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When can you use the “have regard to” section 12 objectives, or other problems with the process, for a procurement challenge or judicial review?

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The challenge landscape – where are we now?

- Effect of transitional provisions + authorities having in many cases sought to start procurements under the old and familiar regime is that until the last few weeks there do not appear to have been many claims under the new Act
- But a number of claims (maybe a dozen or so??) have now been issued – apparently no hearings or judgments as yet, and in several of these automatic suspension lifted by agreement – one or more CMCs due early in 2026
- Various other disputes in correspondence, and cases where advice has been sought – more claims likely to manifest as larger procurements started in spring 2025 start to come to the point of award
- Anecdotally, early claims have been mainly evaluation disputes of the kind which accounted for most old regime claims – but also some involving challenges to choice of award criteria, disputes about whether what is being procured is a public contract, abnormally low tenders, improper conflicts of interest etc

The general obligations of a contracting authority – (1)

- Section 11(1) – not to carry out covered procurement except in accordance with Act
- Section 12(1) – “have regard to the importance of” – value for money; public benefit; understanding authority’s policies/decisions; being seen to act with integrity – also section 12(4): have regard to barriers to SME participation and consider steps to reduce
- Sections 12(2), (3) – “treat suppliers the same” unless different treatment justified; all reasonable steps to ensure no unfairness through different treatment
- Sections 13(9), 14(8) – have regard to NPPS and WPPS

The general obligations of a contracting authority – (2)

- Section 19(1) – award to most advantageous tender
- Section 20(3) – ensure that procedure is proportionate means of awarding contract – also sections 22(1) re conditions of participation, 23(2) re award criteria
- Sections 81 to 83 – reasonable steps to identify and avoid unfairness from conflicts of interest
- Section 98 – keep sufficient records to explain material decisions

What has changed in the general obligations? – key points

- The “have regard” duties, as such, are new
- There is no longer any general duty to act in a transparent and proportionate manner – the s 12(1)(c) have regard duty is transparency-related but narrower, and the proportionality duties are more specific and limited – GPA article 4 (conduct procurement “in a transparent and impartial manner”) is an aid to interpretation, but no more than that
- Sections 12(2) and (3) are similar but not identical to the former duty to treat economic operators equally – some potential issues here and in s 90 anti-discrimination provision re e.g. indirect discrimination, positive duty to level the playing field etc
- More extensive obligations in relation to conflicts of interest (ss 81-83), record-keeping (s 98) and below threshold contracts (Part 6)
- Former “manifest error” principle of review probably now succeeded by public law principles of rationality etc

The nature of the “have regard” obligations

- Discussed in detail in my presentation last year
- Key points:
 - Obligation relates to decision-making process, not substance of decision reached
 - Manner/intensity of inquiry into relevant issues, and weight to be given to specified factors, is for decision-maker
 - Decision-maker needs to appreciate relevance and desirability of specified objectives and to consider them in substance and with rigour – required of decision-maker itself
 - But where there are differing and high-level objectives, court must allow decision-maker considerable room for discretion and judgment, and not seek to micro-manage
 - Where having regard to NPPS (as opposed to specified objectives), authority needs to: take it into account; understand it properly; either act in accordance with it, or give clear reasons for departing from it

- Original (non-statutory) version June 2021 – intended statutory version published May 2024, but withdrawn by new administration before taking effect - current version presented to Parliament February 2025 – need to resolve this was presented at the time as the reason for delaying commencement of the Act
- Current NPPS, like the abortive 2024 version, has relatively little truly hard-edged content (less than in 2021) – sets out 8 things authorities “should” do, under 3 broad heads (driving economic growth; delivering social and economic value; building commercial capability) – most of the 8 points are very high level, and hard to imagine as the basis for plausible legal challenge – nonetheless worth noting:
 - Point 1 on maximising spend with SMEs and VCSEs (see also PPN001 and June 2025 *Growing British Industry* consultation; and query legal status of references to Playbook)
 - Points 2 and 5 – suggesting an expectation that contracts will include requirements re workforce terms and conditions; and also re anti-corruption, human rights, environmental impact etc
 - Point 8 on use of “collaborative procurement agreements”, which appears to mean in effect multi-authority frameworks – query whether “good value for money when compared to other agreements” refers only to provider fees or to call-off terms more generally

- It is easier to imagine trade unions or pressure groups trying to rely on the points just mentioned, than it is individual suppliers
- In the case of local authority procurement, following the guidance in the NPPS should not fall foul of the Local Government Act 1988 s 17 bar on regard for non-commercial matters: see s 17(11)
- But nothing in NPPS does or could change the requirements for award criteria in s 23(2) of the Act (related to subject-matter; clear, measurable, specific; proportionate)
- Note also s 1 of the Public Services (Social Value) Act 2012
- The Wales Procurement Policy Statement has not been changed since the Procurement Act and, although longer, is if anything more high-level and less prescriptive than the NPPS. However, other Welsh legislation imposes obligations relevant to procurement which are more far-reaching than in England
- In Scotland, see the Procurement Reform (Scotland) Act 2014 and associated statutory guidance

