

# Time limits for public procurement challenges— reminder of the distinct approaches to limitation in procurement claims and judicial review (*Riverside Truck Rental Ltd v Lancashire County Council—R (on the application of Riverside Truck Rental Ltd) v Lancashire County Council*)

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**Local Government analysis:** In this case, the claimant competed for a contract for the supply and maintenance of fleets of tractor cabs and trailers to a council-owned operator of waste processing facilities. Its tender was disqualified. It concurrently issued a claim in the Technology and Construction Court (TCC) under the Public Contracts Regulations 2015 (PCR 2015), as well as a claim for judicial review in the Administrative Court. The TCC dismissed both claims as being out of time. The court distilled the principles governing limitation and applications for extensions of time in the two different kinds of procurement challenge. Written by Jonathan Lewis, barrister, at Henderson Chambers.

*Riverside Truck Rental Ltd v Lancashire County Council—R (on the application of Riverside Truck Rental Ltd) v Lancashire County Council* [\[2020\] EWHC 1018 \(TCC\)](#)

## **What are the practical implications of this case?**

The short time limits in public procurement claims continue to provide traps for the unwary. In those rare circumstances in which a tenderer chooses to issue both a claim in the TCC under the relevant procurement regulations and a judicial review claim, it is important to keep in mind how time limits are applied in these different types of proceedings.

In judicial review claims, relevant considerations for an extension of time are: whether there is a reasonable objective excuse for the delay—the presence or absence of prejudice to the defendant and/or third parties—and what the public interest requires (at para [101]). The approach to applications to extend time in judicial review claims differs from that in claims under the PCR 2015.

Although the public interest can be a relevant consideration in judicial review proceedings, it is not relevant when considering whether there is a ‘good reason’ for extending the time limit in public procurement claims (at para [89]). This is because a procurement claim is not a public law claim, but a private claim by an economic operator seeking redress for an alleged breach of a duty.

The strict time limits in the PCR 2015 show where Parliament has drawn the balance between providing legal redress for legal wrongs and the speedy resolution of public procurement disputes.

## **What was the background?**

The claimant supplied and maintained fleets of tractor cabs and trailers. It was the incumbent provider in respect of the defendant’s waste processing facilities.

The defendant commenced a procurement exercise governed by the PCR 2015 in relation to a replacement contract. On 29 November 2019 the defendant notified the claimant that its tender was non-compliant and had been disqualified, that Monks was the successful tenderer and that the standstill period would expire on 9 December 2019 (this was later extended to 12 December 2019).

On 18 December 2019, the claimant's solicitors wrote a letter before action alleging that the decision to exclude the claimant was irrational and procedurally unfair and susceptible to judicial review. On 10 January 2020, the defendant responded to the allegations and explained that the claimant's price had been the lowest (such that it would have won but for its disqualification).

On 16 January 2020, the contract was awarded to the winning bidder. On 24 January 2020, the claimant issued a procurement claim in the TCC and a claim for judicial review in the Administrative Court. The judicial review claim was transferred to the TCC to be tried with the procurement claim.

### **What did the court decide?**

In cases not concerning a declaration of ineffectiveness, PCR 2015, [SI 2015/102, reg 92\(2\)](#) provides that 'proceedings must be started within 30 days beginning with the date when the economic operator first knew or ought to have known that grounds for starting the proceedings had arisen'. The court may extend this time limit where it considers that there is a 'good reason' for doing so (PCR 2015, [SI 2015/102, reg 92\(4\)](#)) but cannot extend it beyond three months (PCR 2015, [SI 2015/102, reg 92\(5\)](#)).

[CPR 54.5\(1\)](#) requires a judicial review claim to be filed promptly and in any event within three months of the decision under challenge. However, [CPR 54.5\(6\)](#) imposes a shorter time limit in respect of a challenge to a decision governed by the PCR 2015, reg 92(2) period. Nevertheless, HHJ Eyre held that [CPR 54.5\(6\)](#) does not have the effect of limiting the court's power to extend time under [CPR 3.1\(2\)\(a\)](#) to bring it in line with PCR 2015, reg 92(4) (ie cannot extend beyond three months) (at para [97]). Although not commented upon by the court, there does seem to be a lacuna in respect of [CPR 54.5\(6\)](#) in that it only covers procurement proceedings under the PCR 2015 and not those governed by other regulations or exempt from such regulations.

Under the PCR 2015, a breach which causes loss, or a risk of loss is actionable from the date of the breach. The risk does not have to come to fruition and the loss of which there is a risk does not have to be suffered before proceedings can be commenced (at para [40]). Time can therefore start running before the conclusion of a public procurement exercise and might run from different dates in relation to the different grounds of complaint (at para [41]). HHJ Eyre therefore rejected the claimant's contention that time only ran from the point that it discovered that it would have been the winning bidder (and thus suffered a loss), but for its disqualification (at para [49]).

Following *Jobsin v Department of Health* [\[2001\] EWCA Civ 1241](#), HHJ Eyre distinguished the PCR 2015 challenge from other public law claims in which a claimant was permitted to wait until a final decision had been made. In *Jobsin*, the Court of Appeal found that time began to run from the date a flawed procurement briefing document was published and emphasised the 'crucial significance' of the reference in the regulations to risk of suffering loss. A court must regard to 'the essential complaint' lying 'at the heart of the proceedings'.

In *Risk Management Partners v Brent LBC* [\[2009\] EWCA Civ 490](#), Moore-Bick LJ reinforced the different approaches to limitation between judicial review claims and claims under procurement regulations. Judicial review is a means of challenging the unlawful exercise of power. In some circumstances, where there are good policy reasons for not requiring a person to wait, a decision that is not final can be challenged. However, claims under procurement regulations are actions to vindicate private rights in the context of a procedure that in many cases will be still in progress. A failure to comply with the procedure at any stage inevitably undermines the integrity of all that follows. Accordingly, the right of action is complete immediately and cannot be improved by allowing the procedure to continue to a conclusion (relied upon at para [56]).

HHJ Eyre distilled the relevant principles from the authorities (at para [61]). Notably, he held that it is not correct to say that the date upon which a contract is entered with the winning

bidder is typically the date when time begins to run for a procurement claim (as opposed to a judicial review claim). Indeed, the converse is the case. Where there are a series of breaches time runs from the date of knowledge of each breach and not from the end of the series.

He surveyed the authorities as to the meaning of what constituted a ‘good reason’ to extend time under the PCR 2015 (at paras [73] to [78]) and rejected the following reasons advanced by the claimant: the intervention of the festive season (at [81])—time spent exploring alternatives to litigation (at para [82])—waiting to discover if he would have won the tender but for its disqualification (at [83])—and a legitimate expectation generated by the defendant’s correspondence that it would not oppose an application for an extension of time (at para [85]). He also rejected the claimant’s contention that the defendant should have notified it that it has misunderstood the application of the time limit (at para [87]).

### Case details

- Court: High Court of Justice, Business and Property Courts, Queen’s Bench Division, Technology and Construction Court (Manchester District Registry)
- Judge: Judge Eyre QC
- Date of judgment: 06 May 2020

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