

Will Clients be at a greater risk of challenge under the new rules?
How do you support client objectives and how will remedies work in practice?

Michael Bowsher QC

- Visiting Professor, King's College London
- Barrister; London, Belfast & Dublin



GPA Article XVIII

Domestic Review Procedures

Article XVIII Domestic Review Procedures

1. Each Party shall provide a timely, effective, transparent and nondiscriminatory administrative or judicial review procedure through which a supplier may challenge: a) a breach of the Agreement; or b) where the supplier does not have a right to challenge directly a breach of the Agreement under the domestic law of a Party, a failure to comply with a Party's measures implementing this Agreement, arising in the context of a covered procurement, in which the supplier has, or has had, an interest. The procedural rules for all challenges shall be in writing and made generally available.
2. [Conciliation/ADR encouraged]
3. Each supplier shall be allowed a sufficient period of time to prepare and submit a challenge, which in no case shall be less than 10 days from the time when the basis of the challenge became known or reasonably should have become known to the supplier.
4. Each Party shall establish or designate at least one impartial administrative or judicial authority that is independent of its procuring entities to receive and review a challenge by a supplier arising in the context of a covered procurement.

GPA Article XVIII

Domestic Review Procedures

5. Where a body other than an authority referred to in paragraph 4 initially reviews a challenge, the Party shall ensure that the supplier may appeal the initial decision to an impartial administrative or judicial authority that is independent of the procuring entity whose procurement is the subject of the challenge.

6. Each Party shall ensure that a review body that is not a court shall have its decision subject to judicial review or have procedures that provide that: a) the procuring entity shall respond in writing to the challenge and disclose all relevant documents to the review body; b) the participants to the proceedings (hereinafter referred to as "participants") shall have the right to be heard prior to a decision of the review body being made on the challenge; c) the participants shall have the right to be represented and accompanied; d) the participants shall have access to all proceedings; e) the participants shall have the right to request that the proceedings take place in public and that witnesses may be presented; and f) the review body shall make its decisions or recommendations in a timely fashion, in writing, and shall include an explanation of the basis for each decision or recommendation.

GPA Article XVIII

Domestic Review Procedures

7. Each Party shall adopt or maintain procedures that provide for:
 - a) rapid interim measures to preserve the supplier's opportunity to participate in the procurement. Such interim measures may result in suspension of the procurement process. The procedures may provide that overriding adverse consequences for the interests concerned, including the public interest, may be taken into account when deciding whether such measures should be applied. Just cause for not acting shall be provided in writing; and
 - b) where a review body has determined that there has been a breach or a failure as referred to in paragraph 1, corrective action or compensation for the loss or damages suffered, which may be limited to either the costs for the preparation of the tender or the costs relating to the challenge, or both.

TCA Title VI

Article 286

A long dense provision plainly referring to GPA: some key points

- “rapid interim measures to preserve the supplier’s opportunity to participate in the procurement”
- A standstill period
- Availability of compensation provided for, but scope of compensation not specified

Green Paper on Remedies: the Problems

- What is the Problem that the Green Paper seeks to address?
- System is “lengthy, expensive and complex”
- “too costly to pursue”
- What does this mean?
 - Too Many Challenges? Too Few?
 - Too Many Procurements Held Up?
 - Too Much Paid out in Damages?
 - Too Many Busybodies (or too few)?
 - Do we Need a More Effective Regime? Or Just one that complies with our International Obligations?
- Or do we think that the law applied to bid protests is too strict or too lax?
 - More successful reviews would incentivise challenge
 - Something for legislation?
- How is the Public Procurement Review Service to fit in?

Green Paper on Remedies: Proposals

- A Tailored fast track system
 - Timetabling in TCC and fitting the dispute to the slot
 - *Dräger* (maintaining a suspension dependent upon finding a listing slot)
 - *Vodafone* (crafting a preliminary issue to hold onto a suspension)
 - fine, but like most of the British constitution it's a bit Heath Robinson
 - Pleadings
 - Disclosure
 - Capacity – culture change and use of district registries....and?
 - But where are these judges coming from given the MoJ's current attitude to the system, the more general demands on judges and the MoJ's budget constraints? Given its repeated role as defendant is there a conflict of interest?
 - The need for a True Expert on Procurement – taken out of the general QB pool with no need to go on circuit?
 - Timescales
- Clarify interplay with judicial review....absolutely but be careful what you wish for!

Green Paper on Remedies: or a New Forum

- Tribunal
 - What's the model – the CAT?
 - Or another tribunal feeding into the Upper Tribunal
 - Or the Upper Tribunal itself
 - Are they intending to lower the bar for claims?
- Would this be realistic or helpful
- Would it be helpful if this were taken out of court system and operated under auspices of Cabinet Office (as the CAT operates under auspices of BEIS)

Green Paper on Remedies

- Pre-contractual remedies
 - Move to a quicker review system! Again what is going to be challenged, by whom?
 - How much quicker...come and join the early stages of a procurement dispute
 - And perhaps speed is not all you think it is!
 - Will certainly open up opportunities for more challenges, and require more consideration of potential challenges by purchasers

Green Paper on Remedies

- Applications to Lift
 - A new test to balance public interest, urgency, the upholding of the regulations and the impact on the winning bidder against the right for the claimant to be able to participate and alternative remedies
 - The reduction in court timescales will allow more contracts to remain suspended while the case is heard!!!
- And Capping the Level of Damages
 - That will feed into applications to lift. But is this the tail wagging the dog. Is the Treasury's determination to avoid an NDA style payout conditioning everything now.
 - Perhaps the NDA payout was the once in a lifetime learning experience the system needed!!
- All this suggests more points of challenge
 - Perhaps consider what drives challenges, and therefore drives the number of challenges up or down.

