Public procurement in UK (England and Wales): overview

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LEGAL FRAMEWORK

1. What is the principal legislation that regulates public procurement?

The principal public procurement legislation in England and Wales is in the form of the following regulations (statutory instruments):

- **Public Contracts Regulations 2006 as amended (PCR).** These regulations implement Directive 2004/18/EC on the co-ordination of procedures for awarding public works, supply and service contracts (Consolidated Public Sector Directive) and govern public procurement by contracting authorities (that is, arms of government).

- **Utilities Contracts Regulations 2006 as amended (UCR).** The UCR implements Directive 2004/17/EC co-ordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors (Utilities Directive) and governs procurement by utilities that operate in transport, energy and water. An entity falls under the UCR regime if it is:
  - a contracting authority, a public undertaking or an entity that operates under special or exclusive rights; and
  - conducting a relevant activity reflecting the EU definitions of utilities (Schedule 1, UCR).

- **Defence and Security Public Contracts Regulations 2011 (DSPCR).** These regulations apply to virtually all procurement of military equipment or services, or militarily-sensitive equipment or services.

- **National Health Service (Procurement, Patient Choice and Competition) Regulations 2013.** These regulations place specific obligations on the National Health Service (NHS), which are additional to the NHS’s general obligations as a contracting authority under the PCR.

These regulations are used to implement EU public procurement directives, such as the Consolidated Public Sector Directive and the Utilities Directive.

The key regulations directly relevant to most public procurement are the PCR and, to a lesser extent, the UCR, which are both now subject to tougher enforcement regimes asset out in the following:

- **Public Contracts (Amendment) Regulations 2009.**
- **Utilities Contracts (Amendment) Regulations 2009.**
- **Public Procurement (Miscellaneous Amendments) Regulations 2011.**

The PCR and UCR are also applicable in Northern Ireland. The following separate, parallel, sets of regulations apply in Scotland:

- **Public Contracts (Scotland) Regulations 2006.**
- **Utilities Contracts (Scotland) Regulations 2006.**

Other legislation exists that may be of relevance to contracting authorities including the following:

- Local Government Act 1999 (as amended), which contains obligations to consult (section 3) for certain decisions and to achieve “best value” when spending public money.
- Public Services (Social Value) Act 2012, which requires commissioners and procurers to consider the economic, environmental and social benefits of their approaches to procurement before the process starts. Local authorities must have “standing orders” in place. Standing orders govern how to enter into contracts to purchase supplies, services and works (section 135, Local Government Act 1972).
- Freedom of Information Act 2000 (as amended), which has implications for authorities’ duty to disclose information produced in the context of public procurement competitions.

RECENT TRENDS

2. What have been the recent trends in the public procurement sector?

By international standards, the UK has experienced comparatively little public procurement litigation. Litigation in the superior courts is costly and time-consuming.

The UK does not have a system of specialist administrative law courts or tribunals that are commonplace in civil law jurisdictions. Aggrieved bidders must initiate proceedings within 30 days of the date they become aware of a breach of the PCR or UCR. In practice, this tends to encourage a high volume of pre-litigation activity by tenderers anxious to preserve their right to litigate. However, in practice, the experience has been that such cases rarely reach the interim (applications to lift the suspension on contract award, applications for specific disclosure, and so on) or in particular substantive (that is, a full hearing on the merits of the case) phases of litigation. While there is an observable upward trend in the number of cases proceeding to a hearing in recent years, that number is still low by European standards.

While claimants often seek a declaration of ineffectiveness, no such declaration has been made by an English court in a public procurement case. The main English case in which ineffectiveness was a key part of the legal issues at stake was the judgment in Alstom Transport v Eurostar International Ltd and another (Rev 1) [2011]. However, in that case the High Court held that the claimant did not have valid grounds for the relief it was seeking.
USE OF PROCUREMENT PROCEDURES

3. How are the four EU procurement procedures used by contracting authorities?


Open and restricted procedures are most commonly used. However, competitive dialogue is more prevalent in the UK than in other EU jurisdictions. In its 2011 study on public procurement in the UK, the Cabinet Office noted that competitive dialogue is overused in the UK (Accelerating Government Procurement, 2011). The government has been promoting a “lean sourcing” initiative in recent years to encourage more efficient procurement and reduce the length of time taken to carry out the average procurement procedure. In addition, in its 2012 procurement policy note, the Cabinet Office said that contracting authorities should use competitive dialogue only in rare cases (Procurement Supporting Growth, 2012). Therefore, it is likely that in future there will be increased use of open and restricted procedures instead of competitive dialogue.

