



## **Time Limits for Tender Challenges: test for extending time to bring a public procurement challenge**

**By Rhodri Williams QC**

**In *Riverside Truck Rental Ltd-v-Lancashire County Council* [2020] EWHC 1018 (TCC) the High Court confirmed the strict application of the rules governing the time limits for bringing a claim for breach of the EU Public Procurement regime, whether it be in the High Court (TCC) by way of a claim under the regulation 91 of the Public Contracts Regulations 2015, or in the Administrative Court by way of a claim for judicial review.**

### **SUMMARY**

1. The High Court (HH Judge Eyre QC, sitting as a High Court Judge and as a Judge of the Administrative Court) dismissed two applications to extend time, pursuant to regulation 92(4) of the Public Contracts Regulations 2015 and CPR rule 3.1(2)(a), in a case where proceedings had been begun more than 30 days after the aggrieved tenderer had been sent a decision award letter informing it that it had not been successful in winning the contract.
2. The case concerned the application of the short 30-day time limit for bringing a claim under the 2015 Regulations, pursuant to regulation 92(2), and the for bringing a claim for judicial review arising out of the 2015 Regulations, by virtue of CPR rule 54.5(6). The Judge ruled that insofar as the Claimant knew, or ought to have known, that grounds for bringing a claim first arose more than three months before the claim was issued, the Court had no power to extend time, by virtue of regulation 92(5), and that, insofar as the Court did have the power but the time had started to run more than 30 days before proceedings were issued, there were no good reasons on the facts for extending time to bring the claims, whether under regulation 91 of the 2015 Regulations or whether under CPR rule 3.1(2)(a) in respect of a claim for judicial review.

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### **Background**

3. The Claim concerned an allegation that the Defendant had acted unlawfully in disqualifying the Claimant from a tender procedure, for the award of a contract for the provision of lease and maintenance services for a waste transport fleet of vehicles, on the ground that the Claimant's tender did not comply with the mandatory technical specifications set out in the tender documentation.
4. The tender process was launched by the publication of a contract notice in the OJEU on 19<sup>th</sup> September 2019. The Claimant was informed by letter dated 29<sup>th</sup> November 2019 that it had been unsuccessful because its tender did not comply with the mandatory technical specification for its 6x4 tractor unit cabs in that these did not provide standing height for the cab driver, as had been stipulated in the tender documentation.
5. The Claimant began proceedings for breach of the Defendant's statutory duties under the Public Contracts Regulations 2015 ("the 2015 Regulations") (together with parallel proceedings for judicial review) on 24<sup>th</sup> January 2020, outside the thirty-day time limit permitted by regulation 92(2) of the 2015 Regulations. The Particulars of Claim also dated 24<sup>th</sup> January 2020, though detailed did not deal with this issue. However, on the same date the Claimant issued its application "*to extend time for issuing a claim in relation to a decision governed by the Public Contracts Regulations 2015(SI 2015/1102) and related duties under EU law pursuant to CPR 3.1(2)(a) for the reasons set out in the attached witness statement*". The Defence filed on 28<sup>th</sup> February 2020 raised the issue of limitation under regulation 92(2) of the 2015 Regulations. No Reply was filed dealing with the limitation issues set out in the Defence.

### **Identification of the Time for Starting Proceedings under the 2015 Regulations**

6. The Court ruled that the starting point was consideration of the provisions of regulations 91 and 92 with the former providing that a breach is actionable by economic operator who "*suffers, or risks suffering, loss or damage*" in consequence of the breach and with the latter providing that proceedings must be commenced within 30 days of the date when the economic operator first "*knew or ought to have known that grounds for starting the proceedings had arisen*".

7. It followed that a breach which caused loss or a risk of loss was actionable from the date of the breach. The risk did not have to come to fruition and the loss of which there was a risk did not have to be suffered before proceedings could be commenced. An economic operator who knew or ought to have known of a breach which had caused a risk of loss has 30 days from the time of that knowledge to commence proceedings.
8. Where an economic operator had a number of different grounds of complaint and asserted a number of different deficiencies in a procurement exercise there could be different dates for the start of the 30 day period under regulation 92 (2) in relation to the different grounds of complaint.
9. Thus, a breach was actionable once it had caused a risk of loss to an economic operator. The proceedings had to be commenced within 30 days of the date when the economic operator first knew or ought to have known that grounds for starting proceedings had arisen. In *Sita UK v Greater Manchester Waste Disposal Authority* [2011] EWCA Civ 156, [2012] PTSR 645 the Court of Appeal explained what constituted knowledge for these purposes. Elias and Rimer LJ (at [26] and [91] respectively) adopted the test which had been applied by Mann J at first instance namely that: “*The standard ought to be a knowledge of the facts which apparently clearly indicate, though they need not absolutely prove, an infringement.*”