What drives Bid Protests?

Market Entry Issues

- non-UK parties - challenges on discrimination etc – eg the social value model etc
- More limited availability of challenge in court for non-UK parties as duty limited to covered procurement (or similar) see eg Reg. 90A and 90B of PCR

Conduct or Outcome Issues, eg. poor value, change

- many more potential areas of dispute eg social value model and scoring of sustainability elements

Negotiation

- using litigation as a tool

Grief and Outrage

- Flynn, *Grieving the Loss of a Public Contract: De La Rue and the Brexit Passport* (2020) JOPP 20
- Bidders in grief need time; shortening the time limits (and the standstill period) drives disputes which could be avoided if bidders could be guided to acceptance
- Political and Press reaction during grief demonstrates why we need a system
 - Process deemed "a national humiliation" by someone now holding one of the great offices of state
 - Daily Mail to contracting authority: "Why do you hate our country, its history, culture and the people's sense of identity?"

Stakeholder Concerns – eg Shareholders, Unions

A Growing Role for Judicial Review? And more Claims?

- Confusion of Overlapping Procedures
- Claims by parties other than Bidders or Suppliers shown the way by,
- *Good Law Project v SoS HSC* [2021] EWHC 346 (Admin), Chamberlain J.
 - Lengthy discussion of standing and appropriateness for JR as procedure for enforcing procurement law obligations
 - Is the Claimant “attempting to use the public procurement regime for a purpose for which it was not created?”
- Is procurement law now a means of delivering on a range of other matters; and challengers have a range of interests in using the procurement regime for a purpose for which it was intended; or is becoming intended.
- This case – the Reg. 50 case – also concerns “obligations” derived from PPN on Transparency
- Which raises again, what is procurement law for and what gives rise to enforceable obligations? Given the expansion of Statute and Soft Law it is hard to argue that these are not included on top of transparency and value:
 - Governance (anti-corruption)
 - Social and Environmental Issues
 - UN SDGs more broadly

PPNs since 2019

- [Procurement Policy Note 08/21 - Taking account of a bidder's approach to payment in the procurement of major government contracts](#)
- [Procurement Policy Note 07/21: Update to Legal and Policy requirements to publish procurement information on Contracts Finder](#)
- [Procurement Policy Note 06/21: Taking account of Carbon Reduction Plans in the procurement of major government contracts](#)
- [Procurement Policy Note 05/21: National Procurement Policy Statement](#)
- [Procurement Policy Note 04/21: Applying Exclusions in Public Procurement, Managing Conflicts of Interest and Whistleblowing](#)
- [Procurement Policy Note 03/21: The Sourcing and Consultancy Playbooks](#)
- [Procurement Policy Note 02/21: The WTO GPA and the UK-EU TCA](#)
- [Procurement Policy Note 01/21: Procurement in an Emergency](#)
- [Procurement Policy Note 11/20: Reserving below threshold procurements](#)
- [Procurement Policy Note 10/20: Public Procurement after the Transition Period ends on 31 December 2020](#)
- [Procurement Policy Note 09/20: The Construction Playbook](#)
- [Procurement Policy Note 08/20 - Introduction of Find a Tender](#)
- [Procurement Policy Note 07/20 - Taking account of a bidder's approach to payment in the procurement of major government contracts](#)
- [Procurement Policy Note 06/20 – taking account of social value in the award of central government contracts](#)
- [Procurement Policy Note 05/20: The Outsourcing Playbook V2.0](#)
- [Procurement Policy Note 04/20: Recovery and Transition from COVID-19](#)
- [Procurement Policy Note 03/20: Use of procurement cards - COVID-19](#)
- [Procurement Policy Note 02/20: supplier relief due to coronavirus \(COVID-19\)](#)
- [Procurement Policy Note 01/20: Responding to COVID-19](#)
- [Procurement Policy Note 01/19: Applying Exclusions in Public Procurement, Managing Conflicts of Interest and Whistleblowing](#)
- [Procurement Policy Note 02/19: Preparing for the UK Leaving the EU](#)
- [Procurement Policy Note 03/19: The Public Procurement \(Electronic Invoices etc.\) Regulations](#)
- [Procurement Policy Note 05/19: Tackling Modern Slavery in Government Supply Chains](#)
- [Procurement Policy Note 06/19: New Thresholds 2020](#)

Impact of Judicial Review Reform

- Judicial Review and Courts Bill
 - Clause 1 – provision for deferred Quashing Orders
 - Historically quashing a contract a rather theoretical outcome
- So reform lowers the bar for JR to be a route to achieve a declaration of ineffectiveness

More Diverse Routes of Review of Procurement

- Audit/Attestation
- Enhanced Role for Public Procurement Review Service?
- EU Commission Review
 - Countervailing challenges for excessive social value, or insufficient carbon reduction. Will this be the route for non-UK bidders?
- Other Inter-State Review Mechanisms

Will Clients be at a greater risk of challenge under the new rules?

How do you support client objectives and how will remedies work in practice?

-
- Dangers of Defensive Procurement
 - Procurement designed to prevent error may prevent ambitious procurement

I will return to some of these themes on my blog at <https://mostlyprocurement.typepad.com/>