REVIEW PROCEDURES

4. Which body is responsible for dealing with procurement law breaches?

Breaches of procurement law are dealt with by the High Court as follows:

- **Claims for breaches.** If the procurement regulations (PCR, UCR and DSPCR) are breached a disappointed bidder or potential bidder based in the EU can bring a claim under those regulations (see for example PCR 47A(3)); PCR 47A provides that duties under the PCR are owed to these economic operators.

  An economic operator is any national of the EU or a Government Procurement Agreement (GPA) state that sought, seeks or would have wished to be the person the contract was awarded to. Therefore, a range of parties who wished to provide the goods or services have a right to issue proceedings in the courts for a breach of the regulations. These parties include, principally, bidders and potential bidders or those who would have bid but were not aware of the tender because the opportunity was not advertised in accordance with the Regulations (for example in the Official Journal of the European Union).

  PCR 47C(2) confirms that these actions must be brought in the High Court. The comparable provisions in the UCR are in Regulation 45.

  In addition, the High Court is the standard forum for claims that:

  - fall outside the regulations; or
  - are in parallel with breaches under the regulations where either:
    - a breach of procurement obligations arises from the breach of an alleged procurement contract (that is a contract formed between bidder and procurer to conduct the procurement in a specific way); or
    - a breach of other obligations, such as generally applicable obligations under the EU treaties or negligence in scoring and so on.

- **Claims for judicial review.** If the challenger is not an economic operator with an interest in the procurement or in certain cases where the regulations do not provide for an adequate or appropriate remedy, the High Court (Administrative) Division considers claims for judicial review. These claims can relate to irrational or illegal decisions made by a public body including procurement decisions that are contrary to the law (that is the regulations or general treaty obligations and so on).

  A judicial review claim is concerned principally with whether the process was fair. If the process is deemed unfair then the decision can be overturned and remitted to the public body to take again. Examples of procurement judicial review claims include Virgin Trains Limited’s challenge to the decision by the Secretary of State for Transport to award a passenger rail franchise to a competitor in 2012 and R (Nash) v Barnet London Borough Council, a challenge to a substantial outsourcing decision by Barnet Council by a local interest group.

  Where a procurement law breach also includes breaches of competition law, the High Court and the Competition Commission and Competition Appeals Tribunal can be involved.

5. Does the aggrieved party have to seek review first with the awarding body?

No. When a procurement breach occurs or a disputed award is made timescales are often very short. No review process is envisaged by the legislation.

6. Is there a requirement to notify the awarding body before starting court proceedings?

No. An obligation to notify the awarding body of a potential court claim was included in the PCR (former 47(T1)) and UCR (former 45(T1)). This obligation no longer exists for procurements that began after 20 December 2009.

  Potential claimants must write to potential defendants setting out in full their case and demands (letter before action) under the court rules (the pre-action protocol) generally, as well as in relation to procurement. The relevant protocol sets out the content that must be included. In addition, it should be done in time to allow for a response to be provided and received. Failure to do this is not a bar to issuing proceedings and where time limits are short this step can be missed out. However, failure to take this step can result in an adverse award of costs by the court or (exceptionally) a stay of proceedings while it is completed.

7. Which parties have standing to launch proceedings for breach of procurement legislation?

Any economic operator that suffers, or risks suffering, loss or damage due to a breach can bring a claim for that breach (PCR 47(T1), UCR 45(T1)).

  Any individual or group with a direct interest in the decision (standing) that is alleged was wrongly reached can bring a claim for judicial review. Usually for a group a single representative claimant is put forward. Any person affected by the procurement, including by the provision of the services tendered, can therefore in principle launch a claim. However, the court retains discretion to prevent these applicants from proceeding with their claim if it is not in the interests of justice to allow the proceedings to continue.