**The Approach to be taken when considering an Application to extend Time for a Claim under the Public Contracts Regulations.**

10. The Court held that regulation 92 (4) gave the court power to extend the relevant time limits when it “*considers there is a good reason for doing so*”. The question of whether such a good reason existed in a particular case had to be considered in the light of the policy considerations underlying the strict time limits imposed in the Regulations.
11. Although the categories of good reason were not closed or exhaustively listed regard was to be had to *Jobsin v Department of Health* where, at [33], Dyson LJ explained that commercial considerations on the part of the claimant were not a good reason for this purpose. That was so even though in that case there were “*strong commercial reasons why it would have been reasonable for [the claimant] not to start proceedings until the tender process had been completed.*”

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### Whether Time should be extended for the Procurement Claim

12. On the facts, the Judge ruled that none of the matters set out by the Claimant ((i) the fact that time expired during the Christmas vacation period; (ii) that the Claimant acted reasonably in spending the first week of the 30 day period seeking to explore alternatives to litigation; (iii) that until 10<sup>th</sup> January 2020 it did not have all of the information that enabled it to fully formulate its claim under the 2015 Regulations and “*decide that it was worthwhile bringing this challenge*”; and (iv) that it acted reasonably promptly after it received the pricing information on 10<sup>th</sup> January 2010) amounted of itself to a good reason for extending time.
13. In that exercise it was relevant that the Claimant was not pointing to matters outside its control as having prevented it from commencing proceedings in time. The reality was that the Claimant failed to start the Procurement Claim in time because it adopted a mistaken view of the appropriate line of challenge and of the applicable time limits and because it was not minded to commence proceedings until it knew whether or not it would have been the successful tenderer if it had not been excluded because until then there was a prospect that the proceedings would not be worthwhile commercially. None of that amounted to a good reason for an extension and the Judge concluded that even when the matter was viewed in the round there was no good reason for an extension and so the application for an extension had to fail.

### The Approach to be taken when considering an Application to extend Time for a Judicial Review Challenge to a Procurement Decision.

14. The Judge ruled that the application for the extension of time of the Judicial Review Claim had to be considered in the light of the principles governing the extension of time for judicial review claims generally, rather than specifically under regulation 92(4)(5) of the 2015 Regulations, albeit doing so in the context of a procurement process where there is a particular public interest in the speedy resolution of disputes.
15. The potentially relevant considerations for current purposes are:
  - a. Whether there is a reasonable objective excuse for the claim having been commenced out of time.
  - b. The presence or absence of prejudice to the Defendant and/or third parties.

- c. Whether the public interest requires that the claim be allowed to proceed. This was a potent consideration in *R (ex p Greenpeace) v Secretary of State for Trade and Industry* [2000] 2 CMLR 94 and was a factor on which the Claimant places reliance in the current case. In considering the public interest account is to be taken of the merits (see per Maurice Kay J at [76]). However, it was to be noted that *Greenpeace* was a particularly strong case. There the judge had heard full argument on the merits and had come to the clear conclusion that the regulations in question were unlawful. That conclusion related to the lawfulness of regulations of general application and Maurice Kay J explained that his finding as to their lawfulness was a “*matter of substantial public importance*.” In addition, when considering the impact of public interest and whether it called for an extension of time account had to be taken of the counterbalancing strong public interest in the speedy resolution of disputes relating to public procurement exercises.

### Conclusion

16. This case confirms the strict way in which the Courts will interpret regulation 92 of the Public Contracts Regulations 2015 in relation to the time at which the limitation period starts to run in EU public procurement challenges and the circumstances in which the Courts will grant an extension of time for bringing a claim which is commenced outside the thirty day period, insofar as the Court has the jurisdiction to do so.
17. The case also clarifies the extent to which the same time limits will be applied in relation to a claim brought by way of judicial review arising out of a challenge to a decision made under the Public Contracts Regulations 2015. Even though the provisions in regulation 92(4)(5) may not be applied verbatim, there is no doubt that by analogy, the Courts will approach the basis of an application to extend time, pursuant to CPR rule 3.1(2)(a), in a similar manner and claimants, whether in ignorance or not, will not be permitted to avoid the strict time limits imposed by the EU public procurement regime by issuing a claim for judicial review in the Administrative Court, under CPR rule 54, rather than a civil claim for breach of regulation 91 in the High Court.

**Rhodri Williams QC**

6<sup>th</sup> May 2020