority would choose deliberately to contravene a High Court order made against it, particularly in view of the severe penalties that may follow. If an authority disobeyed the terms of injunction, the complainant could apply for the committal of its officials to prison (although the court would probably give the authority a warning at first hearing in order to induce compliance). In the case of judgments for damages, the complainant could apply for an order to appropriate the authority's assets.

Useful Addresses

The High Court in London:

Royal Courts of Justice
Strand
London WC2A 2LL

The Court of Session in Scotland:

Parliament House
Parliament Square
Edinburgh EH1 1RQ

The High Court in Northern Ireland:

Royal Courts of Justice
Chichester Street
Belfast BT1 3JF

In addition, district registries of the High Court (and Court of Session in Scotland) are located in numerous towns and cities throughout the United Kingdom.

The Procurement Policy Unit (PP) within the Office of Government Commerce (OGC) is a joint Treasury/DTI unit responsible to Treasury Ministers on domestic procurement policy and the implementation of the EC rules. It is responsible to DTI Ministers on EC procurement policy and the development of the EC directives and other international measures and co-ordinates all correspondence with the European Commission on procurement matters.

Office of Government Commerce:

Procurement Policy Unit
Fleetbank House
2-6, Salisbury Square
London EC4Y 8AE.
Tel: 020 7211 1336
Fax: 020 7211 1344

All information in this Guidance is checked and believed to be correct, but cannot be so guaranteed and the publishers shall not be liable for any loss suffered directly or indirectly as a result of its use.