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8. **What conditions must an applicant meet before a claim can be brought?**

There are no conditions that an economic operator with standing to bring a claim must comply with before it issues proceedings for a breach of the procurement regulations.

For judicial reviews, claimants must obtain permission to proceed before the court will consider the claim. This is the first procedural stage. Claimants must then submit the argument and documentation, which will be considered by a judge. If the matter appears sufficiently important and the claimant appears to have standing the judge is likely to allow permission to have a judicial review process provided that both:

- The claim has a reasonable prospect of success.
- It is in the interests of justice to hear the case.

9. **What are the applicable statutes of limitation?**

Limitation periods are governed by the following:

- Limitation Act 1980, which sets out certain general periods of limitation.
- Normal limitation periods applicable to claims for breaches of the procurement regulations, which are found in the following:
  - 2009 amendments to the PCR and UCR; and
  - Public Procurement (Miscellaneous Amendments) Regulations 2011.
- Standstill period, which governs the actual period during which a claim must be brought to prevent a contract being entered into. Contracts cannot be executed during the standstill period.

Relevant practical and legal time limits are therefore governed by the remedy sought as follows:

- To prevent the contract being signed a claim must be brought before the contract is signed, if the contract was awarded but not executed (PCR 47G, UCR 45Q). Contracts cannot be executed within a standstill period of ten days (ending on a working day) after notification of the intention to award. Therefore, challengers must issue proceedings by midnight on the last day of the standstill period if they want to prevent the contract being signed.
- For other remedies proceedings must start within 30 days beginning with the date when the economic operator first knew or ought to have known that there were grounds to start proceedings. In some cases this may be extended by up to three months from knowledge if the court considers there is a good reason.
- For a declaration of ineffectiveness, proceedings must begin within six months of the date of the contract.

The principal limitation periods depend on the bidder’s knowledge. This period can expire during a procurement process (that is, before the award decision is made). Bidders participating in a procurement process cannot afford to wait to bring claims until the final outcome is known. Action must be brought shortly after a bidder becomes aware of a breach.

To start proceedings a claim form must be issued (for example PCR 47D(6)). The claim form must then be served on the contracting entity within seven days (PCR 47F(1), UCR 45F(1)). To prevent the contracting party from executing a contract that is not yet entered into it is sufficient to notify them that a claim form was issued.

Claims for judicial review are also limited to 30 days subject to a court’s discretion to increase the period of time up to three months.

**REMEDIES**

10. **What remedies are available to an aggrieved contractor? Can a breach of procurement legislation by a regulated body lead to criminal liability?**

**Remedies**

Broadly, the remedies available aim to:

- Prevent or undo the award of a contract.
- Prevent a process continuing.
- Provide compensation for losses caused by a flawed process.

**Injunction from entering the contract.** Issuing proceedings is sufficient to prevent a contract that is not yet executed from being entered into (PCR 47G, UCR 45Q).

If a claim form is issued and the contracting entity is notified of this, the contracting entity must obtain a court order, or resolve or dismiss the proceedings, before the contract can be entered into. The court order application is in the form of a reverse injunction application, which is determined by the court. The court uses the same test it applies when it grants an injunction against entering the contract. The test considers the following:

- Whether the claim has a reasonable prospect of success.
- Whether damages, rather than an injunction, is adequate for either party.
- Where the "balance of convenience" lies for granting an injunction.

The proceedings can also include a request for a permanent injunction from entering the contract.

**Contract not yet entered into.** If the contract is not yet entered into, the court can (PCR 47I, UCR 45I):

- Order the decision or action to be set aside.
- Order the contracting authority to amend any document.
- Award damages to an economic operator that has suffered loss or damage due to the breach.

**Contract entered into.** If the contract is already entered into, the court (PCR 47I, UCR 45I):

- Must, if it is satisfied that any of the grounds for ineffectiveness applies, make a declaration of ineffectiveness for the contract. However, if the court determines that there are overriding issues of general interest that mean ineffectiveness is not appropriate it need not make the declaration (PCR 47L, UCR 45L).
- Must impose penalties, including civil financial penalties and/or the shortening of the contract (in which case the end of the term of the illegally awarded contract is brought forward so a new tender process is required sooner). Contract shortening in this context cannot be applied retrospectively.
- May award damages to an economic operator that suffered loss or damage due to the breach.

**Damages**

The precise manner in which damages should be calculated is not clear in all cases. Damages aim to compensate the economic operator for the effect of the breaches that have been identified. This can include wasted bid costs. However, in most cases a dissatisfied bidder also seeks compensation for the lost benefit of the contract and potentially some form of damage to its goodwill that arises from not winning the contract.

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In most cases it is not certain that any specific breach, or even especially a series of breaches, led to a bidder failing to win the contract. In theory, scoring may be affected in a complex manner and other bidders’ behaviour cannot be predicted if different information was provided (for example for transparency breaches).

There is some indication that the courts would be prepared to undertake an analysis of the percentage chance that a bidder would have won except for the breach(es). For example, in Harmon CFEM Facades (UK) Ltd v Corporate Officer of the House of Commons 2000, the High Court indicated that it might award a proportion of the contract’s benefit to an unsuccessful bidder if that bidder can show that it had a substantial chance of winning the competition. In calculating any such award, the courts will take account of the likely profits that would have derived from the performance of the contract, and discount that figure based on the percentage likelihood that the tenderer would in fact have been successful. The approach of assessing the loss of a chance of profit was also alluded to by the High Court, albeit at the interlocutory stage, in European Dynamics v HM Treasury [2009] EWHC 3419 (TCC) and in Covanta Energy Limited v Merseyside Waste Disposal Authority [2013] EWHC 2922 (TCC).

In practice, a calculation of this nature can be extremely difficult to predict or undertake. This difficulty is often used as a reason why damages are not considered to be an adequate remedy for a dissatisfied bidder at the injunction or reverse injunction stage (for example Covanta Energy Ltd v Merseyside Waste Disposal Authority 2013 considered the difficulty of calculating damages).

**Ineffectiveness**

A contract that was entered into can, and must, subject to overriding obligations of general interest, be made ineffective where (PCR 47K, UCR 45K):

- The contract was awarded and not advertised in the official journal (in breach of the regulations).
- The contracting entity:
  - entered into the contract before the end of the standstill period or after a claim was issued; and
  - the underlying breach of process was a breach of duty to the challenger, which reduced the challenger's chances of being awarded the contract.
- The contract was awarded using a dynamic purchasing system where the value of the contact was over the threshold (in breach of the regulations).

**Criminal liability**

Generally, there is no criminal liability for a general breach of procurement law, except under the general law where a breach is part of a wider criminal offence such as fraud.

**11. Does an ineffectiveness order have a prospective or retrospective effect?**

The consequences of an ineffectiveness order are set out in PCR 47M (UCR 45M). This provides that ineffectiveness orders are prospective and not retrospective.

**TRANSPARENCY**

12. What systems are in place in relation to the publication of details/copies of completed tender and contract documentation, which include pricing and other potentially sensitive information?

Completed tender and contract documentation is not available to the public. A contracting authority that produced public contracts and documents during a procurement competition may need to disclose these in response to a request under freedom of information legislation. However, the Freedom of Information Act 2000 contains an express exception for commercially-sensitive information.

As part of an initiative to improve the transparency and accountability of government, the Cabinet Office publishes information on public contracts awarded by central government (see www.gov.uk/government/collections/procurement-and-contracting-transparency-progress-reports#documents).

**CONTRACTS OUTSIDE THE SCOPE OF THE CONSOLIDATED PUBLIC SECTOR DIRECTIVE**

13. Is the award of contracts which are fully or partly outside the scope of the Consolidated Public Sector Directive regulated under national legislation?

The award of contracts that fall outside of the PCR and UCR is not subject to express alternative regulation. However, such procurement is not entirely outside procurement law.

Public bodies that undertake procurement decisions must comply with general obligations to conduct a fair and rational (legal) process complying with relevant law. These may provide for consultation obligations or overarching policy requirements. Failure to comply may lead to a judicial review challenge.

In addition, English courts enforce the general European treaty principles of transparency and non-discrimination on the grounds of nationality to any decision made by a public body. English courts consider the level of transparency required by the European courts in cases such as Coname Consorzi Aziende Metano (Coname) v Comune di Cingia de' Btti (Case C-231/03) and Teliaustria Telia Austria Verlags GmbH v Telecom Austria (Case C-324/98).

14. What remedies are available in relation to the award of contracts which are fully or partly outside the scope of the Consolidated Public Sector Directive?

The remedies available for contracts not subject to the PCR and UCR are the standard remedies available to the courts. In judicial review cases, remedies include quashing the decision and an assessment of damages that flow directly from the mistake.

In other High Court actions damages are available. A claimant can also seek a temporary or permanent injunction to prevent a contract being signed or awarded.

**IMPLEMENTATION OF EU REFORMS**

15. What decisions have been taken to date with regard to the transposition of the revised public procurement directives where there is flexibility for the member state as to how the directives are implemented?

The UK Government is currently consulting stakeholders on the manner in which the directives will be implemented in the UK.

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The government sees efficiency gains from the new rules and is keen to implement the regulations as soon as possible.

Government policy is to implement the new regulations by way of “copy out”. This means the new regulations will be copies of the final directives as much as possible. However, the new directives will not have preambles and therefore are a major departure, at least in terminology and style, from existing UK regulations.

Consultation continues in the UK. The Cabinet Office will continue to consider each of the open points in the directives into January 2014. No formal decisions have yet been made as the new directives have not been adopted at the time of writing.

ONLINE RESOURCES
Legislation.gov.uk

Website: www.legislation.gov.uk

Description. This is a UK website of primary and secondary legislation (statutes and regulations) provided by The National Archives. It contains official original text of legislation that is generally up-to-date. In some cases consolidated amended legislation is available. However, there is no guarantee of this. The procurement regulations are not currently updated with subsequent amendments.

British and Irish Legal Information Institute

Website: www.bailii.org

Description. Bailii is a UK company limited by guarantee and a charitable foundation that receives a number of donations from a range of commercial sources to provide databases of caselaw and legislation from Britain and Ireland.

Cabinet Office Public Procurement Policy Notes

Website: http://procurement.cabinetoffice.gov.uk/policy-capability/latest-policy-and-regulations/public-procurement-policy

Description. This website provides regular non-binding guidance notes by the Cabinet Office on the implementation of the procurement regulations in England and Wales.
Practical Law Contributor profiles

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Areas of practice. Central/local government; transport; energy; IT; education; defence; emergency services; contentious procurement.

Recent transactions

- Leading the team advising the Nuclear Decommissioning Authority on the disposal to the private sector of the Capenhurst and Springfields nuclear businesses; advising on competitions for decommissioning of Dounreay nuclear site and the Magnox sites (value several £Billion).
- Leading the team advising the Home Office on its Disclosure and Barring Service BPO/IT procurement. The competition was run as a pilot to introduce the Cabinet Office’s Lean Procurement initiative. It is regarded by the government as a “pathfinder” project for future Whitehall procurements.
- Procurement lead on the successful defence of Eurostar in Alstom v Eurostar and on the West Coast Mainline litigation.

Languages. French

Professional associations/memberships. Chair of various Procurement Lawyers’ Association working groups; supporting HM Treasury and Cabinet Office in policy development in these areas.

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Areas of practice. Central/local government; transport; health; contentious procurement.

Non-professional qualifications. MA Law (Canterbury)

Recent transactions

- Lead partner defending Eurostar in Alstom v Eurostar procurement and contract dispute for the next generation fleet of Eurostar trains (flee value of about £Billion). This was one of The Lawyer’s magazine’s top five cases of 2011; the UK’s largest contested procurement case.
- Running £60 million claim for payment flows under public regulated contracts including a reported successful appeal to the Commercial Court and eight figure recovery.
- Advising and acting as Advocate for the UK Atomic Energy Authority on the Redfern public inquiry into certain issues in the nuclear industry.

Languages. French

Professional associations/memberships. Regularly appearing as advocate in public inquiries, arbitrations, mediations, court proceedings and inquests; provides training to directors and senior management on legal and regulatory risk.

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