The stages when a challenge might arise

- Authority's approach to regime application – definitions of contracting authority and public contract; direct awards; light touch regime; use of frameworks
- Design of procurement – e.g. division into lots form of process; specified contract terms; conditions of participation
- Procurement process (including publication of notices; conflict and level playing field issues; exclusion decisions, termination of procurement)
- Evaluation of tenders, award and notices
- Lifetime of the contract – modification, management and termination

Key issues on a challenge

- Which duties apply? – general obligations as discussed above, and relevant specific obligation
- What is role of court? – objective issues for court versus process point
- Part 9 or judicial review?
- What are the facts? - identifying a basis for challenge
- Standing
- Time limits
- Nature of remedies

Role of court

- Essential to focus on this in assessing prospects, how to plead, nature of relevant evidence
- Is this a matter which the court has to decide for itself?
- Is it something which depends on what the authority “considers” to be the position or is “satisfied” of, in which case what is the basis for disputing the lawfulness of its decision?
- How do evaluation challenges fit in? – note “the authority considers” formulation in s 19(2)
- “Have regard” challenges will need to be focused on process

Part 9 or judicial review?

- Some matters specifically excluded from Part 9 – notably, NPPS/WPPS have regard duty, and SME barriers have regard duty
- But breach of s 12(1) have regard duty can be pursued under Part 9
- Below threshold breaches are a matter for judicial review
- Those who are not suppliers (sub-contractors? pressure groups?) will only be able to pursue judicial review

Finding out the facts

- Looking out for relevant notices e.g. re modifications
- Important to think about what s 98(2) “material decisions” are involved, and what authority/supplier communications under s 98(3) may be relevant
- New Appendix H to TCC Guide is likely further to encourage early disclosure of key materials
- Note that in some particular contexts (e.g. local authority decision-making), there are specific statutory duties to keep records of decisions and the reasons for them
- All this especially important re challenges (as with due regard) based upon the decision-making process – caselaw requires consideration in substance, not *necessarily* explicit reference, but silence may prove damaging

- Supplier must show, under s 100(3)(b), that it has suffered or is at risk of suffering loss or damage in consequence of the breach – this is a low threshold, but just how low? – how might a supplier plausibly claim to have been affected by breach of the s 12(1) duties?
- Relevant duties under the Act are owed (only) to “suppliers”, and the right of action under the Act is limited accordingly: see ss 100(2) and 100(3)(a) – “supplier” is not defined, but it may be interpreted in the same, fairly tightly defined way as was “economic operator” in *International Game Technology plc v Gambling Commission* [2024] PTSR 65, i.e. limited in effect to bidders, candidates, and those who were effectively precluded from bidding by the terms of the procurement (or the absence of a procurement process)
- Will judicial review standing for breach of the Act be more broadly approached again, given its different somewhat character from the PCR (see *R (Good Law Project) v Minister for the Cabinet Office* [2022] PTSR 933 at [6] (“ripe for review”); *R (Good Law Project and Runnymede Trust) v Prime Minister* [2022] EWHC 298 (Admin); *R (Good Law Project) v Secretary of State for Health and Social Care* [2022] EWHC 2468 (TCC) at [498] et seq

Time limits

- At first sight, s 106 time limits look similar to the PCR
- But there are quirks in relation to the time limit under s 106(1) for “specified set-aside proceedings”
- It appears intended to continue to apply the previous 6 month long-stop, but with the addition of the normal “30 days from knowledge” if that expires sooner
- Query, however, whether the s 106(5) definition of “specified set-aside proceedings” will have the effect, in many cases (i.e. those where a contract details notice has been published under s 53), of meaning there is no long-stop limitation period at all

Remedies – pre-contractual remedies

- Assume that suspension has not been lifted, or that authority has chosen not to enter into contract
- Section 103(2) says that the court “may make” one or more of the following orders: setting aside decision/action; requiring authority to take action; damages; “any other order that the court considers appropriate”
- In “due regard” cases, should one apply the pre-statutory judicial review “no difference” test, i.e. no relief is granted if the court is confident the outcome would have been the same
- As with the general discretion to withhold relief in judicial review, there is a need for a set of consistent guiding principles

Remedies – damages

- Does the requirement for a breach to be “sufficiently serious” on the EU law test still apply? –
 - Coulson LJ (*obiter* and without argument) in *Braceurself Ltd v NHS England (no 2)* [2024] KB 914 at [1] suggested nothing had changed – but this is arguably difficult to reconcile with the specific reasoning of the Supreme Court for recognising that requirement under the PCR in *NDA v EnergySolutions* [2017] 1 WLR 1373
 - How might the threshold operate in practice where the complaint is of breach of a have regard duty?
- Time to revisit the question of when loss of a chance is the appropriate approach, and when it is balance of probabilities?
- What is the appropriate counter-factual in modification cases?

Remedies – set-aside proceedings

- There are important differences between the set-aside regime under ss 105 and 106 of the Act, and the previous declaration of ineffectiveness regime
- Critically, the set-aside conditions in s 105(1) include not only the familiar scenarios of non-advertisement and breach of standstill/suspension, but also any case where the breach “became apparent only after the contract was entered into or modified”. Although all the set-aside conditions apply only where the relevant circumstance denied the claimant a “proper opportunity” to seek a pre-contractual remedy, it is hard to see how there could ever be such an opportunity where the claimant was not at least on notice of the breach before contract conclusion
- No longer any VEAT notice protection
- See above re time-